

DEFRAGMENTING INVESTMENT DISPUTES

Multilateral Court of Investment Disputes as a Panacea?

Brook Bekele Kidane *

Table of content

INTRODUCTION260

I. WHAT IS WRONG WITH ISDS AND WHY IS IT IMPORTANT TO REFORM THE SYSTEM.....262

I.A. WHAT IS THE FUNDAMENTAL PROBLEM THAT REQUIRED A REFORM, WHAT IS THE EXTENT OF THE PROBLEM262

I.A.1. Issues arising from ISDS.....264

 I.A.1.a. Lack of consistency and predictability of case Law.....264

 I.A.1.b. Lack of legitimacy and safeguard for Independence266

 I.A.1.c. Lack of appeal review Mechanism.....266

 I.A.1.d. High Cost266

 I.A.1.e. Transparency267

I.A.2. Problems remaining under ICS or arising where ISDS and ICS Coexist.....268

 I.A.2.a. Lack of consistency and predictability of case – Law.....269

 I.A.2.b. Costs.....269

II. WHAT ARE THE VARIOUS OPTIONS TO REFORM THE INVESTMENT DISPUTE SETTLEMENT AND THEIR FEASIBILITY?270

 II.A. BASELINE SCENARIO270

 II.B. RENEGOTIATION OF BITs AND FREE TRADE AND INVESTMENT AGREEMENTS.....270

 II.C. REFORM OF INTERNATIONAL ARBITRATION RULES270

 II.D. ESTABLISHMENT OF A MULTILATERAL APPEAL INSTANCE.....271

 II.E. ESTABLISHMENT OF MULTILATERAL INVESTMENT COURT272

 II.F. NEGOTIATION OF MULTILATERAL SUBSTANTIVE INVESTMENT RULES273

 II.G. IMPROVING ISDS IN BITs.....274

 II.H. MAKING NATIONAL COURTS COMPETENT TO DECIDE ON INVESTMENT DISPUTE275

III. WHAT ARE THE IMPACTS OF THE DIFFERENT POLICY OPTION, WHO WILL BE AFFECTED AND WHAT IS THE BEST WAY FORWARD276

* Ph.D. candidate at the University of Geneva law faculty, department of public international law and international organization. Lecturer at the University of Toulouse and member of the International Society of Economic Law.

III.A.	BASELINE SCENARIO	276
III.A.1.	<i>Composition of Tribunals</i>	276
III.A.1.a.	Where ISDS Applies	276
III.A.1.b.	Where ICS Applies	276
III.A.2.	<i>Procedural Aspects</i>	277
III.A.2.a.	Where ISDS Applies	277
III.A.2.b.	Where ICS Applies	277
III.A.3.	<i>Institutional Aspects</i>	277
III.A.3.a.	Where ISDS Applies	277
III.A.3.b.	Where ICS Applies	278
III.A.4.	<i>Financial Aspects</i>	278
III.A.4.a.	Where ISDS Applies	278
III.A.4.b.	Where ICS Applies	279
III.A.5.	<i>Multilateral investment Court</i>	279
III.A.6.	<i>Composition of the Court</i>	279
III.A.6.a.	Number of adjudicators of the first level tribunal and appeal Tribunal	279
III.A.6.b.	Number linked to the number of contracting Parties	280
III.A.7.	<i>Number linked to the volume of Cases</i>	280
III.A.8.	<i>Terms of Mandate</i>	281
III.A.8.a.	Long and non-renewable Mandate	281
III.A.8.b.	Long or short mandate renewable once	281
III.A.9.	<i>Employment status and remuneration of Judges</i>	281
III.A.9.a.	Judges could work full-time, be employed by the Court and	282
III.A.9.b.	2. Judges could work part-time, be self-employed and receive monthly or daily fees for Service	282
III.A.10.	<i>Qualifications</i>	282
III.A.10.a.	Criteria defined in broader Terms	283
III.A.10.b.	Expertise in more specific areas Required	283
III.A.11.	<i>Ethics</i>	283
III.A.11.a.	Any other professional Activity	284
III.A.11.b.	Only legal activities related to other investment Disputes	284
III.B.	PROCEDURAL ASPECTS	284
III.B.1.	<i>Appointment of Judges</i>	284
III.B.1.a.	Directly by the contracting Parties (i.e. States)	285
III.B.1.b.	By a separate body composed by contracting parties and other Stakeholders	285
III.B.1.c.	By an independent Body	285
III.B.2.	<i>Case Allocation</i>	285
III.B.2.a.	According to objective Criteria	285

DEFRAGMENTING INVESTMENT DISPUTES

III.B.2.b. Allowing the disputing parties to Intervene..... 286

III.B.3. Scope of Appeal 286

III.B.3.a. A complete fresh analysis of the Facts 286

III.B.3.b. An analysis limited to check manifest errors in the appreciation of Facts 286

III.C. INSTITUTIONAL ASPECTS 287

III.C.1. Secretariat 287

III.C.1.a. Creating a self-standing Secretariat 288

III.C.1.b. Housing a secretariat in an existing Organisation 288

III.C.2. Procedures to be part of the multilateral Court..... 288

III.C.2.a. Opt-in System 289

III.C.2.b. Re-negotiating and/or amending each Treaty..... 289

III.C.3. Support to small and medium sized Enterprises (SMEs) 290

III.C.3.a. Simplified procedural Rules 290

III.C.3.b. Not to create any specific Procedure 290

III.C.4. Support developing Countries..... 290

III.C.4.a. More favourable system of Support..... 291

III.C.4.b. No specific Procedures 291

III.D. FINANCIAL ASPECTS 291

III.D.1. Allocation of costs among Members 291

III.D.1.a. A system that reflects the level of development of Members 292

III.D.1.b. A system that equally allocates costs among Members 292

III.D.2. Mixed Financing 292

III.D.2.a. Contracting parties' contributions exclusively..... 292

III.D.2.b. Contracting parties' contributions and user Fees 293

CONCLUSION **293**

Abstract

Never was there a time whereby investment dispute settlement came to the forefront of every possible communication outlet, from academia and mainstream news to civil societies and an outright protest of the public. TTIP and CETA brought ISDS to a broad daylight scrutiny in many parts of Europe getting the attention of law and policy makers at EU and national level. The criticisms and anxiety over ISDS relates to divergent interpretation of similar or identical International Investment Agreements (IIAs) provisions that lead to inconsistency and unpredictability of decisions, lack of transparency in investment disputes, lack of independence and impartiality of arbitrators, the elite group of arbitrators, costs, diversions of public money from public goods and services, 'chilling effect' on state regulatory powers and bypassing national judicial systems.

With a view to establish and tackle the problem with a meaningful solution to the legitimate concerns and anxieties, the EU, with its competence to conclude the Investment Agreements, attempted to create two mechanisms. The inclusion of Investment Court System (ICS) in newly concluded IIAs and the creation of a multilateral investment court.

This article will assess the three systems together, i.e. the ISDS, ICS, and the multilateral investment court, in terms the pros and cons and attempt to envisage the policy shortcomings or benefits under any of the systems.

Résumé

Jamais il n'y a eu une époque où le règlement des différends en matière d'investissement a été au premier plan de tous les moyens de communication possibles, qu'il s'agisse d'universitaires, de la presse grand public, de la société civile voire d'actions publiques. La TTIP et la CETA ont permis à l'ISDS de faire l'objet d'un examen minutieux dans de nombreuses parties de l'Europe, attirant l'attention des législateurs et des décideurs politiques au niveau européen et national. Les critiques et l'anxiété à l'égard de l'ISDS ont trait à l'interprétation divergente de dispositions similaires ou identiques des accords internationaux d'investissement (AII) qui conduisent à l'incohérence et à l'imprévisibilité des décisions, au manque de transparence dans les différends en matière d'investissement, au manque d'indépendance et d'impartialité des arbitres, à l'élite des arbitres, aux coûts, aux détournements de fonds publics

des biens et services publics, à l'"effet paralysant" sur les pouvoirs réglementaires des États et au contournement des systèmes judiciaires nationaux.

En vue d'établir et d'aborder le problème avec une solution significative aux préoccupations et aux inquiétudes légitimes, l'UE, avec sa compétence pour conclure les accords d'investissement, a tenté de créer deux mécanismes. L'inclusion de l'Investment Court System (ICS) dans les AII nouvellement conclus et la création d'un tribunal multilatéral de l'investissement.

Cet article évaluera les trois systèmes ensemble, c'est-à-dire le SIPDS, le SCI et le tribunal multilatéral de l'investissement en termes d'avantages et d'inconvénients et tentera d'envisager les lacunes ou les avantages de l'un ou l'autre des systèmes.

INTRODUCTION

Though not a new invention in and of itself, the Investor – State Dispute Settlement (ISDS) has never been celebrated like recently. In particular, the reaction from the public in parts of the world where ISDS discussed vastly was notable. It was the central debating issue during the negotiations of the mega-regional trade agreements. This is the case in the EU in the context of the negotiations of the Comprehensive Economic and Trade Agreement (CETA) with Canada and the Transatlantic Trade and Investment Partnership (TTIP) with the United States¹.

