XXXVIII POLISH YEARBOOK OF INTERNATIONAL LAW
2018
DOI 10.24425/pyil.2019.129609
PL ISSN 0554-498X

*Łukasz Kułaga**

A BRAVE, NEW, INTERNATIONAL INVESTMENT COURT IN CONTEXT. TOWARDS A PARADIGM SHIFT OF THE ISDS

Abstract:
The idea of a Multilateral Investment Court seems to be one of the most prominent initiatives of the "multilateralization" of international investment law during this century. The creation of a new international, permanent court concentrated on settling investor – state disputes is an extraordinary challenge. Possible problems relate not only to the negotiations concerning the organizational and procedural aspects necessary to ensure the efficient operation of this type of body. It is also necessary to take into account the dynamics of the functioning of international adjudication as such, as well as the controversies surrounding the international legal protection of foreign investments.

Keywords: investment arbitration, multilateral investment court, international investment law

INTRODUCTION

The idea of a Multilateral Investment Court (MIC) seems to be one of the most prominent initiatives of the "multilateralization" of international investment law during this century. Not so long ago Christopher Schreuer pointed out that "at present there is no substitute for investment arbitration. Despite its undeniable weaknesses, it is currently the only functioning system for the orderly settlement of the numerous disputes arising from foreign investments."[1] In this context, the MIC project, which has

* Ph.D., Assistant professor at the Faculty of Law and Administration of the University Cardinal Stefan Wyszyński (Warsaw, Poland), email: l.kulaga@uksw.edu.pl, ORCID: https://orcid.org/0000-0003-0784-8293. This article is a part of the research project no. 2015/17/D/HS5/02555 financed by the National Science Center "A paradigm shift in international investment law – towards a sustainable approach."

[1] C. Schreuer, *Do We Need Investment Arbitration?*, in: J.E. Kalicki, A. Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System Journeys for the 21st Century*, Brill Nijhoff, Leiden-Boston: 2015, pp. 889, 879-890.

recently emerged, can be considered as an effort to create a new institutional by-pass of the current Investor-State Dispute Settlement (ISDS) mechanism.[2]

Until now this "multilateralization" of international investment law has not been a success story.[3] Initiatives in this regard have been undertaken within the framework of the Organization of Economic Cooperation and Development[4] and the World Trade Organization (WTO),[5] but so far have been unsuccessful.

The MIC idea follows the model of "multilateralization" of procedures over substance, i.e. a method of the Washington Convention.[6] In view of the lack of consensus within the international community, this approach towards a complex investment treaty was based on the presumption that significant improvement could be achieved by limiting the ambitions of any new instrument only to the ISDS. Such a *prima facie* modest tactic turned out to be, according to Rudolf Dolzer and Christopher Schreuer, the "boldest innovative step in the modern history of international cooperation concerning the role and protection of foreign investment."[7]

The MIC proposal follows the same idea by regulating, at a multilateral level, a system of dispute settlement – *i.e.* a procedure without getting into substantive norms. However, 50 years have elapsed since the Washington Convention was signed, and the

[2] M. Mota Prado, S.J. Hoffman, *The Concept of an International Institutional Bypass*, 111 AJIL Unbound 231 (2017), pp. 231-232, 231-235.

[3] These concerns are adequately presented by UNCTAD, which considers "multilateral engagement" as only one of ten reform options. *See* UNCTAD, 2017 World Investment Report 131, table III.5; For a different view, *see* Stephan Schill, who argues that "international investment law is evolving towards a multilateral system of investment protection based on bilateral treaties"; S. Schill, *Multilateralization: An Ordering Paradigm for International Investment Law*, in: M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch (eds.), *International Investment Law – A Handbook,* Beck-Hart-Nomos: 2015*,* pp. 1835, 1817-38; *see also* S. Schill, *The Multilateralization of International Investment Law*, Cambridge University Press, Cambridge: 2009.

[4] In this context two initiatives should be borne in mind. Firstly, the 1967 Draft convention on the protection of foreign property; and secondly the 1998 Multilateral Agreement on Investment (MAI). With regard to the latter one cannot forget that at that time the ISDS had already created harsh controversies and "the MAI text on dispute settlement remained in limbo, and only reached the status of a proposal of the chairman of the MAI working group on dispute settlement" (J. Karl, *The Negotiations on the OECD Multilateral Agreement on Investment*, in: Bungenberg et al.*, supra* note 3, pp. 351-353, 342-360); *see also* A.P. Newcombe, L. Paradell, *Law and Practice of Investment Treaties*, Kluwer, Alphen aan den Rijn: 2009, p. 30.

[5] The 2001 WTO Doha Round was supposed to cover negotiations on international investment, however this idea was abandoned at the WTO Ministerial Meeting in Cancun in 2003. The Decision adopted by the WTO General Council on 1 August 2004 states: "[r]elationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round" (WT/L/579).

[6] Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed on 18 March 1965, 575 UNTS 159.

[7] R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press, Oxford: 2008, p. 20; for criticism concerning the practical consequences of this approach, *see* A.A. Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration*, Kluwer, Alphen aan den Rijn: 2015, pp. 39-40.

landscape of international investment law is much more complex than it was at the beginning of the 1960s. First of all, foreign investment disputes cause high political, legal, social and economic tensions nowadays due to their scale, the amounts of compensation claimed, and their influence on regulatory competences.[8] As a result, states are much more aware of the risks flowing from international investment law. Most have already formulated their "position" towards the ISDS.[9] These views stretch from a model of complete resignation from the ISDS[10] to a revolutionary model,[11] a modest reform model,[12] and through to acceptance of the classical model.[13] Until recently these positions did not envisage any possibility of creating a multilateral court.[14]

[8] As a result, there are also opinions that the "procedure before the substance" model is not appropriate: "[w]hile such institutional change is necessary, it is not sufficient to achieve reform. What is also needed is an express transformation of substantive norms of international investment law to a more socially and environmentally acceptable set of rules and principles" (K. Miles, *The Origins of International Investment Law – Empire, Environment and the Safeguarding of Capital*, Cambridge University Press, Cambridge: 2013, pp. 380-381).

[9] A. Roberts, *Incremental, systemic, and paradigmatic reform of investor-state arbitration*, 112(3) American Journal of International Law 410 (2018), pp. 410-415.

[10] The Brazil model of cooperation and facilitation investment agreement of 2014 envisages a dispute prevention mechanism and only a state-state arbitration procedure: *see* N. Bernasconi-Osterwalder, M.D. Brauch, *Comparative Commentary to Brazil's Cooperation and Investment Facilitation Agreements (CIFAs) with Mozambique, Angola, Mexico, and Malawi*, 2 TDM 2016; *see also* the judgment of the Court of Justice from 6 March 2018 in case C-284/16 *Achmea BV*, in which the Court stated: "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept."

[11] The India new model BIT from 2015 contains the requirement of exhaustion of local remedies before bringing a claim to an arbitral tribunal. The United States-Mexico-Canada Agreement follows the same approach in US-Mexico relations, when the investor does not have a specific government contract. The ISDS model contained in the EU draft of Transatlantic Trade and Investment Partnership (TTIP) investment chapter should be also considered as revolutionary: "[t]he European Commission's proposal does not suggest that the practice of international adjudication in investment law can find sufficient support in the functional logic of investment protection. The recent developments rather suggest, and this merits emphasis, that nothing can ultimately carry public authority – including the judicial authority under TTIP – other than peoples and citizens" (I. Venzke, *Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication*, 17 Journal of World Investment & Trade 374 (2016)).

[12] The US model BIT 2012 and Trans-Pacific Partnership (TPP) from 2016. According to Jose Alvarez, "[t]he TPP's investment chapter is in the "reform it, don't end it" mode that has been followed by the US for the past 20 years, as the promises and hazards of ISDS have become clearer." (p. 16); and "[t]he TPP's investment chapter pursues a reform path within the existing international investment regime that many other states, including the US, support" (p. 42), J.E. Alvarez, *Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard"?,* IILJ Working Paper 2016/3.

[13] *See e.g.* the Agreement between Japan and the State of Israel for the liberalization, promotion and protection of investment signed on 1 February 2017.

[14] Provisions on pursuing a multilateral investment tribunal can be found in the EU's latest trade and investment agreements: EU-Canada CETA (Art. 8.29); EU-Singapore investment protection agreement (Art. 3.12), draft; and the EU-Vietnam FTA (Art. 8.15).

