Multilateral investment court: Framework options

SUMMARY

The Council of the EU has authorised the European Commission to represent the EU and its Member States in the intergovernmental talks at the United Nations Commission on International Trade Law (UNCITRAL), with a view to reforming the existing investor-state dispute settlement (ISDS) system. The latter provides a procedural framework for disputes between international investors and host states in relation to international investment agreements, and relies on arbitration procedures. The system has raised serious concerns among stakeholders across the EU, especially in relation to the transparency and consistency of decisions, the independence of arbitrators, and the cost and duration of arbitral procedures. The intergovernmental talks at UNCITRAL are aimed at reforming the system in a manner that would address these concerns; the overarching goal of the Council mandate is to establish a full-fledged permanent multilateral investment court with an appellate mechanism and tenured judges.

UNCITRAL talks started in 2017; in April 2019, the working group identified three areas of concerns, namely a) consistency and predictability of arbitral decisions; b) integrity of arbitrators and decision-makers; and c) cost and duration of ISDS disputes. The states then tabled reform proposals that provided the framework for the discussions launched in October 2019. The UNCITRAL Secretariat has circulated two documents summarising the proposals regarding the selection and appointment of ISDS members, the establishment and scope of an appellate mechanism, and the enforcement mechanism. The proposals range from perfecting the current ISDS to setting up formal investment courts comprised of first-instance and appellate tribunals. The documents include questions to the government delegations.

In its reply to the initial draft, the delegation at UNCITRAL for the EU and its Member States supports the establishment of a multilateral investment court composed of a first-instance and an appellate tribunal staffed by full-time adjudicators.

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Introduction and background

Motivating the reform

The Lisbon Treaty, adopted in 2009, extended EU common commercial policy competence to foreign direct investment. This enabled the EU to start negotiating international investment agreements (IIAs) – sometimes also found as provisions on international investment within broader trade and economic agreements – with third countries. Typically, IIAs are mainly aimed at protecting international investments in host countries and include provisions governing the investor-state dispute settlement (ISDS) mechanism of the IIA, whereby non-domestic investors can bring investment-hosting countries before a tribunal for infringements of the IIA. This serves as a legal tool to protect non-domestic investors against unfair treatment, as these investors can avoid domestic courts whenever they detect discriminating decisions taken by the authorities. Before the Lisbon Treaty, EU Member States could adopt IIAs bilaterally with other EU Member States or third countries.

IIAs dispute settlement usually relies on one or more of the existing ISDS systems, of which the most commonly used ones are predominantly based on arbitrators’ decisions, provide for no appeal and rely on conventional or ad hoc rules. The main ISDS systems are organised by:

1. the United Nations Commission on International Trade Law – UNCITRAL
2. the World Bank International Centre for Settlement of Investment Disputes – ICSID
3. the International Chamber of Commerce – ICC

The inclusion of the standard arbitral ISDS mechanism in the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and then in the negotiations for an EU-US Transatlantic Trade and Investment Partnership (TTIP), sparked protests across the EU. Protesters argued that decisions solely based on arbitration were a threat to democracy, especially to the right of states to regulate in areas like food safety, environment and labour rights. Protesters referred to, among others, the (at the time) recent cases brought by Philip Morris against Uruguay and Australia against a change in their public health legislation – although the claim was eventually rejected. As of today, there have been more than a thousand investor-state dispute cases worldwide showing that such disputes are relatively frequent.

EU initiatives

To respond to public concerns, the EU has adapted its ISDS provisions in its subsequent IIAs, including those of the CETA, to rely on an investment court system (ICS) established by each agreement; these provisions also stipulate an appellate mechanism. The EU has also engaged in multilateral negotiations to reform the ISDS system under the auspices of the United Nations Commission on International Trade (UNCITRAL), which has developed one of the world’s most commonly used ISDS systems. On 20 March 2018, the Council of the EU adopted the negotiating directives authorising the European Commission to negotiate, on behalf of the EU, a convention establishing a multilateral investment court (MIC) for the settlement of investor-state disputes in relation to IIAs in the framework of UNCITRAL. The MIC would be a permanent body with first and appellate instances, and full-time judges; it would eventually replace the ICSs established by the EU IIAs as temporary solutions.

