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INVESTMENT ARBITRATION CHALLENGES IN THE EU

Master thesis

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INTRODUCTION

The relevance of the master thesis and scientific research problem. A significant sector of each country's economy is occupied by foreign investment. This is confirmed by the size of the amounts circulating in the investment sector. Global foreign direct investment (FDI) totaled US$1.39 trillion in 2019, slightly less than a revised $1.41 trillion for 2018. According with UNCTAD report published on January 20, 2020 the United States remained the largest recipient of FDI, attracting $251 billion in inflows, followed by China with flows of $140 billion and Singapore with $110 billion.[1] Any area where large sums of money are involved implies the existence of conflicts and the need to resolve them. International arbitration as a way to resolve the conflict between the investor and the state can be implemented on the basis of several platforms, such as specially created for this purpose ISCID and other which do not preclude the consideration of investment disputes as commercial arbitration, such as International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA), also the Regional Arbitration Centers in Cairo, Kuala Lumpur, and Hong Kong, or the China International Economic and Trade Arbitration Commission (CIETAC).

After the entry into force of the Treaty of Lisbon on 1 December 2009, in accordance with the provisions of Article 207 of the Treaty on the Functioning of the EU, international direct investment passed to the EU as part of the Union's common commercial policy. The three words “foreign direct investment” triggered a fierce debate regarding the scope of the new competence. Accordingly, in September 2015, the European Commission's draft text of the Transatlantic Trade and Investment Partnership (TTIP), which was complemented in November 2015, constituted the first IIA to include the ICS as the mechanism of dispute settlement. Subsequently, in January 2016, the ICS was implemented in the EU-Vietnam FTA, followed by the EU-Canada Comprehensive Economic and Trade Agreement (CETA) in February 2016.[2] Thus, the EU began to develop a new policy, namely the consideration of the possibility of creation of investment courts system.

Master thesis will dwell on the following **scientific research problems**:

Since the EU is making changes to existing policies: **What are problems in the current system for resolving investment disputes in the EU?**

[1] Global investment flows flat in 2019, moderate increase expected in 2020, UNCTAD, 2020, retrieved from, https://unctad.org/news/global-investment-flows-flat-2019-moderate-increase-expected-2020

[2] Reinisch, A. Will the EU's Proposal concerning an Investment Court System for CETA and TTIP lead to Enforceable Awards? - The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration. Journal of International Economic Law. Vol. 19, 2016, 761762. Retrieved from https://academic.oup.com/jiel/article/19/4/761/2742001

What changes in legal regulation are planned and which shortcomings they are planning to deal with?

Level of the analysis of a researched problem There is a sufficient amount of literature that deal with issues of international investment arbitration where one of the countries is an EU member state. In particular Rudolf Dolzer and Christoph Schreuer wrote a fundamental work covering the development of investment arbitration, sources of regulation and all the main issues of the arbitration dispute resolution process[3], however, this book is from 2008 and it logically could not take into account the events that took place in connection with the entry into force of the Lisbon Treaty. Another interesting article has been written by Juan Pablo Charris-Benedetti,[4] his work contains an analysis of criticism of ISDS and ICS but does not offer solutions. Definitely, there is a lack of analysis of the issue of replacing existing ISDS and how to deal with potential regulatory gaps that may arise. So I want to dedicate my work to this.

The scientific novelty of the master thesis will consist of analysis and search for ways to address the gaps that will arise in connection with the EU's new investment policy. As this question has arisen rather recently and there is no extensive developed scientific opinion yet. So there is space to make the contribution.

Significance of the final thesis. As the work will concern practical issues, its content will be relevant for the legislator. Also, its study will be meaningful for scholars who are interested in the latest developments in investment arbitration in the EU.

The aim of the master thesis is firstly identify existing problems of dispute resolution within ISDS. **Secondly,** analyze the potential of pathways to address possible gaps in connection with the introduction of the Investment court system.

The objectives of the master thesis. Firstly, to analyze the existing system for resolving investment disputes in the EU and identify the problems that led to the policy change. **Secondly,** to systematize the information on the Investment court system proposed by the EU, highlight its main characteristics and implementation risks.

Methods used in the master thesis. Given the exploratory nature of this work, one of the main methods will be the collection, systematization and analysis of information. In particular, these will be legal acts, case law and scientific articles. The logical consequence of the analysis of information will be the conclusions in which an attempt will be made to briefly systematize the information obtained and identify problematic aspects of the issues under consideration. In order to further work on them and make suggestions for improvement.

[3] Rudolf Dolzer and Christoph Schreuer, Principles of InternationalInvestment Law (OUP 2008)
[4] Juan Pablo Charris-Benedetti, The proposed Investment Court System: does it really solve the problems? Rev. Law State no.42 Bogotá Jan./Apr. 2019

The method of historical analysis will be used to track the causal links of events, as well as to track a number of improvements that have been made regarding the work of the ISDS.

The structure of the master thesis. It consists of two main parts.

The first part of the work will reveal the essence of investment arbitrage and main characteristics of ISDS and main issues it is blamed for.

The second part of the work will deal with the analysis of main shortcomings of ISDS, as well as characteristics of the Investment Court System and solutions it brings.

The defence statements. Existing international regulation of investor to state dispute settlement is not appropriate to ensure the consistency of arbitral decisions, the commitment of investors and host countries in their legality, impartiality and completeness. Addressing aspects of criticism of the existing system is possible through changes to the investment arbitration process and the creation of an additional body that will consolidate the practice of tribunals.

LIST OF ABBREVIATIONS

ACIIL	Advisory Center on International Investment Law
BIT	Bilateral Investment Treaty
CETA	EU-Canada Comprehensive Economic and Trade Agreement
ECJ	European Court of Justice
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
OECD	Organisation for Economic Cooperation and Development
GATT	General Agreement on Tariffs and Trade
ICSID or Center	International Center for Investment Dispute Resolution
ISDS	investor state dispute settlement
NAFTA	North American Free Trade Agreement
SMEs	Small and Medium-sized enterprizes
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	the United Nations Commission for International Trade Law Rules

1. GENERAL PART

1.1. Overview of the arbitration concept

In order to begin consideration of the concept of arbitration, it is needed to find out the meaning of this concept. It makes sense to agree with the position and first of all level the dispute about words, only then go further. According to the Merriam-Webster dictionary word 'arbiter' from Latin means 'eyewitness, onlooker, person appointed to settle a dispute'[5].

Unfortunately it was impossible to find primary sources on the existence of arbitration proceedings during the Roman Empire, but there are works of scholars[6] who state that ancient Rome never used arbitration to resolve disputes involving it. However, very often countries that were not part of the Roman Empire elected Rome as arbitrators. This was because Rome was one of the strongest countries at the time and could enforce its decisions by force.

Despite the fact that arbitration as a means of resolving disputes has been known since the signing of the Anglo-American Treaty of Friendship, Trade and Navigation on November 19, 1794[7] and there are currently at least four international conventions on the subject[8], none of them defines the concept of arbitration. Attempts[9] were made by the working group that developed the New York Convention on the Recognition and Enforcement of the Arbitral Awards 1958, but later, in order to make the application of the act as broad as possible, no definition was included in the convention. Therefore, in this work will be turned to the definitions of scientists.