This article aims to present the MIC initiative by examining its roots, planned structure, and functions, whilst taking into account the potential legal hitches that can appear during the realization of this project. It is also submitted that the prospects for creating the MIC should be evaluated taking into account important social factors permeating current international relations, such as the harsh criticism of international investment law and some trends resulting from a backlash against international courts in general. Finally, the article aims to demonstrate that the MIC project could be considered as a signal of a paradigm shift in international investment law.

1.1. History of the permanent international investment court

The idea of creating a permanent court for settlement of investment disputes is quite a new one.[15] As stated by Jose Alvarez in 2016: "[s]tanding international courts devoted to considering and awarding to private parties what may be substantial monetary awards against states for unknown prospective claims have not existed."[16] Past proposals for establishing a multilateral investment regime in general did not envisage the creation of a permanent judicial body. The two notable exceptions were the International Law Association Draft Statute of the Foreign Investment Court and the Arab Investment Court.

Already in 1948 the International Law Association (ILA) published Draft Statutes of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Court (FIC).[17] With regard to the latter, the ILA project envisaged that "the Party against which the claim is made has declared that it accepts the jurisdiction of the Court in respect of claims by nationals of one or more Parties, including the Party concerned" (Art. III(1) of the draft). The FIC was supposed to consist of 15 judges, chosen for nine years with the possibility of re-election by Parties to the instrument establishing this Court (Arts. V and X). Persons elected as judges should have "recognized competence in international law or are persons of recognized competence in international economic life" (Art. IV). Finally, Art. XXIII ensured, following the (International Court of Justice) ICJ model,

[15] "An international investment court could be multilateral, regional, or bilateral. It could be a full court or an appellate body court that would hear appeals from decisions made in the first instance by arbitrators. It could be an autonomous entity or housed within existing institutions. It could be staffed by dedicated judges or via a roster of jurists who sit on domestic courts. Ultimately, it is not so important to arrive at a specific design for an international investment court that suits all states or all commentators (…) The critical point is that alternatives should be measured against the criteria of judging in public law, especially the related concepts of openness and independence" (G. Van Harten, *A Case for an International Investment Court,* 22 Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper, Online Proceedings, pp. 30-31); UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap – Special issue for the Multilateral Dialogue on Investment*, 2 IIA Issues Note, 9 (2013); O.E. García-Bolívar, *Permanent Investment Tribunals: The Momentum is Building Up*, in: Kalicki, Joubin-Bret (eds.), *supra* note 1, pp. 397, 394-402).

[16] J.E. Alvarez, *To Court or Not to Court?*, IILJ Working Paper 2016/2. According to Alvarez "the ECHR and Inter-American Court of Human Rights (…) are, like the UN human rights treaty bodies, more intent on correcting states' obligations to their citizens – and not creating insurmountable financial obstacles to achieving that end" (p. 3).

[17] UNCTAD, *International Investment Instruments: A Compendium*, Vol. III, New York and Geneva: 1996, pp. 267-272.

that "[j]udges of the nationality of each of the Parties shall retain their right to sit in the case before the Court." In practice, of the two proposals presented by the ILA in 1948 only one related to arbitral tribunals and was pursued in international discussions. This was exemplified in particular in the 1959 Draft Convention on Investments Abroad (Abs-Shawcross Draft Convention),[18] the 1967 OECD Draft Convention on the Protection of Foreign Property,[19] and the practice (from 1968) of inserting arbitration clauses into treaties encouraging the promotion and reciprocal protection of investment.[20]

The Arab Investment Court was created in accordance with the Unified Agreement for the Investment of Arab Capital, which was signed on 26 November 1980 in Amman, Jordan, by 21 states and entered into force on 7 September 1981.[21] The significance of the Arab Investment Court is limited as in accordance with the Unified Agreement it has no compulsory jurisdiction with regard to disputes arising from the application of the Agreement. This flows from the fact that parties to the dispute can choose arbitration instead of litigating before the Court. Nonetheless it is useful to note the structure of this Court. According to Art. 28(2):

> The Court shall be composed of at least five judges and several reserve members, each having a different Arab nationality, who shall be chosen by the Council from a list of Arab legal specialists drawn up specifically for such purpose, two of whom are to be nominated by each State Party from amongst those having the academic and moral qualifications to assume high-ranking legal positions. The Council shall appoint the chairman of the Court from amongst the members of the Court.

Members of the Court are chosen for a three-year term, which may be renewed. The Court has jurisdiction to settle inter-state disputes, investor-state disputes, and disputes "between the public institutions and organizations of more than one State Party." Its judgments are final and not subject to appeal. Furthermore, in accordance with Art. 34(3), a judgment of the Court shall be enforceable in the same manner as a final enforceable judgment delivered by the courts of States Parties.

Evaluation of the design of the Arab Investment Court is hampered by the fact that this theory has not been put into significant practice. To date, this Court has only settled one case.[22]

---

[18] According to Art. VII(2) of the draft Convention "A national of one of the Parties claiming that he has been injured by measures in breach of this Convention may institute proceedings against the Party responsible for such measures before the Arbitral Tribunal…" (UNCTAD, *International Investment Instruments: A Compendium*, Vol. V, New York and Geneva: 2000, pp. 301-305).

[19] Art. 7 (b) of the OECD Draft Convention provides that "a national of a Party claiming that he has been injured by measures in breach of this Convention may institute proceedings against any other Party responsible for such measures before the Arbitral Tribunal," available at: https://bit.ly/2Pq7hvH (accessed 30 May 2019).

[20] Newcombe, Paradell, *supra* note 4, pp. 44-45.

[21] The text of this agreement is available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2394 (accessed 30 May 2019).

[22] W.B. Hamida, *The First Arab Investment Court Decision*, 5 Journal of World Investment & Trade 699 (2006), pp. 699-721.

With reference to more current practice, it has to be noted that the draft MAI, negotiated under the auspices of the OECD, had already installed provisions for an arbitration mechanism. Although this method was already firmly established at the time in treaty practice, some delegations participating in the negotiations raised concerns relating to its suitability and legitimacy. In any case the Norwegian proposal for creating an international investment tribunal did not meet with any interest.[23] Simultaneously, proposals were raised for creating a dispute settlement mechanism similar to the one existing in the WTO.[24]

Owing to both the practice of states and the academic literature, for a long time there was no recognition of either the necessity nor the possibility of creating a standing judicial investment institution. Discussions on these matters were rather concentrated on duplicating the WTO dispute settlement procedures, in particular by creating an appellate mechanism.[25] Already in 2004, the ICSID Secretariat suggested that an Appeal Facility "might be established and operate under a set of ICSID Appeals Facility Rules adopted by the Administrative Council of ICSID."[26] Nevertheless, ultimately this proposal was considered as premature and was not pursued.[27]

1.2. The debate on reforming the ISDS

The issue of the necessity to reform the ISDS is raised every year, in particular taking into account the number and importance of claims brought to the arbitral tribunal. In total, for the last 30 years during which this practice has been conducted 831 investment cases were registered, including disputes initiated before the International Center for Settlement of Investment Disputes (ICSID) and other applicable forums.[28]

Criticism of the ISDS as a system has concentrated on its three main institutional pillars.[29] Firstly, there is a lack of an appellate mechanism, which does not allow for the

[23] *Ibidem*, p. 699.

[24] UNCTAD, *Lessons from the MAI*, New York and Geneva 1999, p. 19.

[25] S.D. Amarasinha, J. Kokott, *Multilateral Investment Rules Revisited*, in: P. Muchlinski, F. Ortino, C. Schreuer (eds.), *The Oxford Handbook of International Investment Law*, Oxford University Press, Oxford: 2008, pp. 149-150, 120-150.

[26] ICSID Secretariat Discussion Paper, *Possible improvements of the framework for ICSID arbitration*, 22 October 2004, annex pt 1.

[27] "The members of the Administrative Council and others who provided comments on the Discussion Paper expressed appreciation for the initiative to review the framework for ICSID arbitration and identify possible improvements. There was general agreement that, if international appellate procedures were to be introduced for investment treaty arbitrations, then this might best be done through a single ICSID mechanism rather than by different mechanisms established under each treaty concerned. Most, however, considered that it would be premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues raised in the Discussion Paper" (Working Paper of the ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, 12 May 2005, pt 4).

[28] M. Langford, D. Behn, R. Hilleren Lie, *The Revolving Door in International Investment Arbitration*, 20 Journal of International Economic Law 301 (2017), p. 307.