Investment court systems (ICSs) in EU law

With respect to the ICSs provided for by EU IIAs, the European Commission and Belgium submitted two requests for an opinion to the Court of Justice of the EU (CJEU). The latter firstly declared that direct investment indeed falls within the competence of the EU, but portfolio investment does not (Opinion 2/15, 2017). Secondly, it declared that the ICS introduced by the EU-Canada CETA is compatible with the Treaties of the European Union (Opinion 1/17, 2019).
UNCITRAL Working Group III

Intergovernmental talks are being conducted under the auspices of Working Group III (WGIII) of UNCITRAL, given that the latter is a UN intergovernmental forum viewed as providing the widest audience for states. The Working Group is composed of all the 60 elected member states of UNCITRAL; non-members of UNCITRAL and international governmental organisations may attend WGIII sessions as observers and participate in the deliberations. Each UNCITRAL working group addresses specific issues; WGIII covers the ISDS.

WGIII participants have agreed to first identify the concerns regarding the current ISDS (phase 1), then consider whether reform is desirable (phase 2), and finally submit reform proposals for discussion and develop solutions to be recommended (phase 3) to UNCITRAL.

Between November 2017 and October 2018, WGIII drew up a list of concerns regarding the current ISDS system, which it classified into three categories:

- consistency, coherence, predictability and correctness of arbitral decisions;
- integrity of arbitrators and decision-makers;
- cost and duration of ISDS disputes.

WGIII added a category entitled 'Additional concerns'. On wrapping up the discussion about these concerns, WGIII concluded that it was desirable to work on reform. Some 24 government delegations submitted proposals to address these concerns, in addition to that of the European Union and its Member States. The proposals reflected the different views on what the reform process is supposed to achieve and what the end goal should be. There is a division between the parties, with some (such as the EU) favouring profound structural reforms (e.g. the creation of a permanent MIC that includes the establishment of an appellate mechanism), and others preferring more limited incremental changes (e.g. creation of a code of conduct for arbitrators and limiting the cost and duration of arbitration). Since no consensus on the scope of the reforms could be found, discussions are progressing on parallel tracks (structural and incremental). In addition, the discussions are open-ended in the sense that there is no obligation for any state to sign up to any of the reform proposals being discussed, and it has also been suggested that the new framework would serve as an umbrella and states could partially adopt the new framework (opt-in convention).

The UNCITRAL Secretariat has published two documents consolidating the options for reform according to the submitted proposals, which give insights as to what the potential framework reform of the new ISDS system will look like. The two documents pose questions to the delegations about the various options in order to let them clarify some details or declare their preferences. The first document dwells on the selection and appointment of ISDS tribunal members and the second on the appellate mechanism and the enforcement instruments. As of May 2021, six delegations had submitted their comments and opinions, namely those of Armenia, Canada, the EU and its Member States, South Korea, Switzerland and the United Kingdom.

Selection and appointment of ISDS tribunal members

With respect to the selection and appointment of tribunal members, the aforementioned document prepared by the UNCITRAL Secretariat, which focuses on the selection and appointment of tribunal members, proposes two main avenues to reform the UNCITRAL procedure (reflecting the wording used by the UNCITRAL Secretariat): a) the introduction of an ad hoc mechanism with or without an appointing authority; or b) the establishment of a standing committee with rules for an independent selection of tribunal members.