According to Jane Mallor Arbitration is the submission of a dispute to a neutral, nonjudicial third party (arbitrator) who issues a binding decision resolve the dispute.[10] The author defines arbitration as the submission of a dispute, but it seems that, in this interpretation, the whole is replaced by a part. Of course, in order to start the process, it is necessary to file a dispute with the

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[5] Merriam-Webster dictionary (1828), Definition of arbiter, Retrieved from https://www.merriam-webster.com/dictionary/arbiter

[6] Zoya Mammon, Epistemology of International Public Arbitration, retrieved from http://www.ndiiv.org.ua/Files2/2006_5/9.pdf

[7] Treaty of Friendship, Trade and Navigation, between the United States and the United Kingdom, June 24, 1995, 28 articles, retrieved from https://www.dfa.ie/media/dfa/alldfawebsitemedia/treatyseries/uploads/documents/treaties/docs/195007.pdf

[8] Geneva protocol on arbitration clauses of 1923, Retrieved from https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=550&chapter=30&clang=_en Geneva Convention for the Enforcement of Foreign Arbitral Awards of 1927, retrieved from http://translex.uni-koeln.de/511400/_/convention-on-the-execution-of-foreign-arbitral-awards-signed-at-geneva-on-the-twenty-sixth-day-of-september-nineteen-hundred-and-twenty-seven/ New York Convention on the Recognition and Enforcement of Arbitral Awards 1958, ICSID Convention 1965, retrieved from https://www.wipo.int/amc/en/arbitration/ny-convention/text.html

[9] United Nation Commission on International Trade Law, A/CN.9/WG.II/WP.35 - Possible features of a model law on international commercial arbitration: questions for discussion by the Working Group, Retrieved from https://undocs.org/en/A/CN.9/WG.II/WP.35

[10] Jane Mallor, et al., Business Law and the Regulatory Environment: Concepts and Cases (Irwin McGraw-Hill, Burr Ridge, IL: 11th ed. 2001) retrieved from https://www.csun.edu/sites/default/files/blawarbitration.pdf

relevant arbitration institution or independent arbitrator. However, the arbitration itself is not reduced to this stage.

In Halsbury's Laws of England arbitration is defined as the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law.[11] Defining a concept through a common word 'process' is comfortable in the context of providing broad meaning. First of all, this approach ensures the absence of disputes, because arbitration is really a process, like almost anything in this world. Then the qualities of this process are specified through the characteristics of arbitration. Which, again, is very convenient, because it makes the definition structured and easy to understand.

The general definitions of arbitration are given above. Now it is worth to specify and narrow down to the definition of investment arbitrage. As the name implies, this subtype of arbitration is associated with investment. For the purpose of this work, there is no interes in a complex scientific definition of investment, it is important to understand that this is the use of available resources in order to obtain excess rewards in the future. Investments of individuals or legal entities in a country that is foreign to them will be considered, so that in the event of a dispute between such parties, the arbitration shall be considered international.

Investment arbitration in the context of the dispute settlement mechanism is a legal relationship. That's why later in this paper in addition to the inherent characteristics of arbitration first its features in the context of the constituent elements of the legal relationship, namely: subjects, object and content will be considered.

Investment arbitration combines elements of public and private nature due to the special status of one of the subjects, which is the state (endowed with power and sovereignty). This is expressed in the private-public mechanism of formation of the arbitration agreement[12] and a certain restriction of the principle of confidentiality[13]. Within the first element of the legal relationship, an investor carrying out investment activities and the state in which these activities are carried out exist.

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[11] Halsbury's Laws of England (4th ed, Butterworths 1991), para 601, 332. Retrieved from https://lexisweb.co.uk/source-guides/source-guide-bulletin-dwnld/file-51a7734b99b88.pdf

[12] Prof. Dr. Bernardo M. Cremades, ARBITRATION IN INVESTMENT TREATIES: PUBLIC OFFER OF ARBITRATION IN INVESTMENT-PROTECTION TREATIES, Retrieved from https://www.cremades.com/pics/contenido/File634528980336478688.pdf

[13] Barbara Magalhaes Bravo, Claudia Figueiras, World Academy of Science, Engineering and Technology International Journal of Law and Political Sciences Vol:12, No:3, 2018, The problem of Reconciling the Principle of Confidentiality in Foreign Investment Arbitration with the Public Interest, retrieved from http://repositorio.uportu.pt/jspui/bitstream/11328/2315/1/The-Problem-of-Reconciling-the-Principle-of-Confidentiality-in-Foreign-Investment-Arbitration-with-the-Public-Interest.pdf

The content of these legal relations will be the rights and obligations of its participants - the investor and the state, in the process of resolving the dispute. With regard to the object, the plaintiff will have the right to defense (which will include the right to open a dispute, its independent and competent consideration, immediate and full execution of the decision), in turn, the state has a number of corresponding responsibilities (entry, participation and execution of decision)[14]

In module prepared by Mr. Eric E. Bergsten at the request of the United Nations Conference on Trade and Development (UNCTAD)[15] are presented the inherent characteristics of arbitration:

a mechanism for the settlement of disputes - indisputable description, because in fact for the sake of resolving the dispute the parties apply to arbitration. The differences between arbitration and litigation, as well as the reasons for the rejection of the second to the first, will be considered in the second section;

it is **consensual** - in the context of this characteristic, it is implied that neither party may compel the other to participate in the arbitration if the other does not wish or has not given prior consent;

a **private procedure** - Despite the participation of the public entity - the state, in the dispute, the entire process from filing to arbitration and to the decision is a private procedure, information about which is disclosed only with the consent of the parties;

leads to a final and binding determination of the rights and obligations of the parties - the main consequence of the whole arbitration process, as well as any way of resolving disputes, is legal certainty. In order for the parties to be sure that their violated rights have been restored, the decision must be binding.

As a result of researching this topic, it is possible to come to a conclusion that investment arbitrage uses a mechanism that was originally developed to settle classic commercial disputes between individuals. Which means that there are no fundamentally different things in it. However, there are important points to pay attention to.

In essence, the mechanism of arbitration of investment disputes can be defined as follows: it is a set of certain elements that ensure the right of the parties to consider the dispute under the jurisdiction of the tribunal. Given that currently the most popular investment arbitration platform is the International Center for Investment Dispute Resolution (hereinafter ICSID or Center)[16], later

[14] ICSID Convention 1965, ICSID Worldbank, Art. 36, 37, 42, 53, 54; Retrieved from https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf
[15] United Nations Conference on Trade and development (2005), International commercial Arbitration, Retrieved from https://unctad.org/system/files/official-document/edmmisc232add38_en.pdf
[16] THE ICSID CASELOAD — STATISTICS, Retrieved from https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf

in the paper the content of the elements of the investment arbitration mechanism will be considered in the context of this platform.

