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Reforming Investor-state Dispute Settlement: The EU Multilateral Investment Court Perspective

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Abstract: Rapid changes to the global socio-political dynamics have led the emergence of new challenges to the investor-state dispute settlement (ISDS) mechanism. The imperfections of the existing ISDS system have shown a clear need for reforming this institution. Moreover, this is evidenced by the desire of a number of countries to create a multilateral investment court as proposed by the European Union. Will the new EU Multilateral Investment Court System be better than the current ISDS mechanisms? The Multilateral Investment Court System is the latest proposed measure in the context of multilateralism and the institutionalization of a decentralized international investment law regime. The success of the proposal will declare a new era for international investment law around the world. Still, the proposed reform of ISDS has both benefits and disadvantages. The main goal of this paper is to examine investor-state dispute settlement (ISDS) reform in the context of the EU Multilateral Investment Court by pointing out the shortcomings and rooms for improvement. In addition, this paper indicates that the MIC project has the greatest chance of support by majority of countries, as compared to other possible options for the proposed ISDS reform but at the same time, it has difficulties in achieving the goals of ISDS and fully realizing potential. The results of this research should help to proceed with smooth transition of the MIC to ISDS system and review issues for further discussion.

Keywords: Multilateral Investment Court (MIC), Investor-State Dispute Settlement (ISDS), Investment Law

1. Introduction

Taking into consideration the universal globalization trends, the investor-state dispute settlement has become a fundamental issue shaping the global trade. According to statistics from the UN Conference on trade and development (UNCTAD), by 2020 the number of investor claims against states reached 983 [1]. ISDS system has gained a global distribution through the conclusion of international investment treaties (IITs). Most existing bilateral and multilateral investment treaties give investors the right to apply to the ISDS mechanism in the event of a violation by a state of foreign investment protection standards. Currently, there are more than 3,000 international investment treaties concluded by states [1] and the number is increasing every year. The approaches to concluding such treaties are further improving and becoming more comprehensive.

Investors fill claims against states through BITs and other treaties containing ISDS norms (such as the Energy Charter Treaty). These agreements typically define the institutions that will administer future disputes, questions of jurisdiction, applicable laws, etc. [2].

Thus, the increase of investment disputes in recent years, as well as difficulties connected with the complex nature of ISDS and other issues determine the significance of the chosen topic.

2. The Crisis of the ISDS System

The imperfection of the ISDS system has been a subject of discussions for a few decades. Critics point out several shortcomings, such as the legitimacy of ISDS itself, lack of transparency of the system, inconsistency in the interpretation of international investment treaties, enforcement of arbitral awards, the lack of an appellate mechanism, negative implications for the budget of states of

arbitral awards to recover in benefit of foreign investors compensation, issues of jurisdiction, etc.

The provisions of the Washington Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States 1965 (Washington Convention) and establishment of International Center For Settlement Of Investment Disputes (ICSID) on its basis are successful examples of an international legal mechanism of a universal nature that allows investment disputes to be resolved [3].

Since its creation, ICSID proved itself as being the most respectful institution for ISDS and having broad experience in this field. In several foreign investment treaties and in various investment laws and contracts, states have settled the ICSID as a platform for ISDS. Statistics of caseload confirms the demand for ICSID now. ICSID is recognized worldwide as an independent, depoliticized and self-contained institution. Moreover, local courts hardly can challenge the ICSID arbitral awards.

However, many developing countries are concerned about the ineffectiveness of investment arbitration as means of resolving investment disputes, states with advanced economies are generally not impressed by the prospect of compensation imposed on developing countries due to market size differences.

European Union and some of its trading partners have been eager to establish the MIC to fix some of the issues with the ISDS. Therefore, in order to talk about the advantages of the new proposed system, it's worth to first point out the underlying shortcomings of the ISDS. The system has a great number of issues and problems that have triggered the reaction of the establishment of the International Court System (ICS), which then evolved into the proposal of a new multilateral dispute resolution mechanism, namely the MIC.