Ad hoc mechanism

The selection of the tribunal could be based on a pre-established list of experts available for serving as members. Such a list – or roster – could include between 150 and 200 individuals. Using a roster for the selection of arbitrators could be mandatory or merely indicative. The selection of the
individuals to be part of a roster could involve states and, possibly, investors. There are no suggestions as to how the individuals would be selected for inclusion in a roster, except that consensus should be avoided as it may lead to deadlock. Nevertheless, the individuals would be selected based on their relevant expertise and experience and with a view to ensuring gender and geographical balance. Moreover, in order to ensure independence, the term of individuals selected to be in a roster would be for a non-renewable determined period, or renewable once or twice in order to ensure continuity. The procedures would all depend on whether one or multiple rosters would be in place, e.g. one for co-arbitrators and another for chairs, and each roster could have its own selection rules. The selection method could also consist of allowing parties to select their respective arbitrators from the roster on a voluntary basis, while the selection of the chair would mandatorily be based on the roster, regardless of the appointing entity – the disputing parties, the co-arbitrators or an appointing authority.

Appointment rules under the existing arbitral ISDS systems

IIAs referring to international arbitration usually rely on (at least) one of the two established systems, namely that offered by the World Bank’s International Centre for Settlement of Investment Disputes (ICSID) Convention (ICSID Convention) and that of the UNCITRAL Arbitration Rules. Both systems run in accordance with one-instance decision arbitral procedures – i.e. there is no appeal.

Under the ICSID Convention arbitral procedure, the arbitral tribunal consists of a sole arbitrator or any uneven number of arbitrators, as the parties agree. Should no agreement be reached with respect to the number of arbitrators and the appointment method, the tribunal then consists of three arbitrators: each party appoints one arbitrator, while the third arbitrator, who chairs the tribunal, is appointed by agreement of the parties (Article 37 of the ICSID Convention). If the tribunal has not been constituted within 90 days after notice of registration of the request, the ICSID Administrative Council chair, at the request of either party (and after consulting both parties as far as possible), appoints the arbitrator or arbitrators not yet appointed; the arbitrators appointed by the chair should not be nationals of either contracting state party (Article 38). The chair of the World Bank (currently David Malpass) is the ex-officio chair of the Administrative Council (Article 5).

As per the UNCITRAL Arbitration Rules, the arbitral tribunal is composed of three arbitrators unless the parties agree to a sole arbitrator. If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days the parties have not reached an agreement, the sole arbitrator is, at the request of a party, appointed by the appointing authority. The parties may designate any appointing authority, and if after 30 days they have not agreed on the appointing authority, any party may request that the secretary general of the Permanent Court of Arbitration (PCA) of The Hague become the appointing authority. The appointing authority proceeds as follows. First, it communicates to the parties an identical list containing at least three names. Then, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference. Finally, the appointing authority appoints the arbitrator from among the approved names and according to the order of preference indicated by the parties. If three arbitrators are to be appointed, each party appoints one arbitrator and the appointing authority appoints the third arbitrator, who chairs the tribunal in the same way as when a sole arbitrator is appointed.

Delegations have asked whether the selection and appointment would be made fully or partially by a dedicated appointing authority and, if yes, what decision process should the appointing authority apply. The Secretariat noted that appointing authorities already intervene in the ISDS regime (see box above) and the question is whether it should be given an enhanced role; any reform would require participation of the appointing authorities and their agreement for any such reform. There is the option to have more than one institution to serve as an appointing authority; then the question is whether a list of such authorities should be established, taking into account geographical diversity, and whether it would be a closed or an open list. Another question is whether disputing parties should be involved in the selection of the appointing authority.

As to the function of the appointing authority, for a tribunal composed of three members (two co-arbitrators and one chair), one option would be for the appointing authority to select the chair and
each disputing party to select one of the two co-arbitrators. Another option could be for the appointing authority to appoint all three members, possibly in consultation with the disputing parties. Some delegations suggested that the appointing authority circulate the lists of potential co-arbitrators and chairs to each of the disputing parties, which would then rank their preferences, and the appointment would be based on the ranking.

The UNCITRAL document states that some delegations proposed, for the sake of enhancing transparency, to consider the publication of applicable rules and criteria (for instance, information on nationality, gender, age group, legal system), and to specify the degree of involvement of the parties in the selection. Appointing authorities could also define the lists of possible ISDS arbitrators and make them public.