A) **Legal dispute**

The existence of a legal dispute over the investment is a jurisdictional requirement in investment arbitration. According to the ICSID[17] (Article 25), there must be a legal dispute arising directly from the investment. The International Court of Justice recognized the dispute as "a disagreement over a law or fact, a conflict of legal views or interests between the parties."[18] In another case, it is defined as "a situation where both parties have clearly opposed views on the issue of fulfillment or non-fulfillment of certain contractual obligations."[19]

B) **Investment dispute**

The dispute must relate directly to the investment. It is considered that an investment transaction usually includes a number of ancillary operations and legal contacts: financing, property lease, purchase of goods, marketing of manufactured goods and tax liabilities. However, for the purposes of the ICSID jurisdiction, peripheral activities arising directly from the investment may be in doubt and should be addressed on a case-by-case basis.[20]

In CSOB v. Slovakia, the plaintiff provided a loan to a Slovak collection company, which was secured by a guarantee from the Slovak Ministry of Finance. When the Slovak collection company failed to make its payments, the CSOB opened ICSID proceedings against Slovakia. Slovakia argued that there were no claims against it directly outside the loan and that the dispute therefore existed outside the Tribunal's jurisdiction.

The tribunal rejected this argument, stating: "An investment is often a rather complex operation consisting of various interrelated transactions, each element of which, on its own, may not always qualify as an investment. Therefore, it should be considered that a dispute referred to the Center arises directly from an investment, even if it is based on a transaction which does not itself qualify as an investment under the Convention, provided that the specific transaction is an integral part of the overall transaction, which qualifies as an investment." [21] The tribunal added that the Slovak Republic's commitments were closely linked to the loan provided by the CSOB.

[17] ICSID Convention 1965, ICSID Worldbank, Art. 25; Retrieved from https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf
[18] East Timor Case, ICJ Reports (1995) 89, 99 Retrieved from https://www.icj-cij.org/en/case/84
[19] Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania (first phase), ICJ Reports (1950) 65, 74; Retrieved from https://www.icj-cij.org/en/case/8
[20] SOABI v. Senegal, Judgment of 25.02.1988, paragraph 8.01-8.23; Retrieved from https://jusmundi.com/en/document/decision/fr-societe-ouest-africaine-des-betons-industriels-v-senegal-sentence-thursday-25th-february-1988
[21] CSOB v. Slovakia, Judgment of jurisdiction of 24 March 1999, para 72. Retrieved from https://jusmundi.com/en/document/decision/en-ceskoslovenska-obchodni-banka-a-s-v-the-slovak-republic-decision-of-the-tribunal-on-objections-to-jurisdiction-monday-24th-may-1999

The loan was part of the overall CSOB consolidation operation and the development of its banking activities in the Slovak Republic. Therefore, the dispute arose directly from the investment.

C) **Investment**

Of course, the primary reason for ICSID's jurisdiction is investment, but the Convention does not offer us a definition. As result of consideration of Salini case in July 2001 tribunal identified three necessary elements of investment: "The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and aparticipation in the risks […]. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition." [22]

As a result of further cases, tribunals issued an additional 3 characteristics which are disputed[23], but which in some cases are taken into account[24].

So we can talk about 6 features of investment.[25] Three main:

1) **contribution** must be made at least in part in the host country and bring with it economic value[26];
2) **duration** - with respect to duration, there must be economic commitments of significant value sufficient for one to agree that the operation is of a nature to promote the economy and development of the country concerned[27];
3) **risk** - with respect to risk, any contract that implies risk for the contracting party such that there should be a particular guarantee of jurisdiction to firms seeking to invest in another country allowing for intervention by international arbitrators, in addition to ordinary mechanisms[28];

Three additional and disputable features:

4) **contribution/significant contribution to economic development**. This characteristic causes controversy both among scholars in the works and among representatives of tribunals in resolving cases. According to Schreuer: it does not follow that an activity that does not

[22] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, Decision on Jurisdiction, para.52, Retrieved from https://www.italaw.com/cases/documents/959

23 GAILLARD, Emmanuel, "Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice" in Christina BINDER et al., eds., International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (Oxford/New York: Oxford University Press, 2009), 403, retrieved from https://www.shearman.com › Files › FileAttachment

[24] Fedax N.V. v. Republic of Venezuela, Decision on Objections to Jurisdiction on 11 July 1997, ICSID Case No. ARB/96/3, (1998) 37 I.L.M. 1378; (2002) 5 ICSID Reports 186, para. 43, retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0315_0.pdf

[25] Michael Waibel, 19 ICSID Reports (Cambridge, University Press, 2021) (pp.1-57), 24, Retrieved from https://www.researchgate.net/publication/348383113_Subject_Matter_Jurisdiction_The_Notion_of_Investment#pf2d

[26] Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria, Award of 10 January 2005, ICSID Case No. ARB/03/08, para. 14 (i), retrieved from https://www.italaw.com/cases/323

[27] Supra note 26, para. 14 (ii)

[28] Supra note 26, para. 14 (iii)

obviously contribute to economic development must be excluded from the Convention's protection. Any concept of economic development, if it were to serve as a yardstick for the existence of an investment and hence for protection under ICSID, should be treated with some flexibility. It should not be restricted to measurable contributions to GDP but should include development of human potential, political and social development and the protection of the local and the global environment[29].

5) **Regularity of profit and return -** should mean that the investor thanks to the investment with a certain regularity prescribed in the contract receives a profit. an agreement premised on a one-off lump sum payment is unlikely to qualify as an "investment"[30]. However, as noted in the case Biwater v. Tanzania such a characteristic will not be applied if the project causes losses in a certain period of time.[31]
6) **Territoriality** - which could be understood as the need for investment to be directed to the territory of a particular state, which later becomes a party to the case.

D) **The parties**

The mixed nature of investment arbitrage exists through the involvement of the host state, on the one hand, and the private investor, on the other. The jurisdiction of the Center extends to the States Parties to the Convention.[32] A list of Contracting States is maintained on the Center's website[33].

The determining factor for the status of the state is the time of registration of the request for arbitration by the Secretary General of the Center. Interestingly, a state may consent to the jurisdiction of the Center before becoming a contracting state, but such consent will have legal force only if the state satisfies the requirements of the contracting party. The state may conduct business with investors through a central authority, territorial entity, specialized state body or otherwise, and the violation of international law, in accordance with the international law of state responsibility, will be attributed to the state.[34]

[29] SCHREUER, Christoph H., The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 2nd ed. (Cambridge: Cambridge University Press, 2009), paras. 173-174, retrieved from https://books.google.ee/books?hl=ru&lr=&id=VCVbBgAAQBAJ&oi=fnd&pg=PR9&ots=YuQ8aiXzIv&sig=fYVUQTKj1gEzKNYVdnassQmcSjo&redir_esc=y#v=onepage&q&f=false

[30] Biwater Gauff (Tanzania) Ltd., Claimant V. United Republic Of Tanzania, Respondent, Icsid Case No. Arb/05/22, Award, July 24, 2008, para. 233 (b) Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0095.pdf

[31] Supra note 30, para 237.

[32] ICSID Convention 1965, ICSID Worldbank, Art. 1; Retrieved from https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf

[33] https://icsid.worldbank.org/about/member-states/database-of-member-states

[34] Liability of States for International Illegal Actions (2001) Articles developed by the International Law Commission (ILC) in 2001, Article 4 (1), retrieved from https://casebook.icrc.org/case-study/international-law-commission-articles-state-responsibility

In most cases, investors are legal entities, although there are no reservations about an individual as a plaintiff. Interestingly, investment arbitrage under the preamble to the Convention is designed to protect private investment. In CSOB v. Slovakia, the defendant challenged the tribunal's jurisdiction because the plaintiff was a bank in the Czech Republic, which he considered a public body rather than an independent commercial entity. However, the tribunal disagreed with this argument and explained that jurisdiction did not depend on whether the company belonged in part or in full to the government. The key issue is the nature of the activity, so banking should be seen in the context of its nature (which is commercial), not its purpose. [35]

The Convention imposes a positive and a negative requirement on the nationality of the investor[36]: the investor must be a national of one of the Contracting States and not a national of the host State. If the investor refers to an agreement on jurisdiction, he must have the citizenship of one of the member states, in the case of arbitration on the basis of BIT - one of the contracting parties.