3. Overview of Current Issues

3.1. Legitimacy Issues

One of the most noteworthy issues with investment arbitration involves its questionable legitimacy. Serving as a parallel dispute settlement organ, it primarily relies on the specific trade agreements related to the case in question, while at the same time often rejecting the underlying international agreements, the law of the European Union and/or national law of its Member States [4]. Because of that, there are reports of problems with the enforcement of the arbitration's decisions, which puts to questions its legitimacy and overall usefulness. ISDS is also exclusive to foreign investors, preventing domestic ones from accessing the system. At the same time, there are hardly any conditions that the international investors have to adhere to. All of that has led many to believe that the ISDS system is inherently unjust and vastly inefficient.

Moreover, the first manifestation of the ISDS crisis of legitimacy was an unprecedented withdrawal by a number of Latin American states (Bolivia, Ecuador, and Venezuela) from Washington Convention in the past few years [5]. These countries announced its withdrawal from the Convention emphasizing that during the participation in the convention the ICSID considered the big amount of cases where they were respondents. This also followed by a wave of withdrawal from bilateral international investment treaties, which began in the same Latin American region and followed to South Africa and Asia (Indonesia, India, etc.).

In addition to the difficulties faced by foreign investors, the enforcement of investment arbitral awards is a serious problem for the states so that, in order to enforce a decision, states have to pay substantial amounts of compensation to investors. At the same time, even if the arbitral tribunals found a violation of a norm of an international investment treaty, which formulated ambiguously or completely differently interpreted before another investment arbitration, the state will be obliged to pay multimillion-dollar loss.

Here we should mention *Yukos v. Russian Federation* case, which was administered by arbitration institution in The Hague, the respondent was obliged to pay an unprecedented $50 billion [6]. However, luckily for the Russian Federation, this award was canceled by The Hague District Court decision. It should also be borne in mind that the host States are often developing countries wishing to attract foreign investment, and the amount of compensation can easily drain treasuries of a developing state.

In *Bechtel v. India* case, the amount that was awarded in favor of investor was $160 million [7], in *Eureko v. Poland* case, the UNCITRAL tribunal ordered Poland to pay $4,3 billion [8]. In *Cargill v. Mexico* case ICSID ruled to award $77.3 million to investor [9], in *Renco v. Peru* case, the claim amount was $800 million [10], ICSID rejected the case because of the lack of jurisdiction, however, the claimant decided to fill a claim at other arbitral institution, PCA. As we see, claim amounts in ISDS arbitration are very high.

3.2. Lack of Transparency and Unnecessary Complexity

One of the major problems with ISDS is the significant lack of transparency and its unnecessary complexity. In ISDS system, the principle of transparency is opposed to the principle of confidentiality of arbitral awards. The transparency is currently a necessary element in the system of resolving investment disputes in order to comply with public interests.

In 2014, the UNCITRAL adopted the Rules on Transparency in Treaty-based Investor-State Arbitration. Although some states included specific treaty provisions on transparency in some BITs, these Rules still did not get much support from majority of countries. Moreover, in 2015, the United Nations also adopted the Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention). According to Mauritius Convention, the principle of transparency means conducting hearings in an open mode, publication of written statements of the parties, involving third parties in the process and making information public. However, as for today, the number of signatories of Mauritius Convention is 7.

It is obvious that the transparency of ISDS proceedings

would help to strengthen democratic ideals, since it would allow states to be accountable not only to arbitral tribunals but also to their citizens. Thus, the lack of transparency decrease the degree of trust in current ISDS system.

The lack of clarity in the investor-state arbitration leads to investors losing faith in the legitimacy of the system and thus, becoming more reluctant to pursue their endeavours [11]. There have been significant concerns regarding the reliability and trustworthiness of the ISDS system with its lack of predictability and inconsistency among some of its decisions. An example of that could be the cases of CME and Lauder v the Czech Republic [12] where each of the UNCITRAL tribunals that reviewed the case arrived with a different decision by applying a different causation mechanism. With a nearly identical background and the applicable standards, the tribunals reached completely different conclusions depending under which treaty the claim was brought. Cases like those illustrate the unreliability of ISDS and call for the drastic change in the dispute settlement process.