Standing mechanism

As an alternative to the roster-based selection of arbitral tribunal members, the UNCITRAL document reports that some delegations propose creating a standing committee whose members would serve as tribunal members. Such a mechanism would limit the involvement of the disputing parties in the selection of the tribunal members; it would also be in sharp contrast with the existing arbitration frameworks and be more aligned with the selection mechanisms in international courts. A major question in the design of the proposed standing committee is the number of adjudicators it would have. In fact, it must be decided whether the number of seats should be such as would allow each state participating in the new ISDS to appoint one or more adjudicators on a permanent basis (full representation), or whether the number of seats would be less than the number of states (selective representation).

A problem associated with the first option is that each state would control the appointment of one or more tribunal members and could be in a position to influence the decisions of the court. Thus, the members of the permanent body could be either directly appointed by each state or proposed by states and subsequently elected by an intergovernmental body. In order to avoid deadlock in the selection process, elections through votes are favoured over elections by consensus, and states may be given more than one voting right so that they can vote for more than one candidate for adjudicator.

A selection by a committee, possibly under the auspices of a body within the UN system, is also an option for consideration. Such a committee could establish a list of adjudicators that could then be endorsed by states. Finally, the selection could be a multi-layer one, whereby a screening committee could conduct a thorough assessment of candidates prior to their election, ensuring their expertise and qualification.

In addition to the issue of adjudicators’ qualifications, WGIII indicated that diversity (including geographical, gender and linguistic diversity) should remain at the heart of the reformed ISDS, which should also be representative of the different legal systems and cultures and the varying degrees of economic development.

Finally, the rules for the assignment of cases must be addressed within a standing committee. The assignment could also be delegated to the secretary-general of the institution managing a list of potential members of the tribunal or to the full-time president of the standing committee. Some delegations argue that the assignment method should take into account the specificities of the case, including whether a developing state was involved and the need for the tribunal to consider a number of other aspects (e.g. environmental and social ones). Some suggest including some random rules in the assignment process in order to make appointments less predictable to the disputing parties.

Appellate mechanism

The second aforementioned document prepared by the UNCITRAL Secretariat summarises the options for an appellate mechanism, which would possibly complement the first-instance
mechanism described in the previous section. The document makes similar consideration as to the appointment and selection methods and, more importantly, the scope of the appeal.

The selection and appointment of the members of the appellate tribunal under the appellate mechanism may follow similar rules to those of the first-instance tribunal, but not necessarily. In the case where the selection of the appellate tribunal is based on a purely ad hoc basis, with the appellate tribunal members being constituted by the parties on a case-by-case basis, the same rosters of candidates could be used for both first instance and appellate tribunal members. If a permanent appellate body were established, the same options and issues would hold. For instance, in the case of a permanent body, the terms of its members could be non-renewable in order to ensure their independence even though allowing for term renewals would help retain valuable experience, and increase the chance of continuity and predictability of decisions. Renewable terms could also improve accountability, since reappointment decisions may be based on the performance of the members, while at the same time those of them wishing to be reappointed may face incentives to satisfy those in control of reappointment decisions.

As regards the scope of the appellate body, the main question is whether the appellate tribunal should be restricted to ruling on errors of law or whether it should also look at errors of fact. A scope covering errors of law could include reviewing errors in the interpretation and/or application of the law. Then, the review could also be limited to specific issues of law, e.g. expropriation and non-discrimination. A scope covering errors of fact implies the re-assessment of the facts and damages. The appellate tribunal could also decide on questions of law involving a general interpretation of provisions, but not on questions regarding the evidence or its interpretation by the first-instance tribunal. A question of fact involves an inquiry into whether something has happened and whether the first-instance tribunal assessed the facts correctly.

The appellate mechanism could also be made available to other institutions handling ISDS cases, which could potentially benefit from the overall consistency and predictability across ISDS systems.