For individuals, an additional requirement is the implementation of the above criteria as of two points in time: consent to submit an application to the jurisdiction of the Center and registration of the request with the Center[37]. The Convention also provides for the possibility of bringing an additional object (investor or host state) into the jurisdiction of the Center, if at least one of the states (host state or investor's domicile state) is a party to the Convention.

Another issue is the possibility of plurality on the part of the plaintiff. Such situations exist in the practice of the Center, in particular even cases with several BITs and arbitration according to a larger set of procedural norms. An example is the case of Abaclat et al v. Argentina. It initially had more than 180,000 bondholders, which later fell to about 60,000. They raised the issue of Argentina's non-compliance with government bonds. The Tribunal noted that the bilateral agreement between Argentina and Italy included claims submitted by several applicants in one proceeding. Therefore, in cases where BIT covers investments that can attract a large number of investors, and when such investments require collective assistance to ensure their effective protection (additionally taking into account the homogeneity of the plaintiffs' claims), requiring additional consent to such arbitration or arbitration itself would be contrary to the objectives BIT and spirit of the Convention.[38]

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[35] CSOB v. Slovakia, judgment of 24 May 1999, §§ 15-27. Retrieved from https://jusmundi.com/en/document/decision/en-ceskoslovenska-obchodni-banka-a-s-v-the-slovak-republic-decision-of-the-tribunal-on-objections-to-jurisdiction-monday-24th-may-1999

[36] ICSID Convention 1965, ICSID Worldbank, Art. 25; Retrieved from https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf

[37] Supra note 36, art. 36

[38] Abaclat ei 'al v. Argentina, Judgment of jurisdiction of 4 August 2011, §§ 216, 294-8, 480-92, 506-51. Retrieved from https://www.italaw.com/cases/35

E) **The basis for arbitration.**

A necessary requirement for the jurisdiction of the court is the consent of the host state to arbitration. Participation in treaties plays an important role, but does not in itself establish jurisdiction. Consent is generally given in one of the following ways:

first, the provisions on consent may be included in the agreement between the parties;

second, the provisions on arbitration may be contained in the national law of the host State. Many capital-importing countries have adopted such provisions[39]. Based on the nature of the arbitration settlement, the existence of only a provision in the law will not be enough, but the investor has the opportunity to accept the offer in writing or by implicit action - the initiation of the case;

third way is a bilateral agreement between the host state and the state of the investor's nationality[40]. The inclusion of such provisions is practiced not only in bilateral investment treaties, but also in a number of regional multilateral treaties such as North American Free Trade Agreement [41] and the Energy Charter Treaty[42].

In order to identify the characteristic features of the phenomenon and predict its future changes, it is necessary to analyze its transformation in the historical aspect. The purpose of this work is not to reveal full historical development, so accordingly it would be appropriate to proceed directly to the conclusions with reasoning, which exist as a result of research.

Based on the historical analysis of the formation of **investment arbitration development** of this system can be divided into two main steps:

1. Investor protection system based on domestic law.
2. Investor rights protection system based on international law.

The first stage, could be called domestic one, began its existence with the significant development of arbitration, which occurred in 1794 after the signing of the Treaty of Jay[43], and continued to exist on a practical level until the events of the Russian Revolution of 1917. The

[39] See German Arbitration Act, 1 January 1998, section 1030, retrieved from https://sccinstitute.com/media/29988/german-arbitration-act.pdf ; Polish Code of Civil Procedure, PART FIVE of the ARBITRATION, retrieved from https://www.global-regulation.com/translation/poland/7049655/act-of-17-november-1964%252c-the-code-of-civil-procedure.html ; Republic of Lithuania Law on Investments, 7 July 1999 No. VIII-1312, art. 6, retrieved from https://investmentpolicy.unctad.org/investment-laws/laws/117/lithuania-investment-law

[40] Agreement between the Swiss Confederation and the Islamic Republic fo Pakistan on the Promotion and Reciprocal Protection of Investments, 1995, art. 4, retrieved from https://jusmundi.com/en/document/treaty/en-pakistan-switzerland-bit-1995-pakistan-switzerland-bit-1995-tuesday-11th-july-1995

[41] North American Free Trade Agreement, 1992, Section B, retrieved from https://www.italaw.com/sites/default/files/laws/italaw6187%286%29.pdf

[42] Energy Charter Treaty, 1998, Title 2, art. 4, retrieved from https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf

[43] British-American Diplomacy The Jay Treaty; November 19, 1794, retrieved from https://avalon.law.yale.edu/18th_century/jay.asp

essence of the concept was that the rights of the investor will be best protected by the norms of the domestic legislation of the state, which is in a constant process of development and improvement, which in turn leads to strengthening the level of investor protection. The logic of this position is quite natural and has meaning in a society that directs all its activities to development and improvement. However, in this case the possibility of abuse by the state was not taken into account.

Carlos Calvo, an Argentine lawyer, first drew attention to this in his study published in 1868. He noted that the current system allows the state to reduce the level of protection of private property of its own citizens, while reducing guarantees for property owned by a foreign investor, which can lead to either initially strong guarantees or a possible complete lack of protection of foreign investors.[44]

In addition, Calvo justified his position by the lack of a foreign investor's right to protection from the country's diplomatic services domicile or access to international tribunals. Thus the address to judicial bodies of the foreign state is considered as onerous, with risk of biased consideration.[45]

Despite Calvo's revolutionary views and their validity, the stage of internal defense lasted for almost a century and a half. One of the reasons for postponing a complete rethinking of this approach at the final stage of its existence was the adoption in 1907 of the Drago Porter Convention on the Prevention of the Use of Force to Debt. The convention was based on the Drago Doctrine with proposals made by Porter during the Second Hague Conference. 44 countries voted for the convention. The convention provided for the refusal of its parties to use force to claim treaty debts "levied by the government of one country on the government of another country, as due to its subjects." This convention began to limit the actions of the state not only by domestic law but also by international law.[46]

A continuation and a significant indicator of the obsolescence of the previous approach was the position expressed in 1910 by Elijah Ruth, according to which there is a standard of justice that every state must take into account. The basis of the position was based on the fact that states should not accept the attitude of a foreign state to its citizens in its territory, regardless of the

[44] Carlos Calvo, Derecho Internacional Teörico y Prdctico de Europa y Amirica vol 3 (1896), 138. retrieved from https://books.google.com.ua/books?id=ipNCAAAAcAAJ&printsec=frontcover&hl=ru&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false

[45] Rodrigo Polanco Lazo, Lessons Learned and Lessons to Be Learned: Investment Law & Development for Developed Countries (4-6), retrieved from https://law.yale.edu/sites/default/files/documents/pdf/SELA14_Polanco_CV_Eng_20140430.pdf

[46] Randall Lesaffer, Peace through Law: The Hague Peace Conferences and the Rise of the Ius contra Bellum, retrieved from https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e733

position of citizens of this state, who are either satisfied with the situation in the country or forced to tolerate it.[47]

The system of investor protection on the basis of international law is of paramount importance primarily due to the fact that a foreign investor has the opportunity to seek protection of their rights in a dispute with the state to international commercial arbitration. Thus, the narrow approach to the protection of investor rights only by national courts has disappeared and the obligation of the state to execute the decisions of commercial arbitrations in good faith has been recognized.