Investment protection and ISDS have been at the forefront of a vigorous public debate in the EU on TTIP, hence with, The EU Commission organized a public consultation between 27 March and 13 July 2014 to develop further the EU approach on these important issues². In May 2015, mindful of the public consultation, the Commission presented a concept paper *"Investment in TTIP and beyond – the path for reform - Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court"*³. The criticism and anxiety of ISDS can be categorized as criticisms concerning divergent interpretation of similar or identical International Investment Agreements (IIAs) provisions that lead to inconsistency and unpredictability of decisions; pro-investor interpretation of substantive treaty protections; lack of transparency in investment disputes; lack of independence and impartiality of arbitrators; the elite group of arbitrators; costs, diversions of public money from public goods and services; ‘chilling effect’ on state regulatory powers; ISDS allows international companies to circumvent national judicial systems; the US, EU and Canada have efficient rule of law legal systems; there is no evidence that investors have ever lacked appropriate legal protection through these systems; when governments concede to demands for ISDS provisions, they may be less willing to agree to other reforms, such as greater market access.

¹ Le Monde, “Des milliers de manifestants à Bruxelles contre les traités de libre-échange transatlantiques”, Le Monde.fr avec AFP, 20.09.2016 à 19h39, mis à jour le 20.09.2016 à 20h47, available online: http://www.lemonde.fr/economie-mondiale/article/2016/09/20/des-milliers-de-manifestants-a-bruxelles-contre-les-traites-de-libre-echange-transatlantiques_5000915_1656941.html. The Economist, “Why Germans are protesting against free trade”, 16/09/2016, available online: <https://www.economist.com/blogs/economist-explains/2016/09/economist-explains-9>. The New York Times, “German and Austrians Protest EU Trade Courts with US and Canada”, 17/09/2016, available online: <https://www.nytimes.com/2016/09/18/world/europe/germans-and-austrians-protest-eu-trade-talks-with-us-and-canada.html>.

² European Union Commission official website, available online: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179.

³ The European Union Commission official website available online: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

The EU Commission established a two-step systemic approach to ameliorate the actual *ad hoc* ISDS system. The first approach proposed was the creation of an institutionalized court system, investment court system (ICS), for adjudication of investment disputes and incorporate it to future standalone IIAs or FTAs that contain investment protection. The second method was that the EU should, alongside the ICS, work towards the creation of an international investment court and review mechanism, *i.e.* appellate instance, with tenured adjudicators. The intention and project is that the multilateral International Investment Court would replace all the ICS. The ambition of the EU Commission is not envisaged not only to the EU member countries but also to trade partners who are willing to introduce the International investment court in their IIAs and FTAs that contain investments issues and replace the existing dispute settlement mechanism, be it ICS or ISDS⁴.

To that end, rhetorical and practical measures were launched with various trade partners both at the technical and political level to reform the current ISDS system and to acquire consensus for the creation of a permanent multilateral investment court⁵.

⁴ The European Commission, Commission staff working document impact assessment, "Multilateral reform of investment dispute resolution", COM 2017, 493 final, SWD 2017, 303 final, Brussels, 13 September 2017, p. 16.

⁵ The European Commission and the Government of Canada co-chair a dedicated session in the margins of UNCTAD's World Investment Forum in Nairobi, Kenya, 17-21 July 2016. Read the co-sponsored discussion paper, accessible at [http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155266.07.13%20Non-paper%20on%20multilateral%20investment%20court%20\(rev2\)\(clean\).pdf](http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155266.07.13%20Non-paper%20on%20multilateral%20investment%20court%20(rev2)(clean).pdf); The European Commission and the Government of Canada co-chair technical exchanges at the OECD-hosted Investment Treaty Dialogue in Paris, France, 17 October 2016, read the co-sponsored discussion paper accessible at http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155265.pdf last accessed 03/01/2018. The EU and Canada agree in a Joint Interpretative Instrument to CETA to "work expeditiously towards the creation of the Multilateral Investment Court", 28 October 2016, accessible at <http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf>. The European Commission and the Government of Canada co-host an inter-governmental expert meeting of investment policy makers from over 40 countries in Geneva, Switzerland, 13-14 December 2016, read the co-sponsored discussion paper accessible at http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf. EU Trade Commissioner Malmström and Canadian Minister of International Trade Freeland co-host an informal ministerial meeting at the World Economic Forum in Davos, Switzerland, 20 January 2017, read the co-sponsored discussion paper accessible at http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155264.pdf and the Commissioner's blog post accessible at https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/davos-discussing-investment-disputes_en. The United Nations Commission on International Trade Law (UNCITRAL) agreed to work on the possible reform of investor-State dispute settlement (ISDS), 10 July 2017, read the UNCITRAL press release accessible at <http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl250.html> and listen to the audio recordings of the EU interventions in the morning, accessible at <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/1b00d406-0d09-4dec-a1ab-74cf6dcf8428> and afternoon sessions, accessible at <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/a398c977-b19c-450f-af33-9f9cac812088>. Commission hosts the side event "Multilateral reform of ISDS: Possible paths forward" in the margins of UNCTAD's Annual High-level IIA Conference, 9 October 2017, information and Commission's presentation is accessible at <http://investmentpolicyhub.unctad.org/Pages/unctad-annual-high-level-ii-a-conference-phase-2-of-ii-a-reform-and-watch-the-video-recording-of-the-event-available-online>: <https://owncloud.unog.ch/index.php/s/nYMA273kunWs1GE/download>. From 27th November to 1st December 2017, UNCITRAL Working Group III held its first session and is available online: http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html.

I. WHAT IS WRONG WITH ISDS AND WHY IS IT IMPORTANT TO REFORM THE SYSTEM

I.A. What is the fundamental problem that required a reform, what is the extent of the Problem

It has been well over half of a century since investment dispute between investors and host states of their investments are adjudicated via ISDS created through the different International Investment Agreements⁶. Up-to-date the investment hub policy under the auspices of United Nations Conference on Trade and Development (UNCTAD) registered 2951 standalone bilateral investment treaties of which 2363 are in force and 373 treaties with investment provisions (TIPs) of which 310 are in force⁷. The dispute that arises from these agreements is in the form of violations or inconsistencies of legal obligation enshrined in it such as, the Most Favoured Nation (MFN) principle that guarantees equal treatment of different foreign investors, National Treatment that guarantees equal treatment as domestic investors and protection against unlawful expropriation and ensuring fair and equitable treatment of investors and investments⁸.

The unique feature of the ISDS proceeding is that it allows individual investors to bring claims where their rights, duly enshrined in the agreements, are violated or that certain measures are inconsistent with the investment agreements. The investor is not required to request its government to bring the case thereby avoiding any diplomatic or politicization of the dispute.

As per the IIAs, investment disputes are usually adjudicated by an ad hoc tribunal where each litigant appoint one arbitrator and the selected arbitrators appoint the third one or in situations where the appointed arbitrators are unable to reach agreement concerning the appointment of the third arbitrator an appointing authority will be requested to undertake the appointing task. Unlike standing full-fledged courts, these *ad hoc* tribunals are made to be disbanded once adjudication is terminated and a final award is pronounced. The decisions pronounced by the tribunals has a binding effect only to the parties to the dispute and that it has no legal precedent to other similar dispute under the same IIAs since the adjudication is in *ad hoc* basis and that it is disbanded only to leave the next case for another composition.

⁶ R. Abbott, F. Erixon, M. F. Ferracane, “Demystifying investor-state dispute settlement (isds)”, European Center for International Political Economy, ECIPE occasional paper, 2014, n. 5, p. 5.

⁷ United Nations Conference on Trade and Development (UNCTAD), “investment policy hub”, available online: <http://investmentpolicyhub.unctad.org/>.

⁸ Organisation for Economic Co-operation and Development Investment Division, “Dispute settlement provisions in international investment agreements: A large sample survey”, 2012, p. 25.

The arbitration procedure and rule of conduct of arbitrators are usually incorporated in the IIAs. The most frequented arbitration rules are the Arbitration Rules under the International Convention for the Settlement of Investment Disputes (ICSID Convention)⁹, or the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)¹⁰.

Arbitration awards rendered by the ISDS *ad hoc* tribunals are final, binding on the disputants and are not subject to review or appealable on grounds of grave errors of law or misrepresentation of facts¹¹. It is only upon the request of either of the disputing parties that an award can be annulled or set-aside, in full or in part, under very limited procedural grounds¹². UNCATD's investment dispute settlement navigator shows that, as of 31st of July 2017, there have been 817 ISDS arbitration of which 528 are concluded, 278 are pending and 11 have an unknown status¹³. Of the concluded arbitrations 36.6 percent are decided in favour of state, 26.9 are decided in favour of investors, 23.5 percent are settled and 10.6 percent are discontinued¹⁴.

As has been indicated the ISDS system has been criticized for numerous reasons throughout the world but particularly in the EU upon the negotiation of CETA and TTIP. The EU commission has assembled all the concerns from different stakeholders and highlighted the deficiency of the system in terms of legitimacy, predictability and interpretative consistency of case law, lack of possibility of review of decisions, lack of transparency and costs of the proceedings. To tackle these shortcomings the EU Commission, since 2015, started an attempt to institutionalize the adjudication system of investment related disputes (ICS) in recently concluded agreements and to replace the old agreements ISDS system through time or wait until they phase themselves out.

The proposal forwarded by the EU Commission establishes a Tribunal of First Instance and an Appeal Tribunal with permanent tribunal members that are to be appointed by the EU and its respective FTA or investment treaty partners¹⁵. The appointed members of the tribunals will be expected to have well-established qualifications as is the case for major international

⁹ ICSID Convention, "Regulations and rules", available online: <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>.

¹⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available online: <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>.

¹¹ The European Commission, "Multilateral reform of investment dispute resolution", Commission staff working document impact assessment, COM 2017, 493 final, SWD 2017, 303 final, 13 September 2017, p. 7.