**Timeline**

The timeline should ensure that appeal proceedings do not delay the dispute settlements. A timeline for appeal decisions could be inspired by existing frameworks, e.g. in recent IIAs the appellate tribunal must render its decision within 180 days from the start of the proceedings. The timeline could be shortened depending on the complexity of the scope of the appeal. For instance, accelerated proceedings could be considered where the subject of the appeal is limited to procedural questions. The UNCITRAL Secretariat also suggests that WGIII should consider the early dismissal of unfounded appeals in order to prevent frivolous claims, which is a potential concern with regard to the establishment of the appeal tribunal.

**Enforcement**

Today, the awards rendered by ISDS tribunals are generally enforceable through the New York Convention (1958) and the ICSID Convention (2006). These conventions rely on the fundamental principle that a contracting state recognises and enforces arbitral awards made in relation to another contracting state. For instance, pursuant to ICSID enforcement rules, an award rendered by an arbitral tribunal is binding on all parties (Article 53(1) of the ICSID Convention), and if a party fails to comply with the award, the other party can seek to have the award recognised and enforced in the courts of any ICSID member state (Article 54(1) of the ICSID Convention). The UNCITRAL document reports various views on whether the awards rendered by the reformed ISDS could be enforced under these same conventions. As an alternative, or in addition to it, the new ISDS system could have its own enforcement regime. For instance, the new system could require the enforcement of decisions by ISDS tribunals in all the states that will be applying the new regime, in a similar manner to the ICSID Convention.
Comments on the proposals

European Commission

In October 2020, the EU delegation to UNCITRAL submitted its comments and answered the questions raised by the UNICTRAL Secretariat in the initial draft of the two abovementioned documents about i) the selection and appointment of ISDS tribunal members, and ii) the appellate mechanism and enforcement issues.

Overall, the EU delegation considers that the ad hoc solutions do not address the concerns raised by WGIII in relation to ‘the independence, impartiality and diversity of investment adjudicators’. The EU delegation emphasises that whenever appointments are made (even only partially) by parties and irrespective of whether the roster is mandatory, the concerns linked to party-appointment would remain.

Besides, the EU considers that a single standing institution with permanent professional staff and an appeal instance is far more likely to rule more consistently and more independently from the interests of the disputing parties. It also agrees that the statute establishing the standing committee should ensure geographical, gender and language diversity. The EU believes that a standing committee would provide more opportunities for the appointment of adjudicators from underrepresented regions and the achievement of gender balance, which a party-appointment system is ‘structurally incapable of achieving’.

As regards the appointment of the members of the standing committee per se, the EU supports the option where states appoint members. Additional appointments by an independent entity could be explored. Yet, there should be no difference in the selection and appointment process of the first and the appeal instances of a standing committee.

Finally, the EU delegation believes that the reform should deliver its own enforcement regime and the New York and ICSID Conventions may be relevant only for enforcement in non-member countries.

Other countries

A few countries have also submitted comments on the proposals, indicating their preferences. The United Kingdom (UK) emphasises that the reformed ISDS should maintain flexibility and cost effectiveness, and therefore favours the ad hoc approach, where parties play a role in the selection process and appointing authorities intervene to select the third arbitrator; that said, the UK delegation does not provide details on the establishment of the appointing authority. It expresses the view that the appeal system should follow the same rules as the first-instance tribunal and that enforcement should remain with the ICSID and the New York Conventions. Armenia is also in favour of maintaining the ad hoc nature of the ISDS. It also adheres to the idea that, should a permanent MIC be established, it should work in parallel to the ad hoc mechanism. The role of appointing authorities in the ad hoc ISDS should be limited to cases where the parties fail to appoint an arbitrator.

Instead, like the EU, Canada supports the creation of a permanent tribunal but believes there should be more discussions in order to avoid its politicisation and to ensure the quality and diversity of its appointed members. Switzerland’s comments are extensively inspired by the First Report of the Geneva Centre for International Dispute Settlement (CIDS). To Switzerland, in an ad hoc system, shifting the appointment of members to an entrusted authority would be beneficial, but the establishment of such an appointing authority would be essential for its credibility. Similarly, the composition of a MIC would be essential to its legitimacy, and it would be crucial to carefully define the requirements towards members in a way that ensures a high level of qualification, geographical and gender representativeness, and offers strong guarantees of independence. It also supports that appeal be limited to error of law, since error of facts could lead to an excessive use of appeals. With
respect to enforcement in the context of the MIC, it should extend beyond the scope of the contracting parties, and the New York Convention should apply.