[29] S.W. Schill, *The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law*, 9 ASIL Insights (2016);

correction of legal errors made in the first instance and makes the creation of a coherent body of law difficult.[30] Secondly, there is a lack of institutionally guaranteed impartiality of the arbitrators, which in consequence has led to the so-called "revolving door" and "double hat" phenomena, i.e. a "situation when individuals act sequentially and even simultaneously as arbitrator, legal counsel, expert witness, or tribunal secretary."[31] Such situations can create doubts as to the impartiality or independence of the arbitrators. A thorough study in this regard by M. Langford, D. Behn, and R. Hilleren Lie has led to the conclusion that:

> In terms of double hatting, we find that the practice continues to exist. In reality, it is a very small group but it is constituted by highly influential, and well-known individuals. In other words, double hatting is not a common or widespread practice across the entire network of cases (i.e., breadth), it is practiced so consistently by a highly visible and powerful core of some of the most influential actors in the system (i.e. depth). Given that critiques of double hatting focus on the perceived bias and lack of impartiality, independence and legitimacy that such a practice can have on the reasonable outside observer, its prevalence amongst influential actors is questionable even if there is a debate on its actual effects on independence.[32]

Thirdly, *ad hoc*, party-appointed arbitrators cannot adequately resolve public law disputes against states.[33] As pointed out by Gus van Harten: "[p]rivate contractors rather than tenured judges are left to manage the legal construction of the public sphere, without rigorous supervision by courts. The ultimate authority to determine what juridical sovereignty means is itself privatized."[34] This is linked to the assumption that ISDS as

S.W. Schill, *The Sixth Path: Reforming Investment Law from Within*, SIEL Online Proceedings Working Paper 02/2014, p. 11.

[30] J. Ketcheson, *Investment Arbitration: Learning from Experience,* in: S. Hindelang, M. Krajewski (eds.), *Shifting Paradigms in International Investment Law*, Oxford University Press, Oxford: 2016, p. 118; E. Young Park, *Appellate Review in Investor-State Arbitration* in: Kalicki, Joubin-Bret (eds.), *supra* note 1, pp. 443-454; G. Bottini, *Reform of the Investor-State Arbitration Regime: The Appeal Proposal,* in: *id*, pp. 455-473. As was pointed out by Schill: "[o]nly the creation of a multilateral investment court would be able to ensure cross-treaty consistency and predictability in international investment law more generally" (Schill (*The European Commission's Proposal*), *supra* note 30).

[31] Langford, Behn, Hilleren Lie, *supra* note 28, p. 301; *see also* R. Berzero, G.J. Horvath, *Arbitrator & Counsel: the Double-Hat Dilemma*, 4 TDM (2013); M. Lalonde, *Quo Vadis Disqualification?,* in: M. Kinnear et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID*, Kluwer, Alphen aan den Rijn: 2015, pp. 640-653.

[32] Langford, Behn, Hilleren Lie, *supra* note 28, p. 328.

[33] G. Van Harten, *Investment Treaty Arbitration and Public Law*, Oxford University Press, Oxford: 2007, pp. 152-183.

[34] G. Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims against the State*, 56(2) International and Comparative Law Quarterly 371 (2007), p. 393. For a different view, *see* Jose Alvarez, who states that: "[t]hose who claim that investment arbitration is distinguishably 'public' have not offered a consistent rationale for the distinction, even though such a rationale appears crucial to the ten public law prescriptions that allegedly follow from it" – J.E. Alvarez, *Is Investor-State Arbitration "Public"?*, 6 IILJ Working Paper, 9, 3-43, (2016); and "[s]o, is ISDS 'public'? Too often the answer has been that it is exclusively public. The answer to the titular question presented here is more nuanced:

a mechanism is to a large extent derived from commercial arbitration[35] and thus is not suitable for the assessment of regulatory state policies.[36]

Other concerns regarding ISDS, which were intensively debated during the first session of the UNCITRAL working group Investor-State Dispute Settlement Reform, were related to issues concerning the duration of proceedings and their costs.[37] These problems will be presented in the following sections in the context of structuring a new international investment court (the proposed MIC).

1.3. Backlashes against international adjudication

Beyond the controversies related to ISDS, another discernible recent trend in international practice which can influence the fate of the MIC project is that of a general, sometimes selective, backlash against international courts and tribunals.[38] This process can be considered as a form of "natural resistance" on the part of some States which are "uncomfortable" with the "Age of Adjudication".[39] The backlash against international courts and tribunals can be observed in different fields and at different levels. One of the most prominent examples in this regard is the situation of the International

Since it is not clear what we mean by 'public', and that description threatens to be circular and produce problematic prescriptions, ISDS is more accurately described as a 'hybrid'" (p. 43). *See also* the opinion of the Eric De Brabandere, who states that: "[t]he characterization of investment treaty arbitration as having a 'hybrid' foundation, coupled with the claim that neither international commercial arbitration, nor private law, nor public international law are adequate legal paradigms to apply in these situations, tends to overlook the effective characterization of the underlying legal relations between foreign investors and host states when claims are brought against the latter for violations of an applicable investment agreement." (E. De Brabandere, *Investment Treaty Arbitration as Public International Law – Procedural Aspects and Implications*, Cambridge University Press, Cambridge: 2014, p. 202).

[35] European Commission, Government of Canada, *The case for creating a multilateral investment dispute settlement mechanism, Informal ministerial meeting*, World Economic Forum, 20 January 2017, para. 9.

[36] According to the Malcolm Langford and Daniel Behn, "[i]t is developed states that are the beneficiaries of the large drop in claimant/investor success rates; less developed states have only registered marginal benefits. (…) The investment treaty arbitration system has been able to enhance effectively its respect for state sovereignty (and partly regulatory autonomy), but some states are more equal than others." (M. Langford, D. Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator*, 29(2) European Journal of International Law 551 (2018), p. 580).

[37] "29. The Working Group took note of analyses based on limited available information suggesting that 80 to 90 per cent of costs in ISDS were associated with fees for legal representation and for experts and that the amount of costs per proceeding averaged US$ 8 million. 30. It was widely felt that lengthy and costly ISDS proceedings under some approaches raised concerns and practical challenges to respondent States as well as to claimant investors." (Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017), Part I, A/CN.9/930).

[38] J. Chaisse, M. Vaccaro-Incisa, *The EU investment court: challenges on the path ahead*, Columbia FDI Perspectives, No. 219, 12 February 2018, p. 2.

[39] This name for the period of development of international law following the end of the cold war was coined by Christopher Greenwood (http://legal.un.org/avl/ls/Greenwood_CT.html); *see also* E.A. Posner, J.C. Yoo, *Judicial Independence in International Tribunals*, 93(1) California Law Review 1 (2005).

Criminal Court (ICC), which faces harsh criticism both from some of the states-parties and from non-party states.[40]

This trend also relates to the courts of African sub-regional organizations, many of which have been subjected to pressure from some members of these organizations. This was a consequence of judicial decisions concerning those members, based on individual applications. Leaders in these backlashes included: Gambia with regard to the Court of Justice of the Economic Community of West African States (ECOWAS); Kenya with regard to the East African Court of Justice (EACJ); and Zimbabwe with regard to the Tribunal of the Southern African Development Community (SADC).[41] They made every effort to eliminate the particular court in question, or at least to narrow its jurisdiction. Zimbabwe succeeded with regard to the SADC Tribunal, whose jurisdiction in 2014 was restricted to hearing inter-state disputes only.[42]

Limiting the competence of international courts when actions at an international level seem to be not plausible can also be achieved by creating specific domestic procedures for evaluation of the suitability of international decisions. The most prominent recent example is legislation enacted by the Russian Federation concerning international bodies on the protection of human rights and freedoms. Russian Constitutional Law concerning the Constitutional Court allows it to express a legal opinion on the impossibility of execution of a particular judgment of the European Court of Human Rights (ECtHR).[43] In this context, it was stated that:

> (…) Russian law does not simply concern the relationship between the Strasbourg Court and the domestic courts (…) It goes much further than that – by denying the enforceability of ECtHR judgments as regards the Russian state altogether, thereby purporting to extinguish the effect of Art. 46 of the ECHR. This is therefore unprecedented in the history of the European human rights regime.[44]

With respect to international arbitration, it is striking that despite the criticism of ISDS arbitration is still considered by some as being a growing phenomenon and a "new

---

[40] C.R. Rossi, *Hauntings, Hegemony, and the Threatened African Exodus from the International Criminal Court*, 2 Human Rights Quarterly 369 (2018); M.W. Mutua, *The International Criminal Court: Promise and Politics*, 109 Proceedings of the ASIL Annual Meeting 269 (2015).