¹² *Ibid.*, p. 8.

¹³ UNCTAD, "Investment dispute settlement navigator", available online: <http://investmentpolicyhub.unctad.org/ISDS>.

¹⁴ *Ibid.* Note that an unspecified percentage of certain disputes' status is indicated as unknown.

¹⁵ *Supra* note 8, p. 10.

tribunals in the world and disputes will be allocated to these adjudicators on a random basis. Furthermore, a detailed and well-constructed code of conduct will be drafted to guide the adjudication procedures.

In terms of remuneration duly and jointly appointed members of the tribunal will be paid a monthly retainer fee to guarantee the availability of highly qualified individuals in a short notice. They are also paid a daily fee per day actually worked. The costs of the monthly retainer fees and the daily fees for the Appellate Tribunal members are to be shared by the Parties to the agreement. In order to circumvent the deficiency of transparency the procedure of the tribunal will be subject to the UNCITRAL rule on transparency¹⁶ that means that hearings, documents and awards will be made available to the public.

The desire to engage on a multilateral reform of investment disputes adjudication aims at addressing issues that arose from two scenarios; ISDS – The classic problems pinned to ISDS continue to exist which relates to legitimacy, consistency and predictability, lack of possibility of review, transparency and high costs for users. ICS and ISDS coexistence – the incorporation ICS solves a number of problems of ISDS such as legitimacy, lack of review and transparency. However, the problems of predictability, consistency of case laws and cost remain to be unresolved.

I.A.1. Issues arising from ISDS

I.A.1.a. Lack of consistency and predictability of case Law

To highlight the source of the problem one has to focus notably on the impermanency of the *ad hoc* tribunals i.e. the tribunals are created only for a specific dispute and render a binding decision only to the actual dispute only then to be disbanded. There is no coherence, judicial dialogue or coordination between the different tribunals and no formal possibility of consistent interpretations of substantive rules of investment protection despite the fact that most, if not all, of the IIAs contain identical or similar protections of MFN and national treatment of non-discriminatory principles, compensation against unlawful expropriation and fair and equitable treatment (FET)¹⁷. The majority of the IIAs are bilateral and that the substantive provisions must be read in light of each agreement's context and the parties' intention.

¹⁶ UNCITRAL, "Rules on Transparency in Treaty-based Investor-State Arbitration", available online: <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

¹⁷ *Supra* note 12, p. 12.

Ad hoc tribunals in ISDS are tremendously fragmented and has no incentive or obligation to refer to preceding awards to interpret substantive obligations before them despite the fact that similar claims under same treaty has been already adjudicated thereby a certain interpretation has been established. In addition, there is no review mechanism that could have created a two-tiered process, which enhance quality and build a coherent body of jurisprudence.

The inevitable consequence of the deficiency of coherent and consistent body jurisprudence is lack of predictability which has a significant impact on legal certainty, expectations and confidence for investors, states and other stakeholders. More importantly it erodes the ability of all the actors to adjust, calibrate and plan their actions by relying on previous interpretations and anticipate the outcome of disputes. With the ISDS system disputes can repeat infinitely in hoping that some tribunal will take it wasting time, money and energy.

The anxiety and concern is not a mere potential problem. An ISDS case under the US-Argentina Bilateral Investment Treaty exposes such troubling reality in practical terms. While the tribunal that adjudicated the LG&E¹⁸ case accepted Argentina's plea of necessity justifying the breach of the obligations, another tribunal that adjudicated the CMS¹⁹ case found that the conditions for accepting the defence of necessity were not met. This meant that damages were payable in one case but not the other, although both cases were brought under the same treaty and based on the same facts. Another example of conflicting decisions with regard to similar BITs on identical facts is the two cases brought by the company CME and its shareholder Ronald Lauder against the Czech Republic under this country's investment treaties with the Netherlands and the US²⁰. The tribunals gave two contradictory awards, with one dismissing the claim while the other awarded damages to CME. Among other provisions, the tribunals interpreted differently the scope of the standard of full protection and security. While one tribunal found that the standard may only be breached in case of physical violence or damage to the investment, the other tribunal adopted a much broader view encompassing also a duty to provide legal protection to investors²¹.

¹⁸ ICSID, "LG&E Energy Corp. LG&E Capital Corp. LG&E International, Inc. (Claimants) vs Argentine Republic (Respondent)", Proceedings, ICSID case n. ARB/02/1, Date of dispatch to the parties: July 25th, 2007.

¹⁹ ICSID, "CMS Gas Transmission Company vs Argentine Republic", Proceedings, ICSID case n. ARB/01/8, Date of dispatch to the parties: September 25th, 2007.

²⁰ UNCITRAL, "Ronald S. Lauder v. The Czech Republic", 3 September 2001.

²¹ R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2nd ed., 2012.

I.A.1.b. Lack of legitimacy and safeguard for Independence

It is an undisputable and unmistakable fact that impartiality, efficacy and quality are the foundational elements of an effective justice system. ISDS dispute proceedings differ considerably from the classical or traditional court of law adjudication for all the reasons discussed before. However, ISDS tribunals are not comparable to one-off arbitration since ISDS tribunals are interpreting treaties that first, bear a great deal of similarity and second, need to be applied repeatedly. Partly for this reason and partly because it is applied to solve disputes between an individual and a state, the use of ISDS has been broadly criticised²².

I.A.1.c. Lack of appeal review Mechanism

As has been indicated in the introductory part the ISDS dispute settlement system procedures establish very limited grounds for appeal. Under ISDS, awards can only be cancelled, in full or in part, or set aside in situations such as corruption, erroneous constitution of the *ad hoc* tribunal, breaches of procedural rules. Conversely, awards rendered by the ISDS systems review is not possible under the grounds that decisions contain a grave legal error or when decisions are factually misrepresented and flawed which is detrimental to the quality of the award rendered by the *ad hoc* tribunals in ISDS system. ICSID annulment committee in *CDC group plc. v. Republic of Seychelles* demonstrates that:

"The main function of annulment is to provide a limited form of review of awards in order to safeguard the integrity of the proceedings"... "this [limited review] mechanism protecting against errors that threaten the fundamental fairness of the arbitral process (but not against incorrect decisions) arises from the ICSID drafters desire that the Awards be final and binding ..."²³

The deficiency of the lack appeal review system is seriously problematic. There is no coming back from awards that are inaccurate in interpretations which manifest evidently irrational examination of facts and erroneous application of law.

I.A.1.d. High Cost

ISDS dispute settlement mechanism is highly expensive for disputing parties that resort to the system that can create a problem of access to the system and availability of legal remedies.

²² J. C. Thomas, H. K. Dhillon, "The Foundations of Investment Treaty Arbitration", *Foreign Investment Law Journal*, 1st October 2017, v. 32, Issue 3, pp. 459-502.

²³ ICSID, "CDC group plc. v. Republic of Seychelles", decision on Annulment, ICSID case n. ARB/02/14, 29 June 2005, § 36.

Research²⁴ by the OECD indicates that the average legal and arbitration cost for a claimant is around \$8 million. The largest cost component is the expense incurred by each party for their own legal counsel and experts that is about 82 % of the cost of an ISDS case. Arbitrator fees average about 16% of costs. Institutional costs payable to organisations that administer the arbitration and provide secretariat are low, generally amounting to about 2% of the costs²⁵.

The EU Commission stated that:

“An OECD survey carried out between 2006 and 2011 of 100 ISDS cases indicates that almost a quarter (22%) of the claimants were either individuals or very small corporations with limited foreign operations (one or two foreign projects). Almost half the cases (48%) were brought by medium and large enterprises, varying in size from several hundred employees to tens of thousands of employees, while only 8% of these were large multinational companies. In 30 % of the cases there was little or no public information on the type of claimant. Data on potential claimants who did not bring claims due to excessive costs is not available. It is possible that micro-enterprises are practically deprived from this dispute resolution route, given the average costs”²⁶.

I.A.1.e. Transparency

Following the practice of commercial arbitration, one of the features of the ISDS adjudication is its strict confidentiality of the proceedings. Different ISDS proceedings involve degree of transparency from the constitution of the *ad hoc* tribunal to the rendering an award. One thing that is common is the lack of full disclosure that might include vital information such as the identity of the litigants, their claims and the final award rendered by the *ad hoc* tribunal.

A considerable effort to rectify and reform the deficiency of transparency in ISDS proceedings is being taken at the international level in a not systematic manner where certain states include transparency requirements in their investment agreements while others put it in practice. A notable example of this attempt at the international level is the adoption of the UNCITRAL Rules on Transparency in Treaty - based Investor – State Arbitration²⁷ that creates access of hearings and documents to the public. Furthermore, it created a channel that permits third parties to make their submission. In line with this initiation is the Mauritius Convention on Transparency in ISDS²⁸ which has entered into force in October 2017. As of this moment

²⁴ D. Gaukrodger, K. Gordon, “Investor-State Dispute Settlement a Scoping Paper for the Investment Policy Community”, *OECD Working Papers on International Investment*, 31 December 2012, n. 3, p. 9.

²⁵ *Ibid.*

²⁶ *Supra* note 15, p. 15.

²⁷ *Supra* note 13.