3.3. High Cost

ISDS, being a form of arbitration, also inherits all of the shortcomings of that method of the dispute settlement, such as the significant cost of the proceedings. According to the data, the amount of money that the investors who pursue an arbitration have to spend on the legal costs on average exceeds $4 million for the states and the staggering $6 million for the investors [13]. That price could decrease up to six-fold had the investors had an opportunity to pursue their claim in the investment tribunal.

4. The Need for Reform

Since 2013, UNCTAD has a number of concerns regarding the existing ISDS system. The expansion of ISDS under IIA shows the significance of this system, yet, it uncovers that there are various issues. UNCTAD note sums up the fundamental concerns over the current ISDS system, and describes the key possible pathways for reform. It settles upon UNCTAD's Investment Policy Framework for Sustainable Development, which aims at the comprehensive development of investment policy in different countries [14].

Consequently, this issue got deeper attention by the UN Commission on International Trade Law. UNCITRAL formed a special Working Group that fixes its project timetable and continues to work on the proposals made by states and other stakeholders to reform the ISDS. Its framework began with an agreement on the project timetable to direct Working Group III during next the two sessions [15].

Failure to comply with the decision of the investment arbitration tribunal with a high probability may adversely affect the investment attractiveness of the state. Then the state risks its reputation, which, as a result, can lead to a decrease in investment.

Host states, in general, suggest investors to send applications to local courts, but usually investors submit applications to international arbitration. In many cases, states tend to execute arbitral awards against them voluntarily. This is one more reason why investment arbitration is a subject of the public debate.

There is one more issue. Generally, independent and qualified arbitrators, which the parties can independently choose, consider an investment dispute guided by factors such as experience, expertise, and lack of conflict of interest and the reputation of a potential arbitrator. However, sometimes there is a doubt of arbitrators' independence is questionable.

It is notable that investor-state arbitration (ISA) is the most commonly used method of resolving disputes between foreign investors and the host states. International arbitration as a way to resolve international investment disputes has become widespread due to the desire of a foreign investor to bring the dispute out of the jurisdiction of the state accepting the investment, while maintaining direct control over the procedure for resolving it.

The desire to resolve international investment disputes by arbitration is also due to the arbitral tribunals' powers to interpret the provisions of the international treaty and decide whether a state or an investor makes a violation. Independent and qualified arbitrators, which the parties can independently choose, consider an investment dispute guided by factors such as experience, expertise, and lack of conflict of interest.

However, now there is a clear need for reforming this institution, as evidenced by the desire of developed countries to abandon this procedure for considering investment disputes in half the production in national courts, as well as a proposal to create an international investment court.

European Commission, well aware of the problems, have been urged to reform the obsolete arbitration system and introduce a more fair and transparent alternative.

5. The EU Proposal and Multilateral Approach in ISDS Reform

The main aim of the EU reform is to substitute existing ISDS system with a new system for the resolution of investment disputes, where prospective cases are handled in a transparent way by publicly appointed independent judges at public hearings, and which includes an appeal process, where rule of law and continuity of judicial decisions are ensured. The EU was one of the first who defined that investor-state arbitration, as a dispute resolution mechanism, needs a reform and which then lead to the subsequently made proposals.

In September 2015, the European Commission made a proposal on a new multilateral investment court system to replace the current ISDS system for all EU Member States and Institutions negotiations. Huge criticism arose after MEPs' decision to replace the existing system. It is essential that the new system should act in the same way as a true public court system and protect EU investors abroad, to

maintain governments' right to regulate, be transparent, and provide an appeal possibility [15].

In particular, UNCITRAL Working Group III 2017-2020 delegations' discussions highlighted the following issues of concern in the context of ISDS: consistency, predictability and correctness of arbitral awards; the impartiality and independence of the arbitrators; transparency of the arbitration process; duration and cost of arbitration proceedings. There is no doubt that the idea of a permanent investment court is by no means innovative.