South Korea shares the conviction that there is a need for reform, and considers the selection of arbitrators a matter of greater importance than the development of the framework. To this country, it is essential that an arbitrator have expertise in public international law. It furthermore considers that any relevant experience is a priority, as is knowledge about the political, legal or cultural situation of the investment-host state. It also believes that the scope of appeal should be limited to error in interpretation or application of the law.⁷

EU institutions' positions

Council negotiating directives

In its directives to the negotiations, the Council affirms that the MIC would eventually replace the bilateral investment court systems included in EU trade and investment agreements. The objective is to move away from the traditional arbitration framework towards a court system aimed at providing a response to 'legitimate public concerns raised in the context of the traditional investor-to-state dispute settlement'. The new investment arbitration would bring in key features of domestic and international courts. In addition, the Council favours a system based on the following principles:

- the court should be a permanent international institution;
- the judges should be tenured, qualified and receiving permanent remuneration, and their impartiality and independence should be guaranteed;
- proceedings before the court should be conducted in a transparent manner;
- the court should give the possibility of appeal against a decision;
- effective enforcement of the decisions of the court would be vital;
- the court should rule on disputes arising under future and existing investment treaties that countries decide to assign to the authority of the court.

Parliament

The European Parliament has adopted a number of resolutions encouraging the MIC initiative. This position is reflected, among others, in its consent to the EU-Canada CETA (15 February 2017) and the EU-Singapore Investment Protection Agreement (ESIPA) (13 February 2019), which contain provisions for the establishment of an ICS similar to what the EU has proposed to UNCITRAL and for the adoption of the MIC once it has been established.

In its resolution of 5 July 2016 on a forward-looking and innovative future strategy for trade and investment, Parliament recognises the benefits that investor protection agreements bring to trade and growth, in addition to fostering international investment. Additionally, the resolution calls on the EU and its Member States to follow the recommendations contained in UNCTAD's comprehensive investment policy framework for sustainable development, aimed at making investments more responsible, transparent and accountable. Finally, the Parliament voices regret that the ICS proposal does not include an ‘investors’ obligation provision’.

Advisory committees

In December 2018, the European Economic and Social Committee (EESC) adopted an opinion that welcomes the Commission's efforts to establish the MIC under the auspices of the UNCTAD. Protection of investors is widely welcomed as a factor promoting international investment, and the MIC is viewed as a major step towards predictability and transparency of decisions. In particular, the EESC states that enhanced transparency would allow NGOs to monitor the discussions and even participate in them. In addition, the opinion emphasises that the appointments of judges on a permanent basis is key to building predictability, and that, by reducing the costs associated with the
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ISDS, the MIC should give broader access to smaller investing companies. Finally, the decisions must be enforceable and made public.

In its opinion of March 2018, the European Committee of the Regions (CoR) acknowledges the progress in terms of predictability of ISDS decisions, but calls for the MIC to protect not only the rights of investors but also the rights of states to legislate and the rights of third parties. It also stresses that the MIC should not bypass domestic legal systems or local government decisions defending the rights of private investors. Similar concerns are voiced in the EESC opinion: ‘the right of states to regulate in the public interest must not be undermined’.

Stakeholder and expert positions

Stakeholders

In 2014, the Commission conducted a public consultation regarding the inclusion of ISDS provisions in the TIPP, which received nearly 150,000 replies from individuals and from about 450 organisations representing, among others, EU business organisations, trade unions, consumer organisations, law firms and academics. Replies relating to improvements to ISDS could be summarised in four areas:

- the protection of the right to regulate;
- the establishment and functioning of arbitral tribunals;
- the relationship between domestic judicial systems and ISDS;
- the review of ISDS decisions through an appellate mechanism.