After the adoption of the position on the need for international regulation of the protection of foreign property in the countries of the investor, there is a natural problem of an effective mechanism for bringing the state to justice in case of violation of established norms. Fundamental at this stage was the proposal of World Bank Adviser Aron Broches, who initiated and debated the possible scale of international consensus.[48]

Given the controversy within the UN, Broches rightly concluded that the best contribution so far has been to develop effective procedures for the impartial settlement of disputes without attempting to agree on substantive standards. This approach seems artificial, as logic would dictate that any dispute settlement system should be based on a set of essential rules that could be applied. However, Broches argued that from a pragmatic point of view, such an axiomatic approach was neither necessary nor productive. Thus, a system that will resolve conflicts between investors and investment countries does not have to contain the rules according to which it will take place. Given the differences of opinion and the impossibility of reaching a consensus, it will be sufficient to provide a settlement mechanism.[49]

At first glance, Brooch's concept ("procedure before substance") seemed limited and modest. However, this development in 1965 became the essence of the Convention on the Settlement of Investment Disputes between States and Citizens of Other States (ICSID Convention). The success of this concept became apparent when the ICSID Convention quickly entered into force in 1966, and especially in the following decades, a significant number of investment agreements were referred to the established ICSID Center as a platform for dispute

[47] M. Drago and H. Edward Nettles,The Drago Doctrine in International Law and Politics Luis, Duke University Press, Vol. 8, No. 2 (May, 1928), (204-223), retrived from https://www.jstor.org/stable/2506116

[48] John Lewis, Richard Webb, Devesh Kapur, Transcript of interview with ARON BROCHES, WORLD BANK HISTORY PROJECT, Brookings Institution, 1990, page 28, retrieved from https://documents1.worldbank.org/curated/pt/891771468197064100/103397-TRANS-Oral-interview-Brookings-Broches-edited-PUBLIC.doc

[49] Aron Broches, Selected Essays: World Bank, Icsid, and Other Subjects of Public and Private International Law, retrieved from https://books.google.ee/books?id=Vex93znuQmAC&pg=PP5&hl=ru&source=gbs_selected_pages&cad=2#v=onepage&q&f=false

resolution. From the point of view of member states, the main advantage of the system is that investment disputes will become "depoliticized" in the sense that there is a possibility of avoiding a confrontation between a member state and a host state.[50]

As a conclusion to the above information, the following should be noted: there is currently no statutory definition of arbitration. This is due to the desire to maximize the scope of application of the rules that apply to it. Scientific positions differ from the definition of the concept through the submission of a dispute to the use of the most general possible word "process" with the addition of specific characteristics. Investment arbitrage as a narrower concept is also not defined.

As a result of the study, it is proposed that investment arbitration could be considered as a mechanism for resolving disputes between foreign investors and the state, represented by its bodies, which ensures the possibility of investors to demand compensation in case of violation of their legal rights related to investments by the state, by implementation of proceedings outside the state judicial system. ISDS is a unique legal phenomenon because it combines private and public legal elements. It is a consensual, private procedure (although this is questionable in the context of innovation and openness requirements) with binding effect.

In essence, ISDS consists of a legal dispute over investment as the primary cause and main feature. Investment distinguishes this set of cases among others. The necessary conditions are the private party - a foreign investor and the public - the state represented by its bodies.

Investor protection has gone through two main stages of its development: first it was carried out on the basis of domestic law, and later international law. The application of domestic law has not paid off due to the risk of the state lowering standards within the country to benefit from the losses of external investors. An example is the change in the rules of expropriation of property in the direction of expanding the grounds for its implementation. This approach clearly worsens the situation of all entrepreneurs in the state, but it can be used by the state as a measure of influence.

Understanding this led to the idea of creating a mechanism "procedure before the substance" which was the basis of ISDS. Therefore, the international agreement led to the development of a set of universal rules for the implementation of the investor protection process, and later, as a prerequisite for their application, the process of signing BITs and Trade Agreements began. They contained not only the consent of the state for arbitration as a mean of dispute resolution, but also included the principles of investment regimes provided to foreign investors.

[50] Ibrahim F.I. Shihata, 'Towards a Greater Depoliticization of Investment Disputes: the Roles of ICSID and MIGA' in The World Bank in a Changing World(1991) retrieved from https://academic.oup.com/icsidreview/article/1/1/1/756171

1.2. Existing dispute resolution systems

In order to analyze a specific phenomenon, it is worth looking at the picture in general, so one of the ways to identify the positive and negative sides of a phenomenon is to analyze concepts close to it. Talking about investment arbitration separately loses its meaning due to the availability of other ways to resolve investment disputes. In order to fully reveal grounds from the final position, the way to it needs to be demonstrated.

Under traditional international law, investors did not have direct access to international remedies to sue foreign states for violating their rights. They depended on the diplomatic defense of the domicile state. A State exercising diplomatic protection upholds its citizen's claim against another State and enters the process on its behalf.[51]

The Permanent Court of International Justice (PCIJ) in the case of Mavrommatis Palestine concessions explained: it is an elementary principle of international law, according to which a state has the right to protect its citizens in the event of harm to them by acts contrary to international law committed by another state, from which they have not been able to obtain satisfaction in the usual ways. By taking the case of one of its citizens and resorting to diplomatic action or international justice on its behalf, the state actually defends its rights - the right to ensure, in the person of its citizens, respect for the rules of international law.[52]

It should be noted that state protection is difficult to consider as optimal. This is primarily due to the financial and human resources that the state must allocate for business, which not only requires a stable economic situation, but also calls into question the quality. Here it is worth paying attention to the risks of dependence on the political discretion of the state. From the state's point of view, long disputes can lead to a deterioration of international relations, and accordingly, the state may agree to a reduced hearing or at some point refuse to continue.

If the inequality of economic development of different countries, would be taken into account, as consequence it would be visible that such proceedings are disproportionately burdensome for developing countries. Another aspect is that in the process, the state will have unlimited rights as a plaintiff, which will allow it to withdraw the claim, agree to the agreement or completely terminate the defense. As a result, the investor does not control the process in any way.

If the state still decides to exercise diplomatic protection, the one of methods of settlement will be negotiations. If the negotiations have not achieved their goal, it is possible to appeal to the

[51] The International Law Commission adopted Draft Articles on Diplomatie Protection in 2006, United Notions, retrieved from https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf

[52] Mavrommatjs Palestine Concessions Case, 1923 – 1930, PCIJ, Series A, No 2, 12., retrieved from https://www.icj-cij.org/en/pcij-series-a

International Court of Justice. One such case was the case of Elettronica sicula S.P.A. (ELSI) and related assets in a U.S. lawsuit against Italy.