Meanwhile, there is a growing concern over the existing investment disputes resolution mechanisms in the international investment agreements concluded by the EU are not enough to resolve all disputes arising with the MIC. It is critically important for the European Union and other states to design dispute settlement mechanisms in order to facilitate the investment flows.

The fact that the US opposed to the EU's proposal to create MIC could raise some questions. The Transatlantic Trade and Investment Partnership (TTIP), is a trade agreement that negotiated to promote trade relations between the EU and the US, it was originally intended to create a consolidated standard of investment rules that would apply to potential investment agreements with emerging economies such as China [16]. Currently, TTIP is no longer relevant.

Presently, there is still no consensus among lawyers, civil society, and governments on the various key issues. Moreover, in addition to the regulatory issues, the problems associated with the ISDS in the context of MIC establishment also contain an economical, financial, technical, social, and political context, as well as the difficulties of understanding the contents of this law and its implementation, defining its scope and limitation.

The heterogeneity of mechanisms, such as the inclusion of norms on MIC jurisdiction to investment agreements, elaboration of the MIC Statute would allow a foreign investor to seek legal remedies, both under the auspices of the national legislation of host states and based on bilateral and multilateral investment agreements.

Moreover, every year the number of existing ISDS problems becomes wider. The issues of legal regulation, practical problems, a suitable model, and even the appropriateness of the application of investment arbitration stay relevant. In addition, the issues raised in this article are being discussed all over the world: it can be argued with confidence that no country has found a universal means to eliminate the shortcomings of investor-state arbitration. However, the development of investment arbitration as a mechanism for resolving investment disputes was not just a fashionable trend, but was really due to historical prerequisites, the need and readiness for change.

There is a need to outline the complex nature of ISDS in the context of the establishment of the MIC. Every day there is growing concern over the existing investment disputes resolution mechanisms in the international investment agreements concluded by the EU and in accordance with EU legislation that is not enough to resolve all disputes arising from IIT.

Investment arbitration has emerged as the primary method to resolve investment related disputes, which arise between an investor and the host state. Arbitration seems very attractive because it offers some unique benefits over other methods of dispute resolution between an investor and a state. However, in reality, it is cost consuming, takes more time and an arbitral award is not that easy to enforce.

6. Prospective of the EU Multilateral Investment Court

Until very recently, the notion of establishing common global standards and binding norms on the multilateral investment has been outside of the scope of interest for the European Union as well as its trading partners. The idea has only started gaining momentum with the increasing complaints and discontent regarding the operation of ISDS.

This way, in order to counter some of the most significant shortcomings of the ISDS, the European Commission introduced the Investment Court System in 2015. To address the lack of trust towards the institutions of ISDS, ICS was meant to resemble the domestic courts of the EU Member States. A year later, the proposal to establish the MIC has been put out to further enhance the system by making certain adjustments and modifications to the way it operates. The central idea behind it was to make the system more transparent to attract foreign direct investment (FDI). EU, being the largest 'exporter and importer of foreign direct investment' [17], is highly concerned with the impact of the FDI on its economic growth. Combined with a belief that lack of trust and no sense of reliability could lead foreign investors to a decreased incentive to invest, European Commission was more than eager to secure and harmonise the rules regarding international investment on both bilateral and multilateral level.

One of the most important features of the MIC would be the introduction of the new methods of appointing adjudicators. The great advantage of the new Multilateral Investment Courts would be the fact that the members of the court would be appointed in a significantly more transparent way, ensuring their independence and integrity.

The positions would be filled based on an individual's competence, but also nationality and gender to ensure their impartiality and an equal representation of different countries and legal systems. UNCITRAL Working Group III argues that the requirement for geographical diversity serves to reflect various cultural and juridical backgrounds of the adjudicators [18]. Failure to ensure the equal distribution of the MIC members poses a serious threat that more powerful countries would be able to pack the court with their own representatives, promoting their national interest at the expense of developing countries or states with a weaker political stance. That would then most likely undermine the credibility and legitimacy of the court. If the EU Commission fails to ensure a diverse composition of the MIC members, it

won't be able to properly address the underlying issues with the ISDS system.