Overall, the ISDS provisions were criticised for promoting the protection of investors’ rights at the expense of those of civil societies, in particular the right of states to regulate and protect the environment. The criticism is based on the observation that the ISDS system allows corporations to initiate arbitration proceedings against states and to claim substantial damages when new legislation adversely affects their investments; this may deter states from taking further action.

Some associations, such as the Bureau européen des Unions des Consommateurs (BEUC), acknowledge that the mandate of the Commission addresses several of their demands (in particular those having to do with the appeal mechanism, the qualifications of judges and the safeguarding of their independence by means of a transparent appointment system), but perhaps not sufficiently. For instance, the International Trade Union Confederation (ITUC) believes that the reform should incorporate investors’ responsibilities. Conversely, BusinessEurope, a major European association of corporations, supports the ‘modernisation of the current system and recognises the efforts of the European Commission to take on board much of the legitimate criticism around ISDS, for instance by increasing transparency, or by taking measures to eliminate frivolous claims’.

In response to criticism against the MIC in relation to the right of states to regulate, the Commission has recalled on various occasions that the MIC aims to bring legitimacy, transparency and neutrality to decisions. The rights of parties and the precise role of the court in procedures should be determined by the investment agreements. Moreover, the Commission has underlined that the UNCTAD investment policy framework for sustainable development and road map for IIA reform envisage steps for safeguarding the right to regulate and for ensuring responsible investment. Indeed, the EU’s ‘new generation’ IIAs affirm the right to regulate and address issues concerning environmentally and socially responsible investment.

Expert views

In a special issue of the Journal of World Investment and Trade (JWIT) published in June 2020, Professors Langford, Potestà, Kaufmann-Kohler and Behn emphasise that the ISDS regime has attracted criticism for more than a decade and that it lacks public legitimacy, which makes reform necessary. Critics claim that the system is biased in favour of investors and high levels of compensation, making the system too costly for some developing countries. Critics also believe that the system is unduly subject to secrecy and decisions are inconsistent. However, the UNCITRAL
reform process is limited to procedural reforms and excludes a reform of the substantive provisions of IIAs, for which it has attracted criticism.

In another article of the JWIT special issue, Professors Behn, Langford and Létourneau-Tremblay review the existing academic evidence regarding the concerns raised at the UNICTRAL talks and conclude that inconsistent, independence and correctness of decisions tend to be problematic. In another article, Professors Arato, Brown and Ortino map the problem of inconsistency at a more granular level and argue that it is with regard to the structural 'rules of the game' rather than, for instance, commitments to standards, that inconsistency is most pronounced. To the authors, the ISDS with first and appeal instances, combined with fixed-term appointed adjudicators, is likely to foster consistency and predictability of decisions; it could however induce adverse effects if the court adopts an interpretation that the member states view as 'consistently' wrong, in a similar fashion as in the crisis about the WTO Appellate Body. Besides, although the ad hoc ISDS procedures are unlikely to address this problem even in a context where its rules are improved, they are beneficial to flexibility and creative solutions.

Next steps

Due to the pandemic, UNCITRAL WGIII met only twice in 2020, and the 'inter-sessional regional meetings', which helped increase the pace of the talks in the previous year, had to be cancelled. The pace of discussion has increased lately, with two meetings having recently taken place (in February and May 2021). The WGIII page shows the tentative scheduling of a third meeting for 15-19 November 2021. In March 2021, the UNCITRAL Secretariat published a schedule of work envisaging the approval in principle of ISDS Procedural Rules Reforms and that of an appellate mechanism and a multilateral permanent investment court, in 2023 and 2024, respectively. If an agreement on solutions is reached, the reform proposal will be submitted to UNCITRAL and then to the UN General Assembly. The schedule envisages the finalisation of the reform in 2025.

Provisions anticipating the adoption of the MIC have been included in new EU IIAs since CETA (see Box below), so that they would adopt the new system if a reform were adopted by UNCITRAL. It is planned that EU IIAs signed after the UNCITRAL reform would adopt the new system and be submitted to the European Parliament for its consent.