[41] K.J. Alter, J.T. Gathi, L.R. Helfer, *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences*, 27(2) European Journal of International Law 296 (2016).

[42] E. de Wet, *The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa*, 3 ICSID Review 1 (2013).

[43] Federal Law of the Russian Federation no. 7-KFZ introducing amendments to the Federal Constitutional Law no. 1-FKZ of 21 July 1994 on the Constitutional Court of the Russian Federation, entered into force on 15 December 2015. For a complex opinion in this regard, *see* the Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court by the European Commission for Democracy Through Law (Venice Commission), Strasbourg, 13 June 2016, Opinion no. 832/2015, CDL-AD (2016)016.

[44] P. Leach, A. Donald, *Russia Defies Strasbourg: Is Contagion Spreading?*, EJIL Talk, 19 December 2015, available at: https://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/ (accessed 30 May 2019).

generation of international adjudication."[45] This assessment however underestimates several important indicators which suggest that in fact international arbitrations share the fate of permanent courts. In this sense, a strong scepticism, or a backlash, real or perceived, relates to both permanent courts and arbitration, even if one excludes ISDS from this analysis. Several facts validate this assertion.

The first concerns recent inter-state arbitrations against Russia[46] and China,[47] where both states decided not to participate in the proceeding, thus ignoring this mechanism. This restrained approach to international arbitration was implicitly indicated by those states in the Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law of 25 July 2016. The longest point of the declaration relates to the peaceful settlement of disputes and declares, *inter alia*, that: "all dispute settlement means and mechanisms are based on consent and used in good faith and in the spirit of cooperation, and their purposes shall not be undermined by abusive practices."[48]

Secondly, the Croatia – Slovenia proceedings related to their maritime and land boundary has shown that interstate international arbitration, similarly as ISDS, is not immune from problems of independence. After Serbian newspapers published transcripts of a communication between a Slovenian arbitrator on the bench and a Slovenian agent, they both resigned from participation in the case and Croatia announced that it would no longer participate in the case.[49] Against this background Philippe Sands stated that:

> It is not entirely unusual for an agent in an inter-state case to share a conversation that he or she has had with a person sitting on a court or tribunal, a fact that causes (or should cause) a tremendous ethical difficulty. Under most rules of professional conduct, counsel should not be privy to such information, and they should not want to hear such stuff or know what is going on. Other rules of professional conduct may have a different standard, and this raises a serious question about the ethical standards for the international bar.[50]

---

[45] S.W. Schill, *The Overlooked Role of Arbitration in International Adjudication Theory*, 2 ESIL Reflections 1 (2015), p. 3; *see also* G. Born, *A New Generation of International Adjudication*, 4 Duke Law Journal 785 (2012).

[46] The Arctic Sunrise Arbitration (*Netherlands v. Russia*), The Russian Federation by Note Verbale dated 27 February 2014 addressed to the Permanent Court of Arbitration indicated its "refusal to take part in this arbitration", available at: https://pca-cpa.org/en/cases/21/ (accessed 30 May 2019).

[47] The South China Sea Arbitration (*The Republic of Philippines v. The People's Republic of China*), The People's Republic of China in a Note Verbale to the PCA on 1 August 2013, and throughout the arbitration proceedings, reiterated "its position that it does not accept the arbitration initiated by the Philippines"; available at: https://pca-cpa.org/en/cases/7/ (accessed 30 May 2019).

[48] The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016, available at: http://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYlKr/content/id/2331698 (accessed 30 May 2019).

[49] *See also* "what was revealed – last summer is like an Exocet missile that goes to the heart of the system that we are all involved and care about, a system that we wish to see succeed and improve" (P. Sands, *Reflections on International Judicialization*, 27(4) European Journal of International Law 885 (2016), p. 896).

[50] *Ibidem*, p. 898, *see also* "[t]he claim that there is no reason to worry about bias when we are dealing with an epistemic community of investment experts drawn from large law firms, generally specialized in

Thirdly, the arbitration mechanism inserted into the 2017 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting has gained little support. As of 30 May 2019, the Convention was signed by 88 States, but only 27 have accepted arbitration between an individual and a state.[51]

Fourthly, the controversies over the functioning of the Appellate Body of the WTO, as expressed by the United States in its opposition to the selection of new arbitrators, has resulted in four vacancies in the seven-member body.[52] As a consequence, this dispute settlement procedure, which until recently was considered "one of the most effective dispute settlement systems in international law,"[53] has reached a critical juncture.

Furthermore, a practice of ignoring obligations deriving from BITs also exists. This practice was applied by the Russian Federation regarding claims invoked on the basis of the Ukraine–Russia BIT as a consequence of Crimea's annexation by the Russian Federation in 2014.[54]

These developments indicate that any effort towards creating a permanent MIC is at present particularly challenging. Although in general the "machinery" of transnational adjudications works well, there are significant signals that the development of an international judiciary is not a one-way road lined with progressively growing support. Conversely, the increase in activities of international courts and tribunals also increases the awareness of states about some of the negative consequences of subjecting disputes to the compulsory jurisdiction of such organs, thus making the acceptance of any new "organ" much more difficult. In this context, arguments for the MIC project should be based not on the novelty of the creation of another international court, but rather on

providing services for MNCs, complemented by academic experts closely aligned with them, is not convincing" (M. Kumm, *An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege*, 3 ESIL Reflections (2015), p. 5).

[51] *See* the status of signature and ratification of the Convention and the status of acceptance of the arbitration chapter: https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (accessed 30 May 2019).

[52] "The year-long impasse on the process for appointing AB Members is debilitating the Body. Its reduced strength is undermining the collegiality of our deliberations, and the lack of proper geographical representation threatens its legitimacy." Statement by Appellate Body chair, Ujal Singh Bhatia, of 22 June 2018, available at: https://www.wto.org/english/news_e/news18_e/ab_22jun18_e.htm; *see also* https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (both accessed 30 May 2019).

[53] Inter-Pacific Bar Association, Kuala Lumpur, plenary session: "Embracing change: forging global trade partnerships" Remarks by Director-General Roberto Azevêdo; 14 April 2016.

[54] The Russian Federation takes the position that Ukraine–Russia BIT cannot serve as a basis for composing an arbitral tribunal to settle claims of Ukrainian investors and that it does not recognize the jurisdiction of an international arbitral tribunal in this regard; *see Stabil LLC and Others v. Russian Federation*, UNCITRAL, PCA Case no. 2015-35; *Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation*, PCA Case No. 2014-30; *PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation*, PCA Case No. 2015-21; *Everest Estate LLC et al. v. The Russian Federation*, PCA Case No. 2015-36; PJSC CB *PrivatBank and Finance Company Finilon LLC v. The Russian Federation*, PCA Case No. 2015-21; *NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrtransgaz, Subsidiary Company Likvo, PJSC Ukrgasvydobuvannya, PJSC Ukrtransnafta, and Subsidiary Company Gaz Ukraiiny v. The Russian Federation* (all available at: www.ita.law.com, accessed 30 May 2019).

the need for replacement of the currently existing and binding international mechanism of adjudication (ISDS) by a new more predictable, economical, and transparent institution.

2. ESTABLISHMENT OF THE MIC

A doctrinal proposition of how to structure the MIC was presented by Gabrielle Kaufmann Kohler and Michele Potestà in an analysis prepared for the UNCITRAL.[55] The main idea of these authors is to follow the model of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, adopted by the U.N. General Assembly on 10 December 2014 (also known as the Mauritius Convention).[56] This approach entails the possibility of importing provisions "into the fragmented treaty-by-treaty regime by way of one single multilateral instrument. Moreover, it achieves this importation by sidestepping the need for amending the 3,000 existing IIAs."[57]

In this context, examples of the limitations of the Mauritius Convention need to be noted. This treaty was of a merely supplementary character. It provided for the possibility of applying a new version of the UNCITRAL Transparency rules, which themselves were only mentioned in the texts of BITs. Conversely, a convention creating the MIC would have to go much further – its provision would have to replace the BITs' provisions. Thus, the question arises as to what the proper extent of the "carve out" should be. Another element of the Mauritius Convention that does not seem to be suitable in the context of the MIC is the number of ratifications required for the Convention to come into force. Any convention, which would create a new, standing international institution, should undoubtedly have a higher threshold in this regard. Finally, other potentially problematic issues would include the adaptation of the MIC to multilateral treaties such as NAFTA or the Energy Charter Treaty.[58]

---

[55] G. Kaufmann-Kohler, M. Potestà, *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?, Analysis and roadmap*, CIDS Research Paper, 3 June 2016; G. Kaufmann-Kohler, M. Potestà, *Challenges on the road toward a multilateral investment court*, Columbia FDI Perspectives, No. 201, 5 June 2017. *See also Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS)*, *Note by the Secretariat*, 20 April 2017, A/CN.9/917.