The United States claimed that Italy had prevented Raytheon and Mahletta, the US corporations, from liquidating the assets of their Italian corporation, which belonged to them entirely, which led to the latter's bankruptcy. This violated the Treaty of Friendship, Trade and Navigation between the United States of America and the Italian Republic in 1948, in particular:

- Article III (2): Italy's actions and omissions prevented Rayton and Mahlett from exercising their right to manage and control the Italian corporation;

- Article V (1) and (3): Italy has failed to provide full protection and security in accordance with the requirements of the Treaty and international law;

- Article V (2), according to which the actions and omissions of Italy constitute the seizure of the property of Rayton and Mahlett without just compensation and due process; In the course of the case, the Court came to the conclusion that the right to dispose of real estate was violated not by requisition, but by the unstable financial condition of the company, as the decision on bankruptcy was made by the manager of the company before requisition.

- Article VII, according to which such actions and omissions deprived Rayton and MacLeatt of the right to dispose of their interests in immovable property on terms no less favorable than other Italian corporations;

- Article 1 of the Annex, according to which the treatment of Rayton and Mahlett was both arbitrary and discriminatory, prevented them from effectively controlling and managing ELSI, and impaired their other legally acquired rights and interests;

However, after examination, the Court found that the treatment of the company was equivalent, and in 1968 - better than that provided to domestic companies. As a result, the court voted 4 in favor and 1 against, concluding that the Italian Republic had not violated any provision of the Treaty or its Annex.[53]

Another way to resolve the conflict for the state, which can be briefly mentioned, could be unfriendly measures or countermeasures. As the sovereign and protector of its citizens, the state has a full opportunity to apply negative measures against another state or its citizens on its territories. In the 21st century, it is difficult to consider such behavior in the international arena acceptable. Under normal circumstances, such activities are limited to the prohibition of the use of force.[54]

[53] Elettronica Sicula S.p.A. (ELSI) Сполучені Штати Америки проти Республіки Італія, Рішення від 20.07.1989 ICJ Rep 15, retrieved from https://www.icj-cij.org/files/case-related/76/076-19890720-JUD-01-00-EN.pdf

[54] Charter of the United Nations (UN), 1945, article 2(4) "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". Retrieved from

As a result of researching historical sources, not a large number of examples of dispute resolution in the ways described above was found. Even the rare cases where they have been used have ceased in recent decades. This happened most likely due to the fact that investors have access to international investment arbitration. An additional reason may be that Article 27 (1) of the ICSID Convention[55] restricts the right of a State to provide diplomatic protection or to bring an international action if there is an agreement to arbitration between the investor and the foreign State.

The ICSID Convention aims to minimize interstate litigation that would interfere with the investor-host relationship. In this case, states have the right to prosecute a general violation of international law, namely the obligations arising from bilateral investment treaties BIT. In Lucketti v. Peru, the investor initiated arbitration against the host country under the BIT. The respondent State subsequently instituted interstate proceedings under BIT v. Chile, the investor's country of residence, and requested the suspension of the investor's and the State's proceedings. Peru argued that interpretive priority should be transferred to intergovernmental proceedings. The Investor-State Tribunal rejected the request for suspension of proceedings[56], and Peru subsequently did not continue the interstate proceedings.

The first and easiest step for an investor in the event of a dispute is to go to court. Naturally, in order to prosecute a body of a certain state, a person will go to court in the territory of that state. Most often, according to legal norms of Privat International Law Acts[57], for example, the provisions of the Law of Ukraine "On Private International Law"[58] article 44 “The law applicable to the contract, in the absence of agreement of the parties on the choice of law” the court of the host state will have jurisdiction to consider such a dispute in accordance with the rules of its own legal system, because the dispute will have the closest connection with it.

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https://popp.undp.org/_layouts/15/WopiFrame.aspx?sourcedoc=/UNDP_POPP_DOCUMENT_LIBRARY/Public/Charter%20of%20the%20United%20Nations.pdf&action=default&utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=Cj0KCQjwnJaKBhDgARIsAHmvz6cvHAfrctZ6NG84nL-hTKLpudF_WRA8bRkO9TS0TuGh3egPR0S9nNQaAhnjEALw_wcB

[55] ICSID Convention 1965, ICSID Worldbank, Art. 27 (1); Retrieved from https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf

[56] Lucchetti v. Peru, Judgment of jurisdiction of 7 February 2005, §§ 7, 9. Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0275.pdf

[57] Republic of Latvia, Private International Law Act § 33. Law applicable in absence of choice of law (1) If the law governing a contract has not been chosen pursuant to § 32 of this Act, the contract shall be governed by the law of the state with which the contract is most closely connected retrieved from https://www.riigiteataja.ee/en/eli/526062017004/consolide ; see also Lithuanian Private International Law, Article 1.37. Law applicable to contractual obligations, 4. If no law applicable to a contractual obligation is designated by the agreement of the contracting parties, the law of the state with which the contractual obligation is most closely connected shall apply, retrieved from https://investmentpolicy.unctad.org/investment-laws/laws/117/lithuania-investment-law

[58] Law of Ukraine “On private international law”, article 44, retrived from https://zakon.rada.gov.ua/laws/show/2709-15#Text

For the investor, such a prospect is not attractive, because he may fear: the lack of impartiality on the part of the courts, the interference of the executive in the judicial process, the loyalty of judges to the state. Even if a decision is made in favor of the investor, the state will be able to ignore it.

This is exactly what happened in the case of Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypti[59]. The complainants were investors in two Egyptian corporations, one of which, SIAG, was sold by the Ministry of Tourism in 1989 to develop a tourist resort. The resolution of the expropriation was subsequently overturned by the Supreme Administrative Court of Egypt in 2001, but the property was not returned to the plaintiffs. The plaintiffs appealed to an Egyptian court to settle the dispute, but despite declaring the expropriation illegal, the property was not returned.

The ICSID Convention offers as an option a conciliation procedure[60], which is not common in practice, as it leaves the last word to the parties, but it may be a necessary precondition for arbitration. In the case of SPP v. Egypt[61], Egypt objected to the jurisdiction of the arbitral tribunal, which was based on national law providing for the settlement of disputes "under the Convention (ICSID)" on the grounds that the phrase was insufficient to consent to arbitration. However, the tribunal rejected this argument, noting: "Nowhere in the Convention is it stated that the consent to the jurisdiction of the Center should specify whether the consent is for the purposes of arbitration or conciliation. One consent under the jurisdiction of the Center, the Convention and its implementing regulations is sufficient to choose one of two methods. The Convention leaves the choice to the party initiating the proceedings. "

In conclusion, it is worth noting that the international community has made attempts in various ways to address the issue of resolving disputes between investors and the state**.** Diplomatic protection has not paid off because it requires too many resources from the state and at the same time completely deprives the investor of participation and control in the case. The method of negotiation is a rather weak tool, which clearly requires in case of failure to use the following more stringent methods, as an option to appeal to the International Court of Justice. However, there remains the same fear from the previous method that at some point the state recognizes the case as not worth the resources spent and will stop the protection. Going to court of the host state, as mentioned above, entails risks of application of foreign and unpredictable legislation, bias of the

[59] Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0786_0.pdf
[60] ICSID Convention 1965, ICSID Worldbank, chapter III; Retrieved from https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf
[61] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, retrieved from https://www.italaw.com/cases/3300

system, as well as in case of a positive decision for the investor, ignoring and non-compliance by the state executive services.