The multilateral investment court in investment protection provisions of the CETA

Article 8.29: Establishment of a multilateral investment tribunal and appellate mechanism

The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.

Source: Article 8.29 of the Canada-EU Comprehensive Economic and Trade Agreement (CETA).
MAIN REFERENCES


UN Commission on International Trade Law (UNCITRAL), Working Group III: Investor-State Dispute Settlement, webpage with all of the documents.

European Commission, Possible Reform of Investor-State Dispute Settlement (ISDS), Appellate Mechanism and Enforcement Issues, Comments, October 2020.


ENDNOTES

1 UNCITRAL is a UN legal body that promotes the harmonisation and modernisation of international trade law. Its tasks consist in preparing and promoting the use and adoption of legislative and non-legislative instruments in this domain. The UNCITRAL is composed of 60 State members that are elected by the UN General Assembly and are representative of the world’s geographic regions and principal economic and legal systems. Terms run for a period of six years and half of the Commission is renewed every three years. As of today, the state members with an expiring term in 2022 are Argentina, Australia, Austria, Belarus, Brazil, Burundi, Chile, Colombia, Czechia, India, Iran, Israel, Italy, Kenya, Lebanon, Lesotho, Libya, Mauritius, Nigeria, Pakistan, the Philippines, Poland, Romania, Spain, Sri Lanka, Thailand, Turkey, Uganda, the United States of America, Venezuela; and those with an expiring term in 2025 are Algeria, Belgium, Cameroon, Canada, China, Ivory Coast, Croatia, the Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Honduras, Hungary, Indonesia, Japan, Malaysia, Mali, Mexico, Peru, the Republic of Korea, the Russian Federation, Singapore, South Africa, Switzerland, Ukraine, the United Kingdom, Vietnam and Zimbabwe.

2 Proposals were submitted by Bahrain, Brazil, Burkina Faso, Chile, China, Colombia, Costa Rica, the Dominican Republic, Ecuador, the EU and its Member States, the Republic of Guinea, Indonesia, Israel, Japan, Kazakhstan, the Republic of Korea, Kuwait, Mali, Morocco, Peru, Russia, South Africa, Thailand and Turkey. Some countries made joint proposals.

3 Updated drafts are available on a separate page of the WGIII.

4 Rosters are already present in other ISDS systems such as the ICSID; the ICSID database for panels of conciliators and arbitrators includes about 250 individuals available for panels of arbitrators.

5 In the case of state-based nomination for a roster in the ad hoc system, there would be no such problem, since parties are involved in the appointment of the tribunal. However, the problem may be similar in the case where the appointing authority has enhanced authority and would select the whole tribunal.

6 The domestic laws relating to the sovereign immunity of other states continue to apply (Article 58 of the ICSID Convention).

7 Government delegations have already submitted proposals giving their preferences, but they have not yet replied to the two documents published by the UNCITRAL Secretariat. For instance, China believes that the right of the parties to appoint arbitrators is the core and most attractive feature of international arbitration – because investment disputes often involve ‘complex factual and legal issues at the first-instance stage’ – and supports the study for establishing a permanent appeal mechanism. The United States has not submitted any proposals at any stage.

8 Consistently with these concerns, EU IIAs assert the right of states to regulate and restrain the protection of investment in relevant activities. See, for instance, the Joint Interpretative Instrument added to the EU-Canada CETA, stating that ‘CETA includes modern rules on investment that preserve the right of governments to regulate in the public interest including when such regulations affect a foreign investment’; see also the EU-Vietnam IIA (Article 2.1, Scope).

9 For instance, inconsistent decisions were taken as to whether the IIA has priority over contract provisions whenever the IIA provides for exclusive dispute resolution in domestic courts.

10 For further discussion, see the EPRS briefing, International trade dispute settlement: WTO Appellate Body crisis and the multiparty interim appeal arrangements, April 2021.

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