[56] *See also* M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement*, European Yearbook of International Economic Law (2018), p. 202.

[57] Kaufmann-Kohler, Potestà (*Can the Mauritius Convention*), *supra* note 55, para. 68.

[58] "In the case of multilateral agreements, the Convention should allow two or more Parties to such an agreement to agree to submit disputes under the multilateral agreement to the jurisdiction of the multilateral court." (Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, Brussels, 20 March 2018, 12981/17, para. 8). For more on the difficulties with regard to establishing such a multilateral court, *see* C. Titi, *Procedural Multilateralism and Multilateral Investment Court*, in: E. Fahey (ed.), *Institutionalisation beyond the Nation State*, Springer, Berlin-Heidelberg: 2018, pp. 160-162, 149-164.

3. FUNCTIONING OF THE MIC

The establishment of a MIC requires decisions on a number of specific aspects regarding the functioning of an international court. These include, *inter alia*, issues of the admissibility of complaints and jurisdiction; the issue of the selection of judges; and the procedure or rules for lodging appeals. These questions will be presented in turn.

3.1. Admissibility and Jurisdiction

3.1.1. Cooling off period

The issue of admissibility of claims requires an agreement as to whether the provisions of BITs apply in this respect, or whether they will be entirely superseded by an instrument creating a MIC. A typical BIT includes a waiting period ("cooling off period") that is aimed at giving the parties time to reach an amicable dispute settlement. The CETA adds additional limitations in this regard, as it stipulates that consultations have to be initiated within three years at the latest after becoming aware of the particular treatment alleged to be a breach of the pertinent provisions, or within two years after the investor ceases to pursue local remedies.[59]

Thus, there is the question as to whether to standardize the "cooling off period" or to leave it untouched by a MIC statute. If the former option is chosen, the language used should be very clear. Those drafting the treaty should consider whether a "cooling off period" is an aspirational, procedural, or jurisdictional requirement, as this issue is a point of controversy in investment arbitration.[60]

3.1.2. Jurisdiction *ratione personae*

Jurisdiction of the MIC should be analogical to the jurisdiction of arbitral tribunals under a particular BIT. Thus, in principle it should cover both ISDS and State to State dispute settlement. Limiting the scope of competence of the MIC only to ISDS would create unsustainable situations, whereby the MIC would interpret a particular BIT in ISDS cases, while a typical arbitral tribunal could still interpret this instrument differently in a possible State to State dispute.[61] Allowing the MIC to also hear inter-state disputes would undoubtedly contribute to coherence in the interpretation of a

[59] Art. 8.19(6) CETA. Furthermore, CETA bars the initiation of consultations 10 years after the investor acquired or should have acquired knowledge of the alleged breach and knowledge of the incurred loss or damage thereby (Art. 8.19(6) letter b). Identical provisions in this regard are contained in the EU-Singapore investment protection agreement (Art. 3.3).

[60] A. Ganesh, *Cooling Off Period (Investment Arbitration)*, Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law Working Paper Series (2017).

[61] However, it has to be noted in this context that the EU, in its first investment treaty with Singapore, clearly separated the ISDS from inter-state dispute settlement procedures. While the former implies double-instance proceedings under the heading of the Investment Court System (Art. 3.9-3.10), the latter is drafted as a classical one-instance arbitration (Arts. 3.28-3.29).

particular BIT.[62] Simultaneously, the interstate mode would be applicable only to those investment treaties which allow for such a mechanism.[63]

3.1.3. Jurisdiction *ratione materiae*

Jurisdiction *ratione materiae* of the MIC, although at first sight obvious and undebatable, can nevertheless lead to some controversies. This has been the experience of the functioning of the *ratione materiae* jurisdiction of the ICSID Convention, which has created tension as to whether the conventional term "investment" has some autonomous meaning, different from the definition contained in a particular BIT, thus allowing for the use of the ICSID procedure.[64] This controversy was present in, *inter alia*, the case of the Malaysian Historical Salvors versus Malaysia, in which the tribunal indicated that in order to constitute an "investment" under the ICSID Convention, the contract must have made a significant contribution to the economic development of the respondent state.[65] This decision was harshly criticized by an ICSID Annulment Committee, which emphasized that so called "Salini criteria" cannot be used strictly for mandatory jurisdiction requirements.[66]

Thus, the MIC Statute should deal with this issue in a more detailed manner. Several options are possible. Firstly, the MIC statute can provide for the definition of an investment as used in a particular BIT when such BIT is applicable. Therefore there would not be a need for any search into the autonomous meaning of the term investment under the MIC statute. Secondly, the MIC statute could indicate that apart from the definition contained in a particular BIT, some additional requirements have to be fulfilled. This method is discernible within EU treaty practice, which inserts into the definition of "investment" additional elements originating from investment tribunals jurisprudence. Thus, CETA indicates that "investment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk (…)."

---

[62] Kaufmann-Kohler, Potestà (*Can the Mauritius Convention*), *supra* note 55, para. 182; C.M. Brown, *A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches*, 3 ICSID Review 673 (2017), p. 689.

[63] M. Potestà, *State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential*, in: N. Boschiero et al. (eds.), *International Courts and the Development of International Law*, Springer, Berlin-Heidelberg: 2013, pp. 753-768, 753-770; N. Bernasconi-Osterwalder, *State–State Dispute Settlement in Investment Treaties*, IISD Best Practices Series 2014, available at: https://bit.ly/2JuRo3z (accessed 30 May 2019).

[64] *See* "[m]ore fundamentally, however, a progressive harmonization appears to take place towards the recognition of an objective requirement under Art. 25 of the ICSID Convention and the necessity of autonomously ensuring a tribunal's jurisdiction under that provision. Likewise, the case law is progressively evolving towards a greater recognition of the Salini criteria and an economic, as opposed to a purely legal, conception of investment – in fact, the ordinary meaning of the word" (E. Gaillard, Y. Banifatemi, *The Long March Towards a Jurisprudence Constante on the Notion of Investment*, in: Kinnear et al. (eds.), *supra* note 31, p. 123).

[65] Award on jurisdiction of 17 May 2007, ICSID Case No. ARB/05/10.

[66] *Malaysian Historical Salvors SDN BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the application for annulment of 16 April 2009, paras. 62-79.

However, when taking such an approach one has to bear in mind that it can be criticized as a step back from the position of only dealing with the dispute settlement mechanism, i.e. without going into the reform of substantive rules.[67]

3.1.4. Jurisdiction *ratione temporis*

Another important consideration in this regard is the *ratione temporis* jurisdiction, in particular whether the jurisdiction of the MIC would also cover the pre-establishment phase, or would only be limited to an established investment. The proper approach in this regard would be to recognize that the "substantive norm" of a particular investment treaty applies.

3.2. Judges

Substituting *ad hoc* arbitrators with permanent judges is one of the crucial elements of change proposed for the establishment of the MIC.[68] This flows from the conviction that giving disputing parties the right to individually choose their adjudicators may create doubts about the objectivity of a decision, and can also have some systemic impacts for the ISDS.[69] This also relates to resignation from the system of remuneration on a case-by-case basis, a practice which may, in light of the other professional activities of arbitrators, create risks of a conflict of interest.[70] As pointed out by G. Kaufmann-Kohler and M. Potestà, "[i]n an asymmetric setting such as investor-State dispute settlement, the shift from an *ad hoc* to a permanent setting means that one category of disputing parties loses control over the selection process, which remains entirely in the hands of the other because the latter is at the same time a treaty party."[71]

The proposal for a MIC has raised a certain opposition concentrated on the unique features of the current system,[72] as well as on the bias of judges chosen by states alone.

---

[67] "Whilst a multilateral reform of the substantive standards is difficult to envisage at this moment in time, the process could also lead to discussion of further reforms of the international investment regime, beyond the question of dispute settlement, if governments so decide. Working on procedural issues should not preclude at the appropriate moment work on the substantive issues and the final result of any process on procedure should leave room for any future substantive rules to use the multilateral dispute settlement mechanism" (European Commission, Government of Canada, *supra* note 35, para. 65).

[68] The idea is that the Multilateral Investment Court would "(…) have tenured, highly qualified judges, obliged to adhere to the strictest ethical standards", available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 (accessed 30 May 2019).