²⁸ United Nations, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, the "Mauritius Convention on Transparency", date of adoption 10 December 2014, Entry into force 18 October 2017.

the convention has three parties²⁹ and 19 signatories. The Convention is an instrument by which Parties to investment treaties concluded before 1 April 2014 express their consent to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. The convention has the potential to eventually apply the UNCITRAL transparency rules to all existing investment agreements. Nevertheless, with respect to pre-existing investment treaties, these rules only apply where individual states have agreed to apply them via the Mauritius Convention. As Lord Hewart CJ has stated “*it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done*”³⁰. Importantly, without transparency, the public can never justifiably believe that ISDS is predictable. How can we judge that it is operating predictably if we cannot see how it is operating? Perceptions of predictability are just as important as actual predictability for the future of the institution. Transparency is a widely held value in almost all the legal systems. It is an important virtue of systems that carry a liberal democracy in which the decision making process is based on. It is an integrated part of adjudication process. The most important feature for the ISDS is that citizens presume that publicly open dispute settlement establishes fairness and equity. A lack of transparency combined with appointment of arbitrators by the disputing parties erodes such expectation of the people. Consequently, the continuing lack of transparency is a problem in itself and contributes to problems of consistency in case-law.

I.A.2. Problems remaining under ICS or arising where ISDS and ICS Coexist

The incorporation of ICS in investment treaties helps to tackle various deficiencies legitimacy and independence, consistency and predictability of case-law within each agreement, possibility of review and transparency.

However, tackling those deficiencies at bilateral level will be proliferation of ICSs and that it will become burdensome in terms of administration and cost as it demands a significant amount of resource to handle well over 3000 IIAs. In light of those shortcomings the problems and deficiencies created by the ISDS system can only meaningfully be tackled and addressed in engaging in multilateral reform of the current investment dispute resolution mechanism.

²⁹ Canada, Mauritius and Switzerland.

³⁰ UK High Court of Justice, “R v Sussex Justices, Ex parte McCarthy”, 1 KB 256, 259, 1924.

I.A.2.a. Lack of consistency and predictability of case – Law

Even though the incorporation of the ICS systems helps to address some of the deficiencies of the ISDS system, it has its own limitations. It can be effective in bringing consistency and predictability of case laws with regard to a substantive interpretation of standards that is enshrined in a given investment agreement. The limitation of the system in guaranteeing a consistent interpretation of substantive obligations enshrined in IIAs emanates from the fact that fragmented and different ICS exist for each IIAs. In this case the risk of different interpretation of identical or similar substantive provisions by different ICS remains to be a deficiency.

I.A.2.b. Costs

The EU Commission calculated the cost of ICS in order to show why the multilateral investment court proposal is advantageous. Accordingly,

“The inclusion of an ICS in each EU agreement has implications for the EU budget. It is estimated that each ICS, if active with one case before the First Instance Tribunal and one case under Appeal, would cost around EUR 800,000 per Contracting Party per year. Calculations are based on permanent judges and members of the Tribunal of First Instance and of the Appeal Tribunal being part-time and remunerated on the basis of retainer fees and fees for day actually worked. In some EU trade and investment agreements (e.g. EU-Viet Nam FTA), it has been decided that the division of costs amongst the EU and its treaty partner will take account of the development level of the Parties, which in practice may mean that the EU would bear a significant amount of the costs”³¹.

In comparison with ISDS, the ICS is normally efficient in terms of cost. Research by the OECD¹² indicates that the average legal and arbitration cost for a claimant is around \$8 million. The largest cost component is the expense incurred by each party (investor and state) for their own legal counsel and experts (about 82 % of the cost of an ISDS case). Arbitrator fees average about 16% of costs. Institutional costs payable to organisations that administer the arbitration and provide secretariat are low, generally amounting to about 2% of the costs³². However, a multilateral investment court can save resources by centralizing the adjudication of investment disputes in on multilateral investment court.

³¹ *Supra* note 8, p. 16.

³² European Commission, “Investor to State Dispute Settlement (ISDS), some facts and figures, Towards an EU-US trade deal, making trade work for you”, 12 march 2015, p. 9.

II. WHAT ARE THE VARIOUS OPTIONS TO REFORM THE INVESTMENT DISPUTE SETTLEMENT AND THEIR FEASIBILITY?

II.A. Baseline Scenario

According to the baseline scenario, it would mean to continue to negotiate bilateral trade and investment or standalone investment agreements and incorporate ICS as a mechanism to settle investment disputes between the parties. As far as ISDS is concerned, it will continue to coexist as long as pre-ICS treaties exist that utilizes the system or at least until the treaties phase out in due time.

As has been indicated in the premise the deficiencies that are related with the system of ISDS will gradually be avoided with considerable limitations. Creation of ICS for each newly concluded bilateral trade and investment or standalone investment agreements is not only challenging to manage due to limited resources but also it does not help to heal the fragmentation and inconsistencies of interpretations of identical or similar substantive investment obligations that is well spread in different IIAs. Furthermore, practically the inclusion of ICS can only be feasible to new agreements.

II.B. Renegotiation of BITs and free trade and investment Agreements

Renegotiating all the existing standalone investment and free trade and investment agreements' dispute settlement anew and introduce the ICS system is another path for the reform. The introduction of ICS will come with the incorporation of specific provisions that would systematically address the appointment of arbitrators that creates a considerable effort of permanency detaching it from the disputing parties. The system will also introduce an appeal system and incorporate the UNCITRAL rules on transparency.

It is a very burdensome and somewhat risky attempt to amend each and every single IIA. Cost and time wise, it is consuming to be engaged with partners to sit down and revisit the investment dispute settlement system not to mention the risk that partners will seize the opportunity to reopen negotiations on matters that are not related to the investment dispute settlement system. There exist also no guarantees that the renegotiation of well over 3000 IIAs will end up being coherent.

II.C. Reform of international arbitration Rules

Reforming international arbitration rules would be restructuring the several rules of arbitration that governs the proceedings of ISDS such as rules of ICSID, of UNCITRAL, or of

the PCA so as to bring these rules in line with ICS constitution that will introduce the much preferred values of permanent seat of adjudication for arbitrators, appointment of arbitrators without the involvement of the parties and an appeal mechanism.

Though fool proof is the policy in theory, it has its own defaults and shortcomings. To begin with, there is no common institutional framework for the procedural aspect of ISDS; this is to mean that apparently to renegotiate several sets of arbitration rules where it is different according to the system chosen by a given arbitration system, i.e. some, for instance, used predominantly adjudication of commercial dispute instead of investment. As a result, renegotiating would be complex and a difficult task.

Several reasons can be illustrated why reforming the existing investment dispute settlement forum in order for it to function as a multilateral investment court does not seem feasible. The notable one is the fact that ISDS does not function in a uniform rule; therefore, reforming an institution or a given arbitration rules does not tackle disputes under another institution or arbitration rules. Furthermore, some of these institutions have an established jurisdiction to apply certain established rules that requires unanimous consent of the members to amend it. Other reason relates to legitimacy. For instance, some of the main actors in the field are closely related to business interests.

II.D. Establishment of a multilateral appeal Instance

An appealing reform with the creation of a permanent multilateral appeal instance that will have jurisdiction to adjudicate appeals based on grave errors of law and misrepresentations or misinterpretations of facts. The multilateral appeal instance will be receiving appeals from *ad hoc* tribunals of ISDS and ICS.

A permanent multilateral appeal instance means consistency and predictability of case laws even though it will be limited only to the amount of cases appealed. It ensures legal certainty as a two-tier adjudicating systems fosters an enhanced quality of decisions. It is also in line with the advantages of ICS in relation with cost and transparency.

Nevertheless, this is not without some drawbacks. The significant obstacle will be remanding cases. Appeal instances rules on questions of law and send back the case to the first instance. A standing functional first instance is a prerequisite for the proper operation of appeal instance. In cases where the first instance has erred in law or in fact and the appeal instance has reversed the decision it send it back to the first instance to correct accordingly. Under this

scheme the idea of multilateral investment appeal instance will work without a problem for all the IIAs that contain ICS but not ISDS. The ISDS tribunals are created to adjudicate a certain dispute and then are disbanded after the final award. The competence of an appeal instance is to only hear questions of law. It is not of the task of the appeal instance to be engaged in adjudicating facts³³.

Another problem that is significant is that it will not tackle all the problems enumerated at the first instance level under both ISDS and ICS. All the major concerns involving legitimacy, consistency and predictability and consistency, at least with regard to awards that were not appealed, costs and transparency at the first instance level of ISDS and ICS remain to be unresolved. Consequently, although multilateral investment appeal instance has a potential to serve to the amelioration of investment disputes, it is not enough to address and tackle all the problems.

II.E. Establishment of multilateral investment Court

The multilateral investment court will be consisted of a tribunal of first instance and an appeal instance and would have the jurisdiction to adjudicate investment disputes of all kinds. The Court would deal with the agreements (both existing and future ones) between two countries when both countries have ratified the agreement establishing the multilateral investment court and both countries have agreed that the bilateral investment agreement or FTAs with investment provisions between them should be subject to the multilateral court. By the same token similar mechanism is applied for the UNCITRAL Transparency Rules for Treaty-based Investor-State Arbitration to existing agreements. The Appeal Instance would hear appeals of the decisions of the First Instance Tribunal. Both instances would be staffed by tenured adjudicators remunerated on a permanent basis and should have a secretariat to support their daily work. The precise design, functioning and technicalities of several aspects of the Court would depend on the multilateral negotiations.