Some Member States even proposed the establishment of an independent authority responsible for appointing the adjudicators, based on clear and transparent standards. Having an agency with plenary powers is a common practice for the dispute settlement organisations, including the Dispute Settlement Body of the World Trade Organization. The plenary body would be composed of the representatives from the EU Member States and other countries to ensure their objectivity and competence. According to this conception, the plenary body would have the discretion to appoint adjudicators, as well as to adopt the internal procedural rules for the MIC.

A transparent procedure of appointing the members of the MIC is perhaps the most significant advantage that the MIC would have as compared to the ISDS. To ensure the highest transparency, Member States would be allowed to each appoint a candidate, from the pool of which the plenary body would select a number of suitable appointees [19]. Further, since the proposal to establish MIC does not specify the number of its members, the number of the adjudicators would be corresponding with the amount of their workload, with the plenary body having the ability to appoint additional members if necessary.

Qualification of the MIC judges is another aspect that could improve the quality and legitimacy of the dispute resolutions as compared with the arbitration. If their rulings will be binding to all states subject to the new system, the highest qualification and competency requirement is expected to be applied. Adjudicators would be required to present expertise in the international investment law and the highest professional standards. In contrast with the bilateral investment tribunals, where the judges are merely expected to be qualified jurists in their respective states, the MIC would need to impose even higher qualification requirements. Similarly, judges from the appellate body of the MIC should have superior competence standards than the members of the first instance.

Another improvement offered by the MIC proposal is that the judges are due to serve a full-time role of the court adjudicators, excluding them from pursuing any parallel legal activity and engagements that could impede their objectivity and independence. To attract the most qualified professionals, the EU Commission will have to compensate them for the potential financial loss by offering a suitable remuneration. In the long run, it is likely to be a more expensive option, but nonetheless worth the expenditure. An alternative would be the appointment of part-time judges, whose impartiality and independence would be highly questionable, due to the potential for the conflict of interest [20]. That would actively undermine the whole reasoning behind the establishment of the court. Therefore, the remuneration should be at the very least equivalent to the standard remuneration for the highly qualified jurists in the adjudicator's Member State.

The uncertainty regarding the independence of the ISDS arbitrators another aspect that the MIC would try to address. Judges, though appointed by their home state, would not serve as their representatives but rather as independent international agents working within their individual capacity and discretion. That means that no government members of the appointing states should be allowed to hold an office in the MIC. If the Commission fails to ensure that requirement, there is a potential for judges to be acting according to the instructions of their respective states. Even if that wasn't in fact the case, the mere possibility would seriously diminish the legitimacy and credibility of the court.

The duration of a term of the Multilateral Investment Court appointee should also be specified to ensure optimal efficiency. According to the proposal, the adjudicators should serve long, but not-renewable terms. A long duration of the appointment would be able to address one of the major issues with the ISDS system – inconsistency of the decisions. On the other hand, awarding a life tenure would be likely to impede the court's ability to adhere to the changing legal environment. Further, it could lead to the lack of representation of some new Member States that did not get a chance to provide their own representatives. Finally, the lack of possibility of reappointment is likely to increase the independence of the judges [21]. Member States are responsible for selecting their appointees, thus some MIC members could feel pressured to rule in accordance with the best interests of their own states, as opposed to their own independent judgement, in order to secure their consecutive appointment. Non-renewability of terms eliminates that threat.

To further ensure impartiality and avoid any potential for the conflict of interests, the MIC cases would be allocated on a random basis. This way, the adjudicators deciding on the particular claims would be less susceptible to any complaints or accusations of bias and the lack of objectivity. That is also beneficial to the interested parties, as they won't have to waste time appointing the judges, making the entire process more swift and efficient [22]. Random allocation of cases would also increase the reliability of the schedule, as the workload would be more evenly distributed among the members of the court.

Such issues as using third-party funding, the adoption of the MIC Statute, the establishment of the MIC Secretariat, Advisory Centre are out of the scope of this article but still require further consideration.