[69] European Commission, Government of Canada, *supra* note 35, para. 11. What is striking is that such an opinion was also expressed by some arbitrators, *see* J. Paulsson, *The Idea of Arbitration*, Oxford University Press, Oxford: 2013, pp. 147-173.

[70] S. Puig, A. Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approac*h, 46(2) The Journal of Legal Studies 371 (2017).

[71] G. Kaufmann-Kohler, M. Potestà, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards,* CIDS Supplemental Report, 15 November 2017, p. 15.

[72] *See e.g.* Heinz-Bockstiegel, who states that: "[s]ome have suggested that all three arbitrators should be appointed by an institution. I do not agree with that proposal. One of the major reasons for the parties to agree on arbitration is that they have an influence to select judges of their own confidence. This cannot

This criticism is difficult to reconcile with the basic facts regarding the mechanics of international adjudication. There are a large number of international courts which can hear individual disputes against states, even though the judges are chosen by the states. An illustrative example in this regard are regional human rights courts and courts of regional or sub-regional organizations. This approach finds support in Anathea Roberts' theory of the dual role of states (treaty parties and disputing parties).[73] Joost Pauwelyn seems to be pointing in the same direction when stating that "what is needed from ICSID adjudicators is not so much (or only) technical expertise and experience to fill gaps in domestic court systems, but representativeness, inclusiveness and trust by governments and other stakeholders so as to justify ISDS's intrusion in the domestic legal process."[74]

Nevertheless, voices can also be heard that the method of appointing judges should involve stakeholders other than states to a greater degree.[75] Although, such proposals could have some merits, the main example invoked by its supporters *i.e.* judges of the European Court of Human Rights (ECtHR) chosen by the Council of Europe General Assembly (PACE) would be very difficult, if not impossible, to transplant into the MIC. The MIC, in contrast to the ECtHR, is not planned to be structurally connected to any existing international organizations equipped with a body of a similar nature to PACE. Thus, although there is some tendency, in particular with respect to European courts, to engage some advisory panels or selection committees (which are called upon to evaluate the candidates put forward by the governments), one has to keep in mind that this is still a rather unique and not universal practice.[76]

---

be replaced by an institution which cannot have the same detailed knowledge of all relevant circumstances of the particular case at hand at the beginning of the procedure"; and "in international arbitration, the parties, their counsel and the institutions make many efforts to find the best candidates for their selection of arbitrators. It is hard to see how a permanent tribunal could be composed of even better judges. Probably those who would find it attractive to accept to spend all their work time on such a permanent appointment would be those who are not in the first row of candidates considered by the parties and institutions" (K. Heinz-Bockstiegel, *The Future of International Investment Law, in International Investment Law – A Handbook*, C.H. Beck, Hart, Nomos: 2015, pp. 1867 and 1870). With regard to the former it is striking however that no such an opinion is presented with regard to the members of the ICSID Annulment Committees, which in accordance with Art. 52(3) are appointed by the Chairman of the Administrative Council from the Panel of Arbitrators.

[73] A. Roberts, *Would a Multilateral Investment Court be Biased? Shifting to a Treaty Party Framework of Analysis*, EJIL Talk, 28 April 2017, available at: https://bit.ly/2pdTvgX (accessed 30 May 2019). *See also* A. Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 American Journal of International Law 179 (2010), p. 179.

[74] J. Pauwelyn, *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus*, 109(4) American Journal of International Law 761 (2015), pp. 804-805.

[75] Investment Treaty Working Group, *Task Force Report on the Investment Court System Proposal Initial Task Force Discussion Paper Investment Treaty Working Group of the International Arbitration Committee*, American Bar Association Section on International Law, 14 October 2016, Discussion Paper, p. 26.

[76] For example this practice does not exist in the election procedures for judges to the ICJ, ICC or ITLOS. Simultaneously, one has to note that these bodies do not adjudicate claims of individuals against states. *See also* M. Bobek, *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*, Oxford University Press, Oxford: 2015.

An important question which still remains concerns the number of judges.[77] In this regard two main tendencies can be discerned. The first is a limited number of judges, strictly regulated in an appropriate instrument and not proportional to the number of states accepting the jurisdiction of such a Court. This pattern can be observed in global international courts such as the ICJ, the ICC, and the International Tribunal for the Law of the Sea. The second model is based on the principle that every state has the right to choose a judge, a notion that is applied in several courts with the competence of adjudicating individual applications, such as regional human rights courts, and regional and sub-regional courts.[78] So which model should be applied for a global court with the competence of judging individual investment complaints? There is no straightforward answer to this question. Several factors should be taken into account including, *inter alia*, the financial aspect (the greater the number of judges the higher the costs) and also the number of complaints (the more complaints filed the greater the number of judges needed). A third proposal that can be made is that the number of judges would be fixed, but when a State party to a case before the MIC does not have a judge of its nationality on the bench it could choose a person to sit as judge *ad hoc* in that specific case.

Another question that should be evaluated is the length of judges' tenure. In this regard the proposal of the Institut de Droit Internacional (IDI) seems to be a good starting point. Art. 2(1) of the IDI Resolution from 2012 states that "in order to strengthen the independence of judges, it would be desirable that they be appointed for long terms of office, ranging between nine and twelve years. Such terms of office should not be renewable."[79] Long terms of office should, at least in theory, ensure that the judicial experience gained by judges in the early years of their tenure will be used by the court in later years. Furthermore, a lack of renewability limits the potentially negative impact of the fact that a judge may wish to position him/herself to remain on the court for subsequent terms, a factor which may, more or less consciously, influence his or her decisions on the bench.[80]

Furthermore, recent controversies regarding the appointments of members of the WTO Appellate Body suggest, *inter alia*, the need to ensure clarity as to whether a judge assigned to a given case, whose term of office expires during the time of its processing,

[77] "Different methods of appointment of the Members of the Court should be explored including, for example, the possibility that all Parties to the Convention are entitled to appoint a Member of the Court, or the possibility that Members of the Court are appointed through other methods inspired by existing international courts such as the International Court of Justice or the International Criminal Court, taking into account, inter alia, the expected size of the Court and the need to ensure effectiveness and cost-efficiency" (*Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes*, Brussels, 20 March 2018, 12981/17, para. 11).

[78] However, it has been noted that "[n]o global court or tribunal follows this composition model" (Kaufmann-Kohler, Potestà, *supr*a note 71, p. 18).

[79] Institut de Droit International, Resolution: The Position of the International Judge, Session de Rhodes, 9 September 2011, Rapporteur: M. Gilbert Guillaume.

[80] In this regard, "Protocol 14 to ECHR from 2004 introduced increasing of the terms of office and prohibited the renewability of judges to reinforce their independence and impartiality", Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, para. 50

should have the right to continue to adjudicate the case until its final completion, or alternatively adjudicate in the case only to a particular stage of proceedings at the end of their term.[81]

With regard to the issue of representativeness in the appointment of the judges, it seems most appropriate to draw comparative patterns with the mechanism of the ICC, particularly as regards ensuring diversity of both gender and region.[82] Such an approach is particularly necessary as it would be in direct opposition to the current situation in the ISDS, which is dominated by men from western states.[83]

3.3. Procedure

Creating a new international investment court would also require the establishment of a detailed procedure, inasmuch as the UNCITRAL Rules or the ICSID Convention would not be automatically applicable. Nevertheless one can assume that the basic concepts contained in these instruments would be followed,[84] with appropriate alterations taking into account the different character of the process of dispute settlement.[85] Simultaneously, some margin of appreciation has to be assigned to the Tribunal to craft its own rules.

3.4. Length of a proceeding

There is a strong practice based on the WTO Dispute Settlement Understanding (DSU) to expressly indicate what is a planned time schedule for first and second instance proceedings. According to Art. 20 of the DSU, "the period from the date of establishment of the panel by the DSB [Dispute Settlement Body] until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed, or 12 months where the report is appealed." Following this model, CETA and IPA Singapore provided for 18 months for a first instance proceeding and an additional 180 days for the appellate procedure (Arts. 28(6) and 29(3) CETA and Arts. 3.18(4) and 3.19(4) IPA). Current

[81] "In the U.S. view, we cannot consider a decision launching a selection process when a person to be replaced continues to serve and decide appeals after the expiry of their term" (U.S. Statements at the 22 November 2017 DSB Meeting).

[82] According to the Art. 36(8) of the 2002 Rome Statute: "The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation; and (iii) A fair representation of female and male judges" (2187 UNTS 3).