The features of the Court present more than one possible sub-options which include:

A. Composition of the court:

- a) Number of adjudicators – depends on the number of contracting parties or volume of cases;

³³ In the WTO dispute settlement system, divisions of the permanent Appellate Body only examine issues of law and do not have the possibility to remand cases to the ad hoc panel. This is an issue of concern to the EU in the WTO. The EU has made proposals to change the system.

- b) Terms of office – long or short, renewable or one – time;
- c) Employment status of adjudicators – full time or part time;
- d) Adjudicators’ qualifications – experience –based or knowledge based;
- e) Adjudicators' ethical requirements: precluding any other professional activity or only those related to investment dispute settlement;

B. Procedural aspects:

- a) Appointment of adjudicators: by the Contracting Parties, by a separate body or by an independent body;
- b) Case allocation: random or according to disputing party's choice;
- c) Scope of appeal: allowing for a certain review of the facts;

C. Institutional aspects:

- a) Secretariat: creation anew or relying on an existing organisation;
- b) Mechanism to be part of the Court: through and opt-in or re-negotiating each treaty;
- c) Support to SMEs: yes or no;
- d) Support to Developing Countries: yes or no;

D. Financial aspects:

- a) Allocation of costs among Contracting Parties: according to level of development or equally; and
- b) Mixed financing (i.e. user fees): yes or no

II.F. Negotiation of multilateral substantive investment Rules

Simply put, this would be seeking to negotiate multilateral substantive rules on investment protections as a wider framework for the negotiation of the investment dispute settlement mechanism. This is not a new proposal; an attempt has been done before. Negotiations on a proposed multilateral agreement on investment (MAI) were launched by governments at the Annual Meeting of the OECD Council at Ministerial level in May 1995. The objective was to provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures, open to non-OECD countries. Negotiations were discontinued in April 1998 and will not be resumed³⁴.

³⁴ OECD, Multilateral Agreement on Investment, SG/PRESS (95)65, Paris, 27th September 1995.

Despite the failure of the initiation the EU Commission has pick up the pieces and tried to pursue the agenda particularly it strives to negotiate clearer and more precise investment substantive rules in its most recent BITs.

Yet, although theoretically attractive, it is not politically feasible at the actual atmosphere to engage in multilateral negotiations on substantive investment rules. According to the EU Commission:

“There is currently insufficient appetite across countries to re-start such negotiations, in part because countries do not agree on the broad parameters of what such a discussion should encompass. Also, nothing suggests that there is a willingness to leave legal approaches behind in favour of a unified approach to substantive investment standards.”³⁵

At the WTO level there is a new initiative in various tracks including investment facilitation. On investment facilitation, 70 WTO members, recognizing the links between investment, trade and development, announced plans to pursue structured discussions with the aim of developing a multilateral framework on investment facilitation. The proponents, who account for around 73% of trade and 66% of inward foreign direct investment (FDI), agreed to meet early in 2018 to discuss how to organize outreach activities and structured discussions on this topic³⁶.

It is a long term project that it is worth achieving. However due to lack of determination the longevity of the negotiations it not considered feasible to embark on multilateral substantive investment protections rules negotiations.

II.G. Improving ISDS in BITs

One of the ways forward is instead of a radical reform of the existing investment dispute settlement system multilaterally, reforms should be taken in bilateral investment agreements that are deeper than just a mere ICS. This includes introduction of more stringent ethical requirements for arbitrators in order to prevent possible conflicts of interest and overall address their neutrality and the system's legitimacy; possibility for interested stakeholders to meaningfully intervene in ISDS proceedings; introduction of the necessary flexibilities so that the fees system in ISDS is not prohibitive for SMEs; extension of the type of remedies available under ISDS to introduce the possibility of non-pecuniary remedies, including mandating a

³⁵ *Supra* note 27, p. 31.

³⁶ WTO, “Joint Ministerial Statement on Investment Facilitation for Development”, Ministerial Conference Eleventh Session Buenos Aires, WT/MIN (17)/59, 10-13 December 2017, 13 December 2017.

change in the host State's legislation; and exhaustion of domestic remedies (i.e. obligation to seek redress at the host state's courts) as a pre-requirement to file an ISDS dispute.

However, this option includes points that are not part of the EU's or Member States' traditional approach in investment, such as exhaustion of domestic remedies. Similarly, investment policy makers have consistently rejected the idea of non-pecuniary remedies as being too intrusive on the right to regulate. In addition, it is based on a bilateral approach and would require the EU to renegotiate the agreements where an ICS has been included and that it seeks to negotiate a further reformed system in future negotiations. It would therefore require large resources and still not guarantee a uniform outcome to all such negotiations.

II.H. Making national courts competent to decide on investment Dispute

It is also possible to envisage the current ISDS investment dispute settlement mechanism to be phased out and that disputes between an investor and host state be settled by the competent domestic courts of the host state. In variation, recourse to domestic courts would apply in host states that are considered to provide sufficient guarantees regarding their judicial systems. In those states that fail to give satisfactory guarantees, a parallel ISDS system would be in place.

Making national courts competent to hear investment disputes arising from treaties with third countries would run counter to the main purpose of international dispute settlement systems (e.g. ICJ, WTO dispute settlement system and International Tribunal for the Law of the Sea (ITLOS)), which is to provide an international and neutral forum for the resolution of cross-border disputes. This builds on the assumption that a potential for bias exists where a foreign investor seeks redress in a domestic court of a partner country, especially against the government of that country. For this reason, international systems (i.e. different from national fora) for the resolution of disputes are considered necessary. International investment agreements are of course based on the principle of reciprocity – the idea is that both countries consider it desirable that their nationals, when operating in a third country, are afforded the opportunity to be heard by international tribunals and be protected under international law.

To put this into practice would require either removing all existing treaties and hence dismantling the existing system, or requiring that all such treaties be directly effective which is against the constitutional practices of a significant number of states.

III. WHAT ARE THE IMPACTS OF THE DIFFERENT POLICY OPTION, WHO WILL BE AFFECTED AND WHAT IS THE BEST WAY FORWARD

III.A. Baseline Scenario

There is no change envisaged under the baseline scenario i.e. the negotiation will continue in incorporating ICS in newly negotiated bilateral trade and investment or investment agreements while ISDS will coexist as long as BITs that use the system exist and did not yet phase out.

III.A.1. Composition of Tribunals

III.A.1.a. Where ISDS Applies

ISDS is known to be impermanent as *ad hoc* tribunals are constituted solely for a given investment dispute only to be disbanded thereafter. Independence of arbitrators is not guaranteed as they are appointed by the disputing parties which in turn erode the legitimacy criteria.

The lack of security of tenure and the party-appointment mechanism are perceived to have a negative impact on the right to a fair trial and effective remedy because such features do not ensure the confidence of all stakeholders in the system.

III.A.1.b. Where ICS Applies

In comparison with ISDS, the ICS systems contributes significantly to the permanency of tribunals since its structure is a two-tier proceeding with permanent adjudicators sitting at a first and appeal instance. The ICS system resolves also the question of legitimacy as it requires the disputing parties to refrain from appointing adjudicators that in turn creates a safeguard of impartiality and independence of tribunals. As an appeal instance is an integrated structure of the ICS system it helps to create a consistent and predictable case laws.

Introducing tenure and permanency has a positive impact on the right to a fair trial and an effective remedy and contributes to the global objective of supporting the principle of rule of law.

In terms of efficiency however, the multiplication of ICSs in bilateral agreements would require significant human and financial resources to manage.

III.A.2. Procedural Aspects

III.A.2.a. Where ISDS Applies

Under the ISDS system there is no appeal therefore the goal of having a two-tiered system is unachievable. Even though very limited grounds are available for appeal purposes, it is nowhere near to a full-fledged classical appeal mechanism.

Enforcement of arbitral decisions is therefore due (subject to the specificities of the applicable regime, whether the ICSID Convention or the New York Convention) regardless of any possible legal or factual errors. This does not bring legitimacy to the system. Predictability and consistency of case-law are not achieved since arbitrators are not bound by previous decisions and there is no systemic requirement to take account of them. The lack of uniform coverage of binding transparency rules (since enhanced requirements have only been adopted by some countries) only makes the system more opaque and inaccessible to citizens.

The absence of an appeal and the limited transparency in the traditional ISDS system has a negative impact on the right to a fair trial and effective remedy.

III.A.2.b. Where ICS Applies

The existence of an appeal instance brings predictability and consistency of case-law within given bilateral agreements. The appeal allows preventing any legally incorrect decision be enforced. Under the ICS, decisions are enforced under the same terms as under ISDS. This is done by referencing the relevant existing rules (e.g. ICSID Convention or New York Convention) in the underlying FTA. Transparency is achieved through important disclosure requirements embodied in the UNCITRAL Rules on Transparency. Introducing an appeal instance and providing for transparency rules has a positive impact on the right to a fair trial and effective remedy and contributes to the global objective of supporting the principle of rule of law.

III.A.3. Institutional Aspects

III.A.3.a. Where ISDS Applies

Existence of a permanent institution with a secretariat support fosters a dispute settlement smooth operation and consistency of case laws as there exist a standing court available whenever an investment dispute arises. Such institution is not the feature of ISDS, *ad hoc* tribunals under ISDS are not permanent. The lack of permanency and fragmentation does

not contribute to predictable and consistent case-law. These features do not contribute to the legitimacy of ISDS.

III.A.3.b. Where ICS Applies

The EU has designated, regarding CETA³⁷ and the agreement with Vietnam, ICSID to provide a secretarial support. Among the different services the support includes managing judges' payment³⁸, provide logistic support and act as repository for disputes. To have ICSID as a single forum of secretariat for all the ICS dispute settlement enhances an efficient usage of resources.