7. The Appellate Mechanism

Another advantage that the establishment of the Multilateral Investment Court would bring is the formation of the appellate mechanism. At the moment, it is not a common thing for the international courts to have the second-instance procedures for a re-evaluation of the cases. However, an introduction of the appellate body has been broadly discussed by a number of international agreements, including ICSID and OECD Investment Committee. Moreover, an appellate mechanism has already been introduced in a number of treaties, including the EU with CETA, EU-Vietnam and EU-

Singapore IPAs. Multilateral Investment Court could be one of the pioneers of that approach.

Having a two-tier dispute settlement body is an important element that was missing in the inter-state arbitration system. A court composed of the first instance and the appellate body that would re-evaluate the claims is likely to improve the confidence of foreign investors in the dispute resolution. Lack of a control mechanism was one of the major reasons behind the inadequacy of ISDS [23].

An example of that could be the case of CMS v Argentina [24] where The Annulment Committee of ICSID found that there were two major legal errors committed by the Tribunal while reviewing the case. However, due to the limited discretion of the committee, it was not able to annul or modify the Tribunal's decision, even though it was legally incorrect. Existence of a second-instance body would largely diminish the occurrence of similar cases. The ICSID's incapacity to improve its coherence and predictability can be largely attributed to its lack of the appellate body.

Predictability is one of the most important factors in building investors' trust in any dispute settlement mechanism. For a tribunal or arbitration system to create a sense of predictability, they must first build up a history of coherence and consistency in the decision-making. To achieve that, the two-instance MIC would provide a uniform interpretation of the treaty norms. Existence of the appellate body can significantly improve the coherence, as there is a control mechanism that is able to review the merits of individual suits in case of irregularities. Further, the requirement for the first-instance to follow the appellate body's interpretations often does not need to be explicit. In most of the cases, the lower court will adopt the appellate body's judgements with specific regulations imposing it to do so [25].

It is also important to keep the number of appellate body members to the minimum to further promote accuracy and the correctness of the rulings and allow for the continuity in the interpretations of the cases while accounting for any legal developments. Any greater number of adjudicators in the appellate body could undermine its coherence due to the increased likelihood of deviations and discrepancies [26].

It is a common practice to establish a time frame within which the concerned parties are able to file an appeal. Such limits vary from one court to another, with the WTO Dispute Settlement Body awarding up to 60 days, while TTIP setting its limits at 90 days since the decision of the first instance [27]. Similarly, it is advisable for the MIC court to stipulate deadlines for the appeals that would be long enough to give the parties time to evaluate their options but not too long, so that enforcement of the rulings is swift and efficient.

The overall duration of the second instance proceedings should also be subject to the limitation. Dispute Settlement Body of the WTO provides that the cases should be reviewed within 60 days, but in any case no longer than 90 days [28]. TTIP Agreement is more generous in that aspect allowing proceedings to last up to 270 days [29]. The longer the proceedings last, the more time parties have to present additional evidence and the more accurate the ultimate ruling is likely to be. At the same time, any delay to the enforcement of the decision could prove harmful to some parties to the conflict and render the MIC less useful as a dispute resolution mechanism. For that reason, the EU Commission should seek balance regarding the overall length of the proceedings in the appellate body.

The extent of authority that the second-instance tribunal would have is also subject to a debate. Appellate body's role is to decide whether the ruling of the first instance court should be confirmed, altered or nullified. However, in certain international tribunals, appellate courts also have an authority to refer the case back to the lower court with instructions to amend the original decision. That is the case for Tribunals governing Comprehensive Economic and Trade Agreement (CETA) [30]. Still, this solution is questionable, as referring back cases to the first instance tribunal would further delay the final decision and prove costly to both the parties involved in the conflict and the court itself.

Even more important question arises regarding the standard of review to be applied for the second-instance of Multilateral Investment Court. For the majority of the appeal courts, the scope of their discretion is limited only to evaluating whether there has been any procedural error or faulty application of the law by the first-instance tribunal. Therefore, the appellate courts are usually unable to review the cases de novo, i.e. re-evaluate all of their facts and merits anew and based on that determine whether the original interpretation is justified. There is an argument that de novo approach would improve the accuracy of the decisions, as the appellate panel would be able to revisit and correct any potential factual errors that lead the original panel of adjudicators to reach an erroneous conclusion.