[83] Langford, Behn, Hilleren Lie, *supra* note 28, pp. 309-311; *see also* S. Puig, *Social Capital in the Arbitration Market*, 25 European Journal of International Law 387 (2014), pp. 418-419; Bungenberg, Reinisch, *supra* note 56, pp. 32-33.

[84] A similar approach was applied when the procedural rules of Iran-US Claims Tribunal were crafted. *See* D. Caron, L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, Oxford University Press, Oxford: 2012, p. 5.

[85] S. Baker, M. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran – US Claims Tribunal*, Springer Netherlands/Kluwer, Alphen aan den Rijn: 1992, p. 2.

arbitral practice shows that complying with such a time frame could be difficult,[86] although it should be taken into account that the length of current proceedings can also be a consequence of the fact that arbitrators engage simultaneously in several cases.[87] In this regard having judges focused only on a particular case could contribute to speeding up the process of resolving cases.

Compliance with a concrete time frame is especially challenging in cases of bifurcations. CETA for example allows a respondent to file a preliminary objection to the Tribunal when the claim is alleged to be manifestly without legal merit (Art. 8.33). In such a situation, a proceeding on the merits is suspended until the preliminary objection is resolved. Further delays can occur if there is a remand of the case by the appellate court to the first instance court. While such a procedure, which is not practiced by international courts, may seem not to be very plausible, particularly from the perspective of the length of proceedings, nevertheless the EU considers the possibility of a "remand" to be an important element of a planned MIC.[88]

An important aspect which affects the speed of proceedings is also the time allowed for lodging an appeal. Therefore it seems necessary to indicate a period that does not excessively prolong proceedings. In this respect, the solution contained in the Washington Convention regarding annulment procedures (120-days) or in EU agreements (90-days in CETA, IPA Singapore Art. 3.18(4)) is excessive. The 60-day period (applicable in WTO law) seems to be sufficient, especially given the fact that most national systems provide for an even shorter period for lodging an appeal.[89]

3.5. The appellate mechanism

An appellate mechanism is not often employed in international law. Apart from some special regimes such as WTO law[90] or EU law, it functions only in criminal courts. Such a situation results from objections relating to the length of proceedings and the costs of double instance proceedings. As regards the time frame, although at first sight the ISDS seems to be simple, fast, and a single instance mechanism, the reality is much more complicated. One of the reasons for this is the possibility of the furcation of proceedings into a jurisdictional and a merits phase; or a merits and liability phase (bifurcation),

[86] "The nineteen awards issued in 2012 came on average thirteen months after the hearing (or the last hearing, in cases with more than one). These included the award in *Daimler Financial Services AG v. Argentina*, which was rendered more than 32 months after the hearing and nearly two years after the last written submissions. The fastest award came five and a half months after the hearing." (J. Lee, *Introduction of an Appellate Review Mechanism for International Investment Disputes: Expected Benefits and Remaining Tasks*, in: Kalicki, Joubin-Bret (eds.), *supra* note 1, pp. 692-693).

[87] *Ibidem*, p. 694.

[88] Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, Brussels, 20 March 2018, 12981/17, para. 10.

[89] Lee, *supra* note 86, p. 700.

[90] The WTO example shows that the appellate procedure is used very often used in practice. The percentage of Panel Reports appealed between 1996 and 2014 was 68 per cent. *See* https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm (accessed 30 May 2019).

and sometimes even on jurisdictional, merits, and damages phases (trifurcation). The analysis of almost 100 arbitration investment cases between 2011 and 2014 showed that 43 per cent were furcated.[91] Another reason is the use of the annulment procedure that is applicable under the ICSID Convention, which in fact creates a double instance proceeding. As a result, the same analysis has indicated that the average time of the arbitration proceedings in the cases analysed was 48.9 months.[92]

One of the most important elements regarding double instance procedures is delimiting the grounds for an appeal. CETA (Art. 8.28(2)) and the IPA Singapore (Art. 3.19) provide for narrow grounds, which are based on annulment prerequisites from the ICSID Convention[93] and supplemented by two additional elements: an error of law and manifest error in findings of fact.[94] This approach assumes that an appellate review mechanism covers both factual and legal issues. Limiting appeals to legal issues alone (errors of law) enables faster proceedings, however such a limitation creates controversies with respect to separating legal and factual issues as they are sometimes closely intertwined.[95] In any case, use of a wide range of grounds for revocation makes it unclear what is the purpose of granting an appellate court the possibility of remand.

3.6. Costs

The issue of costs was traditionally an argument against creating a permanent international court. Already in 1960, during the ILA discussions, Seidl-Hohenveldern stated that: "[a]n Arbitral Tribunal would be preferable to a Permanent Foreign Investments Court, especially in view of the costs involved in the latter case."[96] This evaluation has changed dramatically however with the development of investment arbitration. It is currently estimated that the average arbitration case costs between USD 8[97] to 11.5[98] million, including fees and expenses for party representatives and expert witnesses, costs

[91] D. Behn, *Legitimacy, evolution, and growth in investment treaty arbitration: Empirically evaluating the state-of-the-art*, 46 Georgetown Journal of International Law 363 (2015), p. 377.

[92] *Ibidem*, p. 376.

[93] Art. 52(1) provides that: "Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based."

[94] Identical requirements are contained in the EU-Vietnam FTA, Art. 28(1).

[95] Lee, *supra* note 87, pp. 486-487.

[96] Juridical Aspects of Nationalization and Foreign Property, International Law Association Reports Conference 1960, vol. 49, p. 176.

[97] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017), Part I, 19 December 2017 A/CN.9/930/Rev.1, para. 36; D. Gaukrodger, K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, 2012/03, p. 19.

[98] S. Hindelang, T.M. Hagemeyer, *In pursuit of an international investment court recently negotiated investment chapters in EU comprehensive free trade agreements in comparative perspective*, July 2017, paper requested by the European Parliament's Committee on International Trade, p. 20.

for arbitrators. and the cost of the arbitration institution. Thus, today high costs are currently recognized as one of the main arguments against investment arbitration.

In addition, it is submitted that creating a standing court with an appellate mechanism does not automatically increase the costs of proceedings. Specific delineation of the time frames for proceedings in the first and second instance may result in a situation where even two-instance Court proceedings could be faster than a single instance arbitration proceeding. Secondly, a standing court can create much more predictable jurisprudence than arbitration tribunals.[99] In this regard, Taylor St. John and Yulia Chernykh state that "while a court has higher standing costs, it may generate lower costs per case, because counsel will not spend time on arbitrator selection and because, if precedent operates, counsel will be able to consider certain questions of law as settled."[100]

3.7. Enforcement

Creating rules on enforcement from scratch is necessary, as it is difficult to see how the New York Convention could be applied in this instance, and almost certainly it will not be. The proposed Multilateral Investment Court would seem to go much further than an investment court system contained in CETA or the EU-Singapore investment agreement, which expressly indicate that the New York convention applies.[101] In this context, Art. 54(1) of the Washington Convention seems to provide the most suitable

[99] *See* the EU position: "This lack of consistency brings significant cost. This is problematic because there is a lack of predictability when analyzing the potential legislative or regulatory activities. This also engenders disputes because it is very often the case that one or the other party in a potential dispute can point to at least one instance in which an interpretation that suits them has been adopted and therefore they are tempted to seek to bring a case when it might not be necessary. In our view, there are differences [among the treaties], but these differences should not be exaggerated." (A. Roberts, Z. Bouraoui, *UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims*, EJIL Talk, 6 June 2018, https://bit.ly/2PiFsSo (accessed 30 May 2019).

[100] T.St. John, Y. Chernykh, *Déjà vu? Investment Court Proposals from 1960 and Today*, 15 May 2018, available at: https://bit.ly/2QfES8y (accessed 30 May 2019).

[101] Nevertheless this assumption has created uncertainties as to whether the New York Convention can be applicable to the dispute settlement procedure provided by those treaties. *See* American Bar Association Section on International Law, *Task Force Report on the Investment Court System Proposal*, 14 October 2016, Discussion Paper, pp. 98-108; Kaufmann-Kohler, Potestà (*Can the Mauritius Convention*), *supra* note 55, pp. 54-60; S. Nappert, *Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism*, 2015 EFILA Inaugural Lecture (26 November 2015), p. 8. *See* however N.J. Calamita: "[r]egardless of the nomenclature used in the EU model, and in spite of the method of selection of the members of the standing tribunals, it seems that what counts for the purpose of enforcement under the New York Convention is that there is the agreement of the parties to settle their dispute before the particular tribunal. As a result, while the new EU model departs from classic international commercial arbitral practice in some respects, this should not be a significant issue for the effectiveness of the EU model with respect to the New York Convention." (N.J. Calamita, *The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime*, 18(4) Journal of World Investment & Trade 585 (2017), p. 620; A. Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 Journal of International Economic Law 761 (2016), pp. 782-83).

model for the enforcement of the decisions of a new permanent investment court: "[e]ach 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."