III.A.4. Financial Aspects

III.A.4.a. Where ISDS Applies

Generally speaking, under the ISDS dispute settlement procedure, costs borne by States are those related to their status as respondent in a given dispute, i.e. the arbitrator's fees, the fees of the arbitration institution handling the dispute, the costs of experts and the costs for legal counsel.

However in other circumstances, arbitral tribunals have ruled that each disputing party should bear its own costs while others have applied the principle that "costs follow the event", making the losing party bear all or part of the costs of the proceeding and attorney fees. Examples of arbitration on apportionment of costs are UNCITRAL Article 40(1) and ICSID Article 61(2). Article 40(1) of the UNCITRAL Rules provides that the costs of arbitration shall in principle be borne by the unsuccessful party. It also grants the Tribunal discretion to apportion the costs otherwise between the Parties if it considers a different apportionment reasonable taking into consideration the circumstances of the case. Article 61(2) of the ICSID Convention provides that:

"the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of facilities of the Centre shall be paid. Such decision shall form part of the award".

³⁷ CETA, Article 8.27: the ICSID Secretariat shall act as Secretariat for the Tribunal and provide it with appropriate support.

³⁸ *Ibid.*, Article 8.13.

The costs of ISDS proceedings are high that costs a claimant up to 8 million USD³⁹. Such high cost can discourage small actors from having access to justice due to the incapacity to afford for the litigation.

III.A.4.b. Where ICS Applies

States are better off in ICS in terms of costs than ISDS. For instance, the EU Commission has observed the following:

“The ICS is partly funded (in particular the appeal instance) by the Parties to the agreement, which diminishes the risk that costs discourage users from bringing cases. Where the ICS is active, the EU proposal in the TTIP negotiations makes a distinction between costs that are borne equally by the Contracting Parties and costs that are allocated by the tribunal among the disputing parties. The tribunal will be able to order that all or part of the costs which fall to the respondent as a disputing party be borne by the unsuccessful disputing party according to the "loser pays principle". To estimate the costs when ICS is active, an assumption of one case before the first instance tribunal and one case under appeal was made. This resulted in estimated costs of around EUR 800,000 per Contracting Party per year.”⁴⁰

The problem is the existence of various ICS in each agreement to be concluded and the difficulty that emanates from an efficient management and cost necessary to manage all ICS.

III.A.5. Multilateral investment Court

This policy option is a preferred objective according to the EU Commission that requires a multilateral dialogue with other interested countries.

III.A.6. Composition of the Court

III.A.6.a. Number of adjudicators of the first level tribunal and appeal Tribunal

The structure of the multilateral court consists of a first instance and appeal tribunal. As a matter of jurisdiction the first instance tribunal will adjudicate legal claims, evidence, and legal analysis and render a decision and the Appeal tribunal would receive appeal claims. A better consistency of case laws and predictability of cases can be achieved through the multilateral investment court.

³⁹ D. Gaukrodger, K. Gordon, “Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community”, *OECD Working Papers on International Investment*, OECD Publishing, 2012, n. 3, p. 19.

⁴⁰ *Supra* note 32, p. 37.

The proposal provides two alternative choices regarding the number of adjudicators under the multilateral court; number linked to the number of contracting parties or number linked to the volume of cases.

III.A.6.b. Number linked to the number of contracting Parties

This practice is often used in international courts to ensure that there is at least one adjudicator from each Contracting Party. However, it means that less suitable candidates may become adjudicators (since origin may be prioritised over qualifications or competences). In addition, the number of adjudicators appointed might be too high unless there are a corresponding number of cases. Such a scenario risks leading to inefficiencies.

III.A.7. Number linked to the volume of Cases

This would be more in line with the objective of efficiency. Considering that the number of Contracting Parties to the multilateral Court is unknown but would be expected to grow over time, the number of adjudicators should be flexible enough to adapt to the workload. This is the approach favoured by most recently established international courts (such as the International Criminal Court (ICC) and ITLOS).

In terms of impacts, the estimated cost for the (fixed) remuneration of one adjudicator is around EUR 285,000 per year on the basis of the average annual remuneration level of judges in international courts and tribunals. It is impossible to be certain at the time of the EU Commission's proposal the number of adjudicators but on the basis of a reasonable estimate (nine adjudicators at first instance, five on appeal) the remuneration of adjudicators under the multilateral court is estimated to cost almost EUR 4 million per year (i.e. around EUR 2.5 million for the First Instance plus around EUR 1.5 million for the Appeal Tribunal)⁴¹.

Regarding the number of adjudicators, it is likely that this figure would be lower if it were tailored to the effective workload, which would result in overall lower costs for the EU and indeed all participants. This sub-option would be more advantageous for the EU budget as well for the budgets of Member States⁴². Tailoring the number of adjudicators in the First Instance and Appeal tribunals to the volume of cases would therefore appear to be the most

⁴¹ Explanation of cost analysis can be found in annex 4 of the Commission staff working document impact assessment "Multilateral reform of investment dispute resolution". *Supra* note 4.

⁴² *Ibid.*

efficient option although this would of course depend on the outcome of negotiations and of the future Court's overall structure.

III.A.8. Terms of Mandate

Judges of the multilateral investment court will be appointed for a fixed period of time, i.e. permanent, instead of on a case by case basis as is the case in the current ISDS investment dispute settlement system. Deficiencies of impartiality and independence would be address under such structure.

Regarding how the mandate will be assigned to the judges, two main alternatives has been provided by the proposal; long and non-renewable mandate or long or short mandate renewable once.

III.A.8.a. Long and non-renewable Mandate

A long and non-renewable mandate, where adjudicators cannot be reappointed, would be most consistent with the goal of independence, inasmuch as adjudicators would carry out their functions knowing that, regardless of their decisions, they will not be re-appointed. Long mandates would lead to fewer appointment procedures (i.e. happening less often) and the associated administrative burdens.

III.A.8.b. Long or short mandate renewable once

Whether longer or shorter, renewable mandates allow the Parties to dispose of ineffective adjudicators after the end of their first mandate and to ensure that particularly effective or experienced ones serve for a longer period (i.e. for a second term).

Opting for a long and non-renewable mandate would be the best guarantee for independence of adjudicators in line with the right to an effective remedy before an independent tribunal. This option would also imply a lower administrative burden for the appointing authorities. Subject to the outcome of negotiations and of the overall structure of the future Court, it is therefore the preferred option.

III.A.9. Employment status and remuneration of Judges

Two main possible alternatives regarding the employment status and remuneration of judges; Judges could work full-time, be employed by the Court and receive a fixed salary; or judges could work part-time, be self-employed and receive monthly or daily fees for service.

III.A.9.a. Judges could work full-time, be employed by the Court and

The EU Commission is of the opinion that fulltime judges with secure tenure and fixed remuneration would not be exposed to conflict of interests, hence enhancing their independence and impartiality. Nevertheless, it has also a concern on the fact that fulltime judges could be under-utilised yet unable to accept any other position in case that would be prohibited. It also underlines that this option might be relatively costly, require higher administrative resources and not be the most efficient if only a few cases are submitted to the Court.

III.A.9.b. 2. Judges could work part-time, be self-employed and receive monthly or daily fees for Service

This second way complies less with the objective of independence and impartiality of the system given that the adjudicators could be exposed with conflicts of interests because of their other occupations. Possible conflicts of interest would therefore have to be managed through the ethics regime in the code of conduct.

Compared to full-time adjudicators, part-time self-employed adjudicators would be less costly and may be more efficient when only few cases are submitted to the Court, which can be the situation in particular at the beginning of the functioning of the Court⁴³. However, part-time self-employed adjudicators would not be the preferred approach, since it would address the issues of conflicts and of legitimacy to a lesser extent.

Despite the higher costs and administrative burden, the option that adjudicators be employed by the Court, receive a fixed salary and be entitled to benefits (e.g. health insurance and pensions) is the preferred option because it brings a higher level of independence and impartiality. However, the option that adjudicators be part-time before becoming fulltime should not be excluded provided that possible conflicts of interest are effectively managed through the code of conduct.

III.A.10. Qualifications

Judges are required to meet high qualification in order to preside over the court and render a timely quality decision. The proposal set out two possible ways for the appointment of judges; criteria defined in broader terms; or expertise in more specific areas required.

⁴³ *Supra* note 42.

III.A.10.a. Criteria defined in broader Terms

This follows the footsteps of the ICJ which states under article 2 of its statute “*the Court shall be composed of a body of judges..., who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris consults of recognized competence in international law*”. The reason is that broadly defined criteria would ensure a consistent approach to dispute resolution across cases and contribute to predictability of case-law.

III.A.10.b. Expertise in more specific areas Required

A specific qualification is also another way of appointing judges to the multilateral investment court. Such specific requirement can be in trade law, intellectual property and economics, experience in arbitration and mediation, background in the field of human rights, environmental, social and health law as well as domestic law. High qualification criteria are necessary to ensure legitimacy and independence of adjudicators, as well as consistency and predictability in the functioning of the Court. They are also essential to ensure that the right to a fair hearing is effectively observed. However, overly strict requirements would have negative social impacts on a reduced group of persons, i.e. the pool of candidates who would otherwise be eligible.

Consequently, defining qualification criteria according to broader terms would appear preferable, although the most important criterion for the functioning of the system is having highly effective adjudicators.