Naturally, the access to an independent process in accordance with international rules, with the right to choose the applicable law and direct trustees to resolve the case of arbitrators, ar current stage as far as possible ensures the rights of international investors.

2. SPECIAL PART

2.1. Investor-to-State Dispute Settlement: characteristics and shortcomings

As was described previously in the work people during the history of investment relations tried different ways of resolwing arising disputes. Neither of the classical disput resolution options could be considered as affective in state-ivestore relationships. As result international community came to the constitution of ICSID and signing different treaties establishing investment regime. Currently exist around 2300 international investment agreements (IIAS) in force[62]. Most of them are Bileteral Investment Treaties (BITs) signed between two countries in order to regulate investment relationships. Additionaly, among this amount are Free Trade Agreements (FTAS), such as the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT). They aim to contain additionaly to main threaty provisions investment chapters for the purpose of establishing arbitration dispute settlement mechanism between member States. BITs a lot[63] refer rather to ICSID or to the United Nations Commission for International Trade Law Rules (UNCITRAL) administered by the Permanent Court of Arbitration (PCA) or an ad hoc tribunal as platforms for Investor-to-State Dispute Settlememt (ISDS). This are not the only one istitutions governing investment cases, but most popular as the analysis shows.

Looking back on the history can be clearly understood that ICSID and UNCITRAL are implementation of Brooch's big concept ("procedure before substance"). They, as such, propose no rools on wich graund the case will be solved, because it would be really hard for each state to agree on them. In contrary parties have right to choose the governing law or general princeples in that matter will be applicable. It proposes only the procedure according to which the dispute will be considered.[64]

Like any system, thise one has it’s own picularities which define how the work is done and answer the question what is the real implementation of written rules.

First of all, it is needed to be outlined that idea of isvestor to State arbitration would stay longer as only an abstract model written on the paper if not the existanc of investment state dispute

[62] Mapping of IIA Content, collaborative initiative between UNCTAD and universities worldwide to map the content of IIAs. The resulting database serves as a tool to understand trends in IIA drafting, assess the prevalence of different policy approaches and identify treaty examples; Investment Policy Hub, Retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping

[63] Arbitral Rules - Investment Dispute Settlement Navigator (Investmentpolicyhub.unctad. org, 2017). Retrieved from: http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution

[64] ICSID CONVENTION, REGULATIONS AND RULES, International Centre for Settlement of Investment Disputes, 2006, retrieved from https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf and UNCITRAL Arbitration Rules, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 2014, retrieved from https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf

settlement (ISDS). As obvious or banal as it may sound, the Center and other tribunals are special in that way that they have become a place to ensure constant consideration of investment disputes between an independent state and a foreign investor. In meaning it ensured the transition of isvestor to State arbitration from a theoretical hypotesis to real practice.

Arbitration is a process that **serves the parties**, maximizes their autonomy and is flexible and pragmatic, clearly aimed at resolving a legal dispute, rather than restoring the balance in the rule of law. This goal is realized through the right of the parties to choose independently governing institution, arbitrators, the legislation that will be applied to resolve the dispute and language of the prociding.

ISDS aims to **depoliticize** disputes by removing them from diplomatic intervention and review by domestic courts.[65] As a result of researching the history of the formation of arbitration proceedings, could be concluded that this was the main purpose of the entire system and is currently one of the weaknesses that is criticized.

Speaking about the peculiarities of ISDS, it is necessary to dwell on the final consequence of the case - **the decision**. In order for the parties to have a real reason to apply to the arbitral tribunal and the institution's consideration of the case to be cost-effective, the decision must first of all be final. Clearly, in any activity where a person is involved, there must be a compensation system. In this case, the parties have limited rights to appeal and review the decision. According to article 53(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." [66]

In addition to the fact that the decision must be final, it must have **legal force**. The parties apply to arbitration in order to resolve the dispute and obtain a legal decision that can effectively and efficiently restore their violated rights. Basically, states as sovereigns have no obligation to recognize and enforce decisions against them taken outside the internal judicial system. In this context, international investment agreements play a significant role because due to their dissemination and signing, an investment regime has been created, which imposes obligations on the state.

[65] David Collins, The UK Should Include ISDS in its Post-Brexit International Investment Agreements, page 5, Retrievd from: https://poseidon01.ssrn.com/delivery.php?ID=495104001002067117003068066020117081101069081061084031018005018028083094002113085101000003027026054116046003010025120019025088107048048080009066021112110085085025086039033000103118116116000101096069008126116120066099117005080104018075103124087117101&EXT=pdf&INDEX=TRUE

[66] ICSID Convention 1965, ICSID Worldbank, Section 5. Interpretation, Revision and Annulment of the Award; Retrieved from https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf

Depending on the convention or individual rules that underlie bilateral or multilateral agreements, **the recognition and enforcement** of decisions will vary. As stated in the article 54 (1) of the Washington Convention "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." On the other hand, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards will apply if the arbitration process was conducted according to UNCITRAL rules. This will result in the application of the following rule under the article III of obow mentiond Convention "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles." For a party wishing to enforce a judgment in a particular country, the application of this rule will result in the need for an additional application to a national court for recognition of the arbitral award.[67]

Additionaly worth mentioning that in international commercial arbitration, **confidentiality** is one of the important advantages. However, when it comes to investment arbitrage, the existence of issues of public interest has led to requirements for openness and transparency. This usually involves two areas: access to information and third party participation. As result of transparency demand one of the responsibilities of the ICSID Secretary-General is to publish information on the existence and progress of pending cases[68]. Decisions are published only with the consent of both parties, but the Center must publish fragments of the legal justification for each decision[69].

The progressive system of investment arbitration has made possible real and effective protection of investors' rights. However, like any system, it needs development and transformation because it was not created perfectly at once. According to the statistics given at the beginning of this work global foreign direct investment (FDI) totaled US$1.39 trillion in 2019, slightly less than a revised $1.41 trillion for 2018. According with UNCTAD report published on January 20, 2020 the United States remained the largest recipient of FDI, attracting $251 billion in inflows, followed by China with flows of $140 billion and Singapore with $110 billion.[70]

From this it is easy to conclude that international investment occupies a significant sector of the economy of developed and developing countries, or more simply - it is all about large sums of money. Any sphere of human life where large investments take place always attracts the

[67] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Art. II, III, retrieved from https://www.newyorkconvention.org/english
[68] Rules of Procedure for Arbitration Proceedings (Arbitration Rules), World Bank, Rule 48 (4), retrieved from https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf
[69] Rules of Procedure for Arbitration Proceedings (Arbitration Rules), World Bank, Rule 32, retrieved from https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf
[70] https://unctad.org/news/global-investment-flows-flat-2019-moderate-increase-expected-2020

attention of the public and states seek to control them. As result, the intention to control and protect states from unpredictable decisions of arbitrators has led to criticism of ISDS.