Nevertheless, according to the most recent report by the UNCITRAL Working Group III, the MIC's Appellate Mechanism will be solely concerned with reviewing any procedural or other legal errors committed by the first-instance panel. De Novo approach to reviewing facts of the cases will not be applied. The reasoning for that decision is mainly practical, as the appellate adjudicators may not be sufficiently well-suited to reach its own determinations by a complete substitution of findings of the first-instance court. Further, the de novo standard would likely prolong the overall time of the appeal proceedings.

However, instead of purely limiting the scope of second-instance tribunal's discretion to the procedural errors, the MIC could adopt the standard of review similar to the one used at the WTO's Appellate Body [31]. According to Article 11 "A panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" [32]. In other words, the appellate panel would adopt a standard of the "objective assessment", i.e. it should neither completely conform to the original judgement nor disregard it altogether. Instead, the second-instance tribunal should seek to adopt a standard in-between the two extremes.

8. Challenges to the EU Proposed System

Thinking deeper about MIC establishment could lead to finding out its obvious disadvantages. These include the incompatibility of the MIC with Washington Convention, the lack of enforcement mechanisms by national courts of third countries, as well as the fact that the Court of Justice of the European Union is able to stop completely this reform, finding the creation of MIC contrary to EU law [33].

Former President of the International Court of Justice Steven Schwebel has harshly criticized the plans of the EU Commission. His criticism has focused mainly on two points. First, the appointment of judges only by the states and the loss by investors of the right to appoint their own arbitrators, which might lead to the loss of independence of this dispute resolution mechanism and to a bias against the investors. Secondly, the introduction of an appellate instance instead of the current finality of the arbitration decision will entail both an increase in the costs of the parties for arbitration and an increase in the period for resolving the dispute. Stephen Schwebel was even more adamant about "not breaking what works and works well" [34].

It is notable that the appointment of adjudicators by states could also become a challenging task. Such appointment would possibly politicize the ISDS system and the adjudicators might tend to uphold decisions favoring the state, undermining the balance between the claimant and the respondent. Overall, opponents of the MIC urge that the court-like system will make the dispute settlement process rigid and less flexible, disadvantaging investors.

While the EU new investment court system would not completely solve the problems of the existing ISDS system and the incorporation of the new system in bilateral investment treaties would possibly increase the fragmentation of IIAs in the absence of a consolidated international investment agreement. The new system reflects the changes in the practice of foreign investments in the past few decades and responds to the requests for a more balanced position between the investor and the state and strengthened principles of democracy in the procedure of solving disputes.

From the EU's perspective, it is more beneficial and effective to move towards the creation of the MIC when considering the limitations of replacing a large number of BITs that EU Member States have concluded over the past decades. The opt-in system is considered as an effective mechanism for a multilateral treaty that would allow interested states to participate in it when they consider it appropriate, reducing the possibility of opposition to the MIC Statute as a whole.

Meanwhile, the specifics of the proposed MIC are still open for discussion. In addition to the key principles suggested by the EU and Canada, it could be more realistic to establish such a mechanism within the framework of existing international institutions such as the Permanent Court of Arbitration or ICSID rather than starting from scratch considering the huge amount of cost and human resources to be dedicated [16].

However, the norms in these proposals are too general, so it is too early to judge now how it will work in practice. Some of the provisions deliberately vague or even completely removed due to ongoing disagreement among participants of UNCITRAL Working Group III and other experts.

The next Draft Working Papers will be open for comments until November 30, 2020. Following issues are in consideration: new Appellate mechanism and enforcement issues, harmonization, new selection and appointment of ISDS tribunal members, the code of conduct for adjudicators in ISDS [35].

The creation of such a mechanism as the ISDS Appellate system, based on international treaties and clarification of relevant procedural, institutional and personnel issues, would be an important factor in promoting the application of the rule of law in resolving disputes between investors and states. It should become the most important direction in the development of reliable and high-quality dispute resolution mechanisms as investment arbitration.