III.A.11. Ethics

Similar to any international or domestic courts, judges who would preside over the multilateral investment courts will be subject to a code of conduct. For instance, the ICJ under article of its statute describes the structure of the court to be filled as: “*the Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character*”. Following the model of various international courts, the judges that are to sit over the multilateral investment court may not exercise any political or administrative function, or engage in any other occupation of a professional nature; no member of the Court may act as agent, counsel, or advocate in any case; no member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate

for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

In situations where incompatibilities of judges happen to exist, the proposal set up two ways of handling the situations; any other professional activity; or only legal activities related to other investment disputes.

III.A.11.a. Any other professional Activity

A broad regime of incompatibilities encompassing any professional activity would be fully aligned with the objective of independence and impartiality of adjudicators, although it may be less efficient in that it may discourage good candidates from taking office particularly at the beginning of the operation of the Court.

III.A.11.b. Only legal activities related to other investment Disputes

Under the second sub-option, adjudicators would only be precluded from exercising certain activities carrying a high risk of bias such as, having a role in other investment disputes. This approach would achieve less satisfactory results in terms of independence and impartiality of adjudicators, inasmuch as it might expose them to potential conflicts of interest. It would however be efficient, in that it would not risk discouraging good candidates although the question of encouragement would derive also from other factors.

Setting out high ethical standards and safeguards would be consistent with the right to an independent adjudicator. The regime of incompatibilities should be sufficiently strict to effectively prevent conflicts of interest, although it should not result in driving away good potential candidates to serve as adjudicators. This issue is also related to whether adjudicators are employed full time. An overly strict regime of incompatibilities may have a certain social impact on the professional opportunities of the potential candidates to serve as adjudicators.

III.B. Procedural Aspects

III.B.1. Appointment of Judges

The multilateral investment court envisages that judges need to be appointed to form part of a pool of judges serving under the Court, who will later be allocated to hear specific cases. Concerning the procedure of how the judges will be appointed to a given dispute, it provides three mechanisms; directly by the contracting parties (i.e. States); by a separate body composed by contracting parties and other stakeholders; or by an independent body.

III.B.1.a. Directly by the contracting Parties (i.e. States)

Allowing the states party to the agreement to directly appoint adjudicators is the sub-option that disincentivises the most any bias in favour of investors. However, this might not contribute significantly to the independence of adjudicators, arguing that the appointment process could be subject to undue influence from other government branches.

III.B.1.b. By a separate body composed by contracting parties and other Stakeholders

The modalities to identify the groups are not specified in the proposal but underlines that by allowing broader groups of stakeholders (i.e. potential plaintiffs in addition to respondents) to be involved in the appointment of adjudicators, this possibility would bring a higher degree of legitimacy and independence to the Court and its adjudicators.

III.B.1.c. By an independent Body

Under this sub-option, an independent body where neither contracting parties nor investors would be represented would have a key role in the appointment or screening of adjudicators. It could be made up, for example, of senior serving or former judges or senior academics. This approach would ensure the highest degree of depoliticisation and hence of legitimacy and independence, since no potential disputing party would be involved in the appointment.

The proposal states the preference of the third sub-option and states that subject to the outcome of multilateral negotiations, the third sub-option would be the preferred approach since it would bring the highest degree of independence and legitimacy.

III.B.2. Case Allocation

Cases arriving to the Court would need to be allocated to adjudicators of the Court for deciding on their merit. Two main alternatives are available: according to objective criteria (i.e. random allocation); or allowing the disputing parties to intervene.

III.B.2.a. According to objective Criteria

The proposal highlights the practice of the most notable international tribunals. It recalls that judges of the ICJ are allocated to a specific case by decision of the Court⁴⁴; in other courts

⁴⁴ As is the case regarding disputes between Iran and the United States.

they are distributed by lot drawing from a list or cases are allocated to chambers⁴⁵; while a system of rotation is provided for others⁴⁶.

III.B.2.b. Allowing the disputing parties to Intervene

Conversely, allowing the disputing parties to have a say would run counter to the goal of moving the resolution of investment disputes onto a basis that is more legitimate, independent and impartial.

Random allocation of cases would increase adjudicators' independence and impartiality and improve the system's legitimacy, in compliance with the right to an effective remedy before an independent and impartial tribunal.

III.B.3. Scope of Appeal

In line with domestic international practice a well-established court system is comprised of a first instance and appeal tribunal where decisions of the lower courts can be reviewed in appeal for reasons of procedure or errors of law. This benefits the system's consistency and predictability of case laws.

The process of the appeal is to be conducted in either of the following two ways, according to the proposal; a complete fresh analysis of the facts; or an analysis limited to check manifest errors in the appreciation of facts.

III.B.3.a. A complete fresh analysis of the Facts

Allowing for a complete fresh analysis of the facts would be burdensome since it would amount to re-litigating the case and have a negative impact on the efficiency of the Court system because it would be equal to a second analysis of the case. Since this would translate in additional workload, this sub-option would increase the costs of the Court and of the secretariat, which would have to be borne by the budgets of the EU and its Member States, as well as other contracting parties.

III.B.3.b. An analysis limited to check manifest errors in the appreciation of Facts

The second alternative would give the possibility of review and correction of errors of fact made by the First Instance Tribunal that are manifestly wrong. This approach strikes a good

⁴⁵ The Court of Justice of the European Union and the European Court of Human Rights.

⁴⁶ The Appellate Body of the World Trade Organization.

balance between the need of having an efficient dispute settlement system and reasonable administrative and budgetary burden for the contracting parties. It would not increase the length of proceedings and/or costs for disputing parties dramatically. It would therefore not impact all parties' access to justice and to a fair trial.

Stare decisis is Latin for “to stand by things decided”. It is as well a doctrine which is often used by courts that decides to abide by a point of law which was previously held by a court of equal or superior judicial hierarchy. The notion of *stare decisis* purports to promote stability, certainty, reliability, uniformity, convenience and expediency. Principles like FET, MFN and NT have been applied in a diverse manner. When it comes to investment arbitration different tribunals put emphasis on different criteria. Further inconsistency is caused since the elements which one tribunal finds to be important may be of absolutely no relevance to another tribunal. The Lauder⁴⁷ arbitrations provide a perfect example of how different tribunals can take different views even though the facts remain the same. Therefore, the second sub-option, which favours an appeal in cases of manifest errors in the appreciation of facts, in addition to procedural errors and substantial errors of law, is the preferred approach inasmuch as it ensures the right to an effective remedy without requiring a high budgetary or administrative burden for the contracting parties and disputing parties. It therefore brings efficiency. It secures the objectives of having an appeal that provides for consistency and predictability of case-law and secures legal correctness of decisions but limits the necessary resources by circumscribing the cases where a factual review can be conducted.

III.C. Institutional Aspects

III.C.1. Secretariat

To any full-fledged court a secretariat is necessary for a smooth and efficient operation. The secretariat of the proposed court will be expected to cover legal analysis to assist them in their substantive work, registrar services to manage the flow of cases and general administrative tasks.

Two alternative ways can be projected on how the secretariat of the proposed court can function; creating a self-standing secretariat; or housing that secretariat in an existing organisation.

⁴⁷ UNCITRAL, “Ronald S Lauder v. Czech Republic”, Czech Republic-United States BIT, 1976, available online: https://www.italaw.com/browse/international-investment-agreement-name?field_case_treaties_tid=408.

III.C.1.a. Creating a self-standing Secretariat

The main advantage of setting up a new secretariat and employing new staff would be not being obliged to fit the new system into an existing one. However, this sub-option would be more costly. It is estimated that it would cost under EUR 6 million per year⁴⁸. It would also be more burdensome to set up, since the whole system, including staff regulations for the employees, would need to be designed anew.

III.C.1.b. Housing a secretariat in an existing Organisation

The second alternative would have lower cost implications. Since the actual level of fees has not been agreed and estimating the number of day's staff will work would be highly speculative, the calculation of a fee-based remuneration system for staff was not carried out. Undoubtedly, a fee-based remuneration system alone would cost less than a fixed remuneration system⁴⁹. It will also be efficient because the Court would rely on the expertise and experience of an existing organisation.

The issue of which organisation could host the Court's secretariat would have to be decided through a careful examination of which organisations are willing to do so and some key aspects such as their existing membership, voting rules and public perception. The issue of which organisation could host the Court's secretariat would have to be decided through a careful examination of which organisations are willing to do so and some key aspects such as their existing membership, voting rules and public perception. In any event, such a scenario could only exist if the existing organisation takes the decisions to permit this to happen. At this writing stage nothing has been provided in the proposal to that effect.

In terms of impacts, creating a self-standing secretariat would entail higher financial implications. It would have a positive impact on global governance to the extent that specific expertise would be developed without borrowing it (from other organisations) and would also ensure the complete independence of the staff, which would increase the Court's legitimacy.

III.C.2. Procedures to be part of the multilateral Court

Following the appetite of worldwide concern to ameliorate the investment dispute settlement system, it is expected that membership of the system grow in time and a certain

⁴⁸ *Supra* note 43.

⁴⁹ *Ibid.*

procedure must be put. To that end the proposal envisage two alternatives to accede to the multilateral court; an opt-in system; or re-negotiating and/or amending each treaty.

III.C.2.a. Opt-in System

Through an opt-in system, countries would agree in the legal instrument establishing the multilateral Court to subject their investment treaties to the jurisdiction of the Court. The Court would then supersede ISDS or ICS provisions in investment treaties of the EU and EU Member States with third countries or between third countries. This mechanism would be highly efficient in that it would discharge states from the potentially complex and lengthy processes of re-negotiating the underlying investment treaties to amend their dispute settlement rules to submit them to the jurisdiction of the Court.