It is submitted that the efficiency of the MIC may be dependent on the actual ability of the investors to enforce MIC decision with regard to the property of a state that failed to comply with MIC decision. As a result it seems necessary to link this issue with the number of ratifications required for entry into force of a treaty constituting the MIC. Only ratification of such a treaty by an appropriate number of countries can give a guarantee that the rules for enforcing the decisions of this court will not be illusory. In this regard one should search for an equilibrium between the 20 ratifications needed for the entry into force of the ICSID Convention, and the 60 ratifications required by the ICC Statute.

3.8. Consistency

According to the European Union, "[p]ermanent bodies, by their very permanency, deliver predictability and consistency and manage the fact that multiple disputes arise, since they can elaborate and refine the understanding of a particular set of norms over time and ensure their effective and consistent application. This is particularly relevant when the norms are relatively indeterminate."[102] This position is highlighted by the practice of investment arbitral tribunals, which extensively rely on previous decisions based on different BITs, often without scrutinizing them as to whether the clauses in question are identical.[103] Such an approach does not take into account the possible differences coming from the context of particular treaties, and creates an expectation that the existence of a non-identical substantive norm will nevertheless create identical or almost identical results.[104] As a consequence, "by importing standards from one investment

[102] A/CN.9/WG.III/WP.145 12 December 2017 United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-fifth session New York, 23–27 April 2018. Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union, para. 7.

[103] *See e.g.* the confusing logic of the *Saipem* tribunal, which seems to favour an artificial "duty to seek to contribute to the harmonious development of investment law" over interpretation of a treaty in accordance with international law: "The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of states and investors towards certainty of the rule of law" (*Saipem SpA v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 67).

[104] Similarly, *see* Robert Howse, "[t]he advantage of multilateralism is the greater number of disputes that can be decided in a given time period given the number of countries who are parties to the system (…) this can lead to a rather rapid development of a significant body of precedent, stabilizing expectations (…)" (R. Howse, *International Investment Law and Arbitration: A Conceptual Framework*, IILJ Working

instrument into another one at the discretion of an appeals facility, this facility would turn into a powerful self-styled and lawmaker void of checks and balances."[105] A similar opinion is held by Ingo Venzke, according to whom the introduction of a new court with an appellate mechanism is "likely to usher in a new dynamic of judicial lawmaking."[106] The latter conclusion seems to find support in the EU-Canada position that "conflicting rulings on identical or on very similar treaty provisions should also be avoided."[107]

In conclusion, one must be careful in anticipating the degree of consistency of adjudication that the MIC is presumed to guarantee. It is justifiable to seriously take into account the existing differences in "substantive" standards, as well as their legal context. Adopting such a cautious approach will be conducive to the MIC's legitimacy, even if it does not always lead to overall consistency. A contrary attitude, i.e. making an effort to hammer out some uniform substantive multilateral norm, can lead to a backlash and to opposition similar to that currently faced by an investment arbitral tribunal.

4. SUBSTANCE FOLLOWS PROCEDURE

As already mentioned, the genesis of the ICSID can be traced back to the political advocacy of the then-General Counsel of the World Bank, Aron Broches, who, faced with failed international negotiations concerning applicable material law, advanced the programmatic formula "procedure before substance". The substance, he argued, would follow in the practice of adjudication.[108]

Initiating reform of a solely procedural nature is a difficult process, taking into account the fact that procedural and substantive norms sometimes influence one another. As has already been mentioned, such a problem relates to, *inter alia*, the definition of investment. Another necessary material element that needs to be introduced to the MIC Statue is an indication of the non-applicability of the BIT MFN clause to dispute settlement provisions. Such an option would ensure that the decision of a state adhering to the MIC Statute would not be bypassed through MFN provisions due to the fact that not all BIT partners of a particular state decided to adhere to the MIC.[109]

Paper 2017/1, p. 61); *see also* "The bundle of bilateral rights and duties between two States hardly ever resembles the bundle of bilateral rights and duties of two other States. Hence, provisions are interpreted and cases are adjudicated in different bilateral legal contexts." (Directorate-General for External Policies Policy Department, *In Pursuit of an International Investment Court – Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective*, July 2017, p. 205).

[105] Directorate-General for External Policies Policy Department, *supra* note 104, p. 175.

[106] I. Venzke, *Investor-state dispute settlement in TTIP from the perspective of a public law theory of international adjudication*, ACIL Research Paper 2016, p. 14.

[107] European Commission, Government of Canada, *supra* note 35, para. 13.

[108] A. von Bogdandy, I. Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23(1) European Journal of International Law 7 (2012), p. 9.

[109] "Whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter will be left to dispute settlement tribunals to

Finally, one should also consider introducing some other important and non-controversial substantive elements into the MIC Statute. For example, it should not raise any objections to insert into the MIC Statute some preambular provisions contained in the G20 Guiding Principles for Global Investment Policymaking, in particular the confirmation of the right to regulate.[110]

5. HEADING TOWARDS A PARADIGM CHANGE?

The creation of a new international, permanent court concentrated on settling investor – state disputes is undoubtedly an extraordinary challenge. As indicated, possible problems relate not only to the negotiations concerning the organizational and procedural aspects necessary to ensure the efficient operation of this type of body. It is also necessary to take into account the dynamics of the functioning of international adjudication as such, as well as the controversies surrounding the international legal protection of foreign investments.

In pursuing this endeavour, it has to be borne in mind that it will not be easy to make strict delimitations between procedural and substantive law. However, the problems found in investment tribunals' jurisprudence with respect to application of the definition of an investment or the MFN clause clearly show that such delimitation should be effected.

As with any other form of international adjudication, permanent courts should not be idealized.[111] As happens in an imperfect world, new institutions do solve some problems, but at the same time tend to create others. Nevertheless, due to the "undeniable weakness" of the existing system there are convincing arguments for such an institution. Undoubtedly, the creation of a MIC would significantly change the current situation of ISDS "users". This should not be viewed however as a one-way pro-state reform. As the functioning of regional human rights courts shows, permanent courts can still ensure a significant protection of individuals' rights. Furthermore, the lack of a requirement to exhaust domestic remedies, entailed in the most BITs, would result in the lack of a possibility for domestic courts to review some issues before they are evaluated by the MIC, which can also create tensions between its jurisprudence and the regulatory competences of states. With respect to the appellate mechanism, this element seems to be beneficial for all stakeholders, particularly taking into account the planned reduc-

interpret MFN clauses on a case-by-case basis" (Final Report of the Study Group on the Most-Favoured, -Nation clause 2015, para. 216); *see also* S.W. Schill, *Maffezini v. Plama: Reflections on the Jurisprudential Schism in the Application of Most-Favored-Nation Clauses to Matters of Dispute Settlement*, in: Kinnear et al. (eds.), *supra* note 31, pp. 252-265.

[110] UNCTAD, *World Investment Report 2017,* pp. 118 and 141-142.

[111] Good example of such an idealization is Speech by European Commissioner for Trade Cecilia Malmström "A Multilateral Investment Court: a contribution to the conversation about reform of investment dispute settlement, Brussels, 22 November 2018, available at: https://bit.ly/2ziAChx (accessed 30 May 2019).

tion in the length of the proceedings thanks to the substitution of *ad hoc* arbitrators by permanent judges. Last, but not least, with respect to the EU – which is in the forefront of the proposal to establish the MIC – the issue of the acceptance of its jurisdiction by the CJEU can lead to controversies in and of itself.[112] Finally, whether a reform aimed at changing procedures without changing the substantive rules can create a significantly greater coherence of jurisprudence is a serious question that remains to be answered.

Nevertheless, the establishment of such a Court and its acceptance by an appropriate number of states would constitute an important step towards a significant (and very much needed) transformation of international investment law, i.e. a departure from arbitration as a method of resolving disputes, at the same time depriving investors of the right to appoint their members of the tribunal.

In this respect, the procedural reforms in international investment law presented in this article would fit in within the paradigm shift in this area. At the same time, this also encompasses issues of the reorientation of this branch of law as regards the right to regulate and specify substantive law in new investment treaties, as well as with respect to the limits on judiciary discretion.

[112] C. Titi, *The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead*, 1 TDM (2017), pp. 37-41.