The issue of harmonization aimed to improve the technique of legislation, achieving clarity and precision in the wording of legal acts at all levels on the regulation of ISDS, to avoid contradictions between them. However, there is still no consensus regarding many issues.

Nevertheless, the work to reform and improve the ISDS system and designing the MIC should be carried out by all states. These states are interested in making this mechanism of investment arbitration as effective and affordable as possible, since it directly affects the investment climate of each state participating in the investment treaties. If investors have a guarantee that their property rights and interests are not in danger, they will begin to invest more.

9. Conclusion

ISDS system today is an integral part of the infrastructure of international business. The importance of ISDS for the sustainable development of international turnover and equal investment cooperation of states cannot be overestimated.

The number of investment disputes has sharply increased in the past few years and the reform of the ISDS system will ultimately affect both developed and developing countries. The EU's intention of developing the MIC system will have an effect on setting a new international investment standard and will influence the global sphere of investment rules. That includes the system of dispute settlement, which will directly affect the treaties and practices of investment relationship with other countries. In this sense, it is crucial to consider the approach of the EU in establishing the MIC and analyze the response of other countries to this proposal.

In summary, there is still a need for such a dispute resolution mechanism that would provide flexibility, impartiality and be cost effective and supported by an international system of execution of decisions. That leads to an obvious choice in favor of the MIC.

Nowadays some governments have legal frameworks that

are consistent with internationally recognized laws and standards on the ISDS, while other governments pursue national security and global governance activities that are inconsistent with these international standards. So the crisis of the existing ISDS system such as the lack of transparency, violation of the code of conduct, the lack of an appellate mechanism for eliminating errors made by the arbitral tribunals when considering disputes has become a reality.

Indeed, the MIC has features that can satisfy the fundamental demands for transparent, legitimate, independent, and more open ISDS mechanism. For this reason, the MIC project has the greatest chance of support by majority of countries, as compared to other possible options for the proposed ISDS reform.

However, the establishment of the MIC does not mean a complete rejection of the main elements of arbitration, such as the voluntary submission of application by the parties, the consensual nature of the enforcement of arbitral awards, the use of acquainted procedural rules. A two-tier structure of the investment court is bound to become its most 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 due to its simplicity of joining via the "opt-in" clause and its greater accessibility. Above all, as the recent opinion of the EU Court of Justice on this has issue demonstrated, the introduction of the investment court does not affect the legal order of the Union and its members. In turn, it means that a smooth transition to the settlement of investment disputes within a new system of international justice is beneficial to states [36].

From China's perspective, the EU's MIC proposal was rejected completely. However, China should pay attention to this proposal because the existing ISDS mechanism in the international investment agreements concluded by China is not enough to resolve all investment disputes. Particularly, one of the most significant issues are the disputes arising from the Belt and Road Initiative (BRI). It is critically important for China, the EU and all states involved in the BRI to design a dispute settlement mechanism in order to facilitate the investment flows and legal cooperation.

The issues associated with ISDS reform, the establishment of the MIC and its legal aspects cause many uncertainties and debates, both at the national and international levels. Many issues remain open. There is a need to understand that investment disputes are unavoidable during the modern investment expansion era so the creation and development of an appropriate dispute resolution mechanism becomes an urgent task. It also requires government support and cooperation not only from the EU but also from the other countries.

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[29] TTIP Commission draft text, Art 29 (3) provides that: "As a general rule, the appeal proceedings shall not exceed 180 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appeal Tribunal issues its decision. When the Appeal Tribunal considers that it cannot issue its decision within 180 days, it shall inform the disputing parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its decision. In no case should the proceedings exceed 270 days." See also EU-Singapore IPA, Article 3.19 (4).

[30] CETA Art 8.28 (7)(b) provides that: "The CETA Joint Committee shall promptly adopt a decision setting out the following administrative and organisational matters regarding the functioning of the Appellate Tribunal: (b) procedures for the initiation and the conduct of appeals, and procedures for referring issues back to the Tribunal for adjustment of the award, as appropriate"; See also, Art 8.28 (9) (c).

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