An opt-in mechanism would allow submitting existing and future investment treaties to the jurisdiction of the Court and it would bring a certain degree of flexibility to the system which would need to be balanced with objectives such as consistency of case law.

This approach would bring permanency and transparency to the system, since all agreements under the scope of the Court would be referred to in the instrument establishing the Court.

III.C.2.b. Re-negotiating and/or amending each Treaty

A second approach could be to re-negotiate or amend each investment treaty that is to be brought under the jurisdiction of the Court. For the reasons set out above, this approach would be inefficient since large resources are needed, and run counter to the objective of predictability, since the outcome of negotiation for each treaty would be uncertain. It would not necessarily be transparent since the results of potentially many different negotiations would have to be examined.

An opt-in mechanism allowing to replace all existing treaties at once would be efficient and have lower cost impacts than the potentially complex and lengthy processes of renegotiating the totality of underlying investment treaties to amend their dispute settlement rules. This approach would also contribute more to the objective of transparency and would give enhanced predictability to future agreements.

III.C.3. Support to small and medium sized Enterprises (SMEs)

There are various difficulties faced by SMEs. Principally the problem created by the current ISDS system is accessibility. In order to address such a problem, it is plausible to create specific measures to ensure access to the Court for SMEs such as simplified procedural rules or the waiving of certain costs; or not to create any specific procedure for SMEs.

III.C.3.a. Simplified procedural Rules

Having specific assistance in place for SMEs would ensure that the high costs of litigation do not prevent any investor from resorting to an effective dispute settlement system. In this sense, it would contribute to the goal of efficiency and to ensuring an effective remedy.

On the downside, this approach meets political difficulties such as agreeing on a definition of SMEs and that the contracting parties agree to bear the costs of any such assistance. This sub-option would therefore have financial implications.

III.C.3.b. Not to create any specific Procedure

A different approach would be not to grant any additional assistance to SMEs, considering inter alia that the size of the disputants is not necessarily related to the importance, significance or difficulty of such case. Bigger businesses consider that enhanced support for SMEs risks creating categories within investors and that simplified procedures should apply according to the size of the claim instead.

Though the first option is costly given that SMEs exist to a considerable degree worldwide it should be an option to explore according to the proposal.

III.C.4. Support developing Countries

A criticism commonly made in relation to ISDS is that it puts developing countries and least-developed countries at a disadvantageous position *vis-à-vis* investors, as the former do not always have the budget and/or the expertise to effectively defend themselves in arbitration proceedings. The question in relation to developing countries is whether: there should be a more favourable system of support to developing countries to ensure access to the multilateral investment Court; or there should be no specific procedures for developing countries.

III.C.4.a. More favourable system of Support

Ensuring that the Court caters for the special needs of these countries would contribute to making the system more legitimate. Although the costs at the writing stage are not calculated, it states that it would be more costly for developed countries but the benefits would in all likelihood however outweigh costs.

The proposal also takes into consideration, based on the model of the Advisory Centre for WTO Law (ACWL), that an advisory centre to provide legal advice and training to developing and least-developed countries could be set up.

III.C.4.b. No specific Procedures

The other view is that the existing mechanisms to support developing countries are sufficient and that no additional assistance is needed. While it is true that most if not all states allocate budget lines to dispute settlement, many of them are affected by financial and human resource constraints that do not affect developed countries.

Facilitating access for developing countries to the multilateral system (or failing to do so) will have important implications on the inclusiveness of the multilateral project. A system of support for developing and least-developed countries would ensure an effective access to justice for all states in the event that they are sued by a foreign investor, regardless of their size and GDP. Granting some sort of special assistance to developing and least-developed countries would therefore be the preferred approach. The specific features of that assistance will however have to be negotiated.

III.D. Financial Aspects**III.D.1. Allocation of costs among Members**

In order to ensure that the multilateral investment court can fully operate, sufficient financing will have to be provided. Since the Court aims to include countries with different levels of economic development, there are two main possibilities of apportionment of the costs of the Court: a system that reflects the level of development of members, as operated by different international organisations; or a system that equally allocates costs among members.

III.D.1.a. A system that reflects the level of development of Members

Major international institutions take into consideration the level of developments of its members. Such organizations include UNCTAD⁵⁰ and tribunals including the WTO⁵¹ and the European Court of Human Rights⁵².

It is in line with the principles of fostering multilateral cooperation and good global governance. However, it would have higher budgetary implications.

III.D.1.b. A system that equally allocates costs among Members

In contradistinction, although setting up a system that allocates costs among members on the basis of equal shares would be less expensive for developed countries, it would however be contrary to the practice of main international organisations and courts and would run counter to the general objective of promoting an international system based on stronger multilateral cooperation and good global governance as it would make participation of developing and least developed countries in the system too costly for their available financial means. Consequently, this system would render the whole Court overall less efficient, in that it could hamper access for countries with less means available.

III.D.2. Mixed Financing

It would need to be decided who bears the costs of establishing and operating the multilateral Court. The costs of the Court could be covered by: contracting parties' contributions exclusively; or contracting parties' contributions and user fees.

III.D.2.a. Contracting parties' contributions exclusively

Dispute settlement mechanisms between states, such as the WTO, and dispute settlement mechanisms set up by states for claims by individuals, such as the Court of Justice

⁵⁰ United Nations list of least developed countries, available at <http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx>.

⁵¹ In the WTO, contributions are determined according to each Member's share of international trade (%), based on trade in goods, services and intellectual property rights for the last five years for which data is available. There is a minimum contribution of 0.015 per cent for Members whose share in the total trade of all Members is less than 0.015 per cent. See: https://www.wto.org/english/thewto_e/secre_e/contrib_e.htm.

⁵² The ECtHR is financed from the budget of the Council of Europe, which divides the costs between the member states based on the formula involving national GDP and the annual national population. See <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0302&from=EN>.

of the European Union, do not generally require a filing fee for claimants. Conversely in ISDS requires claimants to pay their share while lodging the case⁵³.

This would bring added legitimacy to the system by limiting financial control of the Court to the Contracting Parties, thereby contributing to approximate investment dispute resolution to international and domestic tribunals. Although it would be more costly for states, it may help reduce the upfront costs which may be attractive for more participants.

III.D.2.b. Contracting parties' contributions and user Fees

A system of user fees could be introduced to cover the costs of the Court in addition to the contributions of Contracting Parties. Such user fees would obviously not be equal to those that apply under the current system, but could be destined to cover specific services like the registrar. This approach would be less costly.

Limiting the Court's funding to Contracting Parties would improve the system's legitimacy, while requiring users to contribute to the costs would relieve members' budgets to some extent. Both options seem to present pros and cons and, although the first sub-option appears preferable at this stage, it cannot be excluded that a certain system of user fees needs to be introduced. In any event, such fees should not be prohibitive for users, particularly SMEs, turning into a de facto barrier to access.

The proposal of the EU Commission finalizes by strongly recommending the establishment of the multilateral investment court due to the advantages enumerated above.

CONCLUSION

Fragmentation of international law is a phenomenon that is a melting pot for academics and practitioners alike. The anarchic decentralized nature of international law coupled with the proliferation of independent yet overlapping norms without a meaningful coherence is an open secret subjected to a scrutiny both from the practitioners and the academia, in short the fragmentation of international law. The lack of pace of international law to cope up with the lightning speed of formations of countless subsystems pause a legitimate question of coherence

⁵³ For instance, in ICSID, the lodging fee must be paid with the submission of the relevant request and, for post-award remedies, within the prescribed time limit set out in the ICSID Convention or Additional Facility Rules. A non-refundable fee of US\$25,000 is payable to the Centre by a party: requesting the institution of conciliation, arbitration or fact-finding proceedings under the ICSID Convention or the Additional Facility; or applying for annulment of an award rendered under the Convention.

and effective implementation and compliance of various obligations enshrined in different legal texts.

The challenge that international law faces can be best illustrated from proliferations of international adjudicative bodies. One of the most important problems caused by a multitude of international tribunals and courts with concurrent jurisdiction is the security, predictability and legitimacy of international law. An obvious concern is multiple tribunals addressing the same dispute, without adequate rules for dealing with overlapping jurisdiction.

The proliferation of *ad hoc* investment dispute settlement procedures is one symptom of the general fragmentation infested international law. In a classical approach academics approach such problem from international rules and principles relating to the interpretation and application of treaties to find out the appropriate fora. More recent projects and proposals to curb and tackle fragmentation includes new governance project. The Multilateral court of investment dispute is of such a kind. Even though it is still a fresh paint it is welcoming news. Various sub-systems like Environmental law went one step ahead, the perfect example is the synergy process of Chemical Conventions.

This is a progressive and actual challenge that international law faces in these challenging times. The luxury of having access to multiple fora is a blessing. However, states running to and fro due to lack of coherence threaten security, predictability and confidence for the constituents of the international legal system. Under the VCLT principle of good faith (expressed succinctly in the maxim of *pacta sunt servanda*), states sign treaties with the intention of full application and enforcement between the signatories. Taking advantage of access to multiple dispute fora, which the positive progression and sophistication of international law provides, threatens the integrity and legitimacy of international law.

From such a noble view, the proposal from the EU is very much appreciated. Nevertheless, how it will be treated by other partners will be revealed soon enough but for now the EU and Canada are on the forefront of the initiation.