ISDS shortcomings

One of the first reasons ISDS is criticized is lack of consistency[71] To address this issue, it is appropriate to pay attention to the conclusions of the UNCITRAL Academic Forum's (own) "Working Group 3"[72] According to the conclusion recorded in the report "**Inconsistency** was considered more of a concern where the same investment treaty standard or same rule of customary international law was interpreted differently in the absence of justifiable ground for the distinction." It should be noted that the existence of many different decisions as well as the interpretation of the provisions of the contract in different ways in different arbitration proceedings is not considered inconsistent. This is primarily due to the uniqueness of each dispute and in the case of application of the general rules of interpretation to the BIT or treaty, different conclusions are a natural consequence. The article 31 of the Vienna Convention on the Law of Treaties[73] gives general scope for theaties interpretation with regard to their object and purpose. The difficulty is that investment agreements are concluded with specific object and purpose and interpretation in their context can lead to inconsistencies.

In order to go deeper and understand this issue there is a need to clearly answer three questions:

1) **What does it mean inconsistency**?

An understanding of this concept can be illustrated by comparisons with the judicial system of State and the European Court of Human Rights.

When talked about the judicial system of the State, is clear that it all starts with the rules of law (substantive and procedural). In some states (in Ukraine, for example) in the process of applying the law, the court is guided by the decisions of the Supreme Court, which are binding.[74] These decisions are called regulations on the application of certain rules of law and are designed to help courts apply the law equally in difficult situations. Thus a system arises in which there are rules of law independent of the judiciary, which regulate public relations, and the interpretation of

[71] Juan Pablo Charris-Benedetti, The proposed Investment Court System: does it really solve the problems?, Revista Derecho del Estado, Print version ISSN 0122-9893, Rev. Derecho Estado no.42 Bogotá Jan./Apr. 2019, retrieved from http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0122-98932019000100083#fn6

[72] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018), United Nations Commission on International Trade Law, retrieved from https://undocs.org/pdf?symbol=en/A/CN.9/935

[73] Vienna Convention on the law of treaties (with annex), Vienna, 23 May 1969, Unated Nation – Treaty Series, art. 31 "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", retrieved from https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf

[74] Civil Procedure Code of Ukraine, 2004, Art. 263 (4)" When choosing and applying the rule of law to the disputed legal relationship, the court takes into account the conclusions on the application of the relevant rules of law set out in the decisions of the Supreme Court.", Retrieved from https://zakon.rada.gov.ua/laws/show/1618-15#Text

these rules, which is based on the repeated application of the rules and court decisions. This mechanism is aimed at ensuring the legal stability of decisions of judges of all instances.

This approach is partly similar to the Anglo-Saxon, because here the legal interpretations in previous court decisions have the force of law for future consideration.[75]

As for the European Court of Human Rights, the situation here is different from the purely Romano-German approach to the judicial system. But the essence is the same as in the case of generalizations in the judicial system of Ukraine. In order to ensure the work of courts in one line, so that decisions do not differ radically from each other in very similar circumstances, courts have a duty to adhere to previous interpretations.

Both mechanisms exist to ensure legal certainty. Their purpose is to reassure the parties that the manner in which their case will be dealt with and the decision taken will not go beyond what is expected. It is possible to come to a conclusion that consistency is the justification of the legal expectations of the parties to resolve the dispute.

2) What causes it?

Human nature could be considered to be the first and most obvious cause of inconsistency. Regardless of the professional level of the judge, whether his responsibility in the process he remains a person and may fall under the moral influence of the parties or simply the facts of the case. However, it would be short-sighted and very naive to blame human nature for everything. After all, disputes between the parties were considered by the people and will be considered in the same way in the future.

The next factor is the complexity and often multifaceted nature of investment disputes. The need to simultaneously take into account a large array of information complicates the case.[76] It is also necessary to take into account the complexity of the investment agreement and the provisions of the legislation applicable in a particular case. As well as the duration of the process wich on average is three years.[77] However, there are cases such as Abaclat and Others v. Argentine Republic[78] the solution of which lasts 8 or more years. As one of the longest cases considered by the Center can be mentioned the case of Victor Pey Casado and President Allende Foundation v.

[75] The European Court of Human Rights: Questions & Answers for Lawyers, 2020, page 5, question 5, retrieved from https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PD_STRAS/PDS_Guides___recommendations/EN_PDS_2020_guide-CEDH.pdf

[76] It is difficult to talk about average numbers, but analysis has shown that tribunal decisions are usually 50 pages long, without taking into account any additional documents during the proceedings. See Alapli Elektrik B.V. v. Republic of Turkey, ICSID Case No. ARB/08/13, and Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, and others.

[77] Duration of ICSID Arbitration – The Neverending Arbitration, 04/12/2016 by Aceris Law LLC, Retrieved from https://www.acerislaw.com/duration-icsid-arbitration-neverending/

[78] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic), retrieved from https://www.italaw.com/cases/35

Republic of Chile[79]. It lasted 19 years from 1999 to 2020 and ended with the annulment of the tribunal's decision.

Finally, it is reasonably to point out that ISDS is not a hierarchical system of bodies, it is a model for resolving investment disputes, which is implemented on the basis of various platforms that exist either as an institution uniting arbitrators (as an example Center) or as ad hocke tribunals, which are formed for the purpose of solving a particular case. Ensuring consistency in such conditions is not that difficult, the question arises whether it is even possible. Therefore, the report of Working Group III (Investor-State Dispute Settlement Reform) states "that seeking to achieve consistency should not be the detriment of the correctness of decisions, and that predictability and correctness should be the objective rather than uniformity."[80]

3) What are outcomes?

This question is best answered through example. First we will look into National Grid plc v. The Argentine Republic[81] and BG Group v Argentine Republic[82] cases. On the core the cases were based on various issues, lets refer to the decisions regarding constant security.

Before moving on to the position of the tribunal, it should be noted that the issues in both cases were decided on the basis of provisions Article 2(2) in the UK-Argentina BIT[83]. In both proceedings Calaimants argued that "by taking the Measures the Respondent withdrew the protection and security previously granted to its investment" and "that while this (fair and equitable treatment) standard of protection has been mainly applied in situations of physical protection of real and tangible property, such protection may extend to other circumstances."[84]

In the first case National Grid plc v. The Argentine Republic tribunal agreed that "the obligation to protect and provide constant security of the Contracting Parties is not limited to physical assets and situations involving physical threats or destruction" and that "Article 2(2) does not provide for such limitation nor limits the protectionto physical assets."[85] The tribunal thus took

[79] Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, retrieved from https://www.italaw.com/cases/829

[80] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018), paragraph 26, United Nations Commission on International Trade Law, retrieved from https://undocs.org/pdf?symbol=en/A/CN.9/935

[81] National Grid plc v. The Argentine Republic, UNCITRAL, 2006, https://www.italaw.com/sites/default/files/case-documents/ita0555.pdf

[82] BG Group Plc. v. The Republic of Argentina, UNCITRAL, 2007, retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf

[83] Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the promotion and protection of investments, 1991, Article 2 (2) "Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party.", retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/273129/2278.pdf

[84] National Grid plc v. The Argentine Republic, UNCITRAL, 2006, paragraph 181-182; BG Group Plc. v. The Republic of Argentina, UNCITRAL, 2007, paragraph 318. retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0553.pdf ;

[85] Supra note, paragraph 187;

into account the arguments based on a study by UNCTAD[86] put forward by the Calaimant and stated “the phrase “protection and constant security” as related to the subject matter of the Treaty does not carry with it the implication that this protection is inherently limited to protection and security of physical assets. This conclusion is reinforced by the inclusion of this commitment in the same article of the Treaty as the language on fair and equitable treatment.”

In the second case BG Group v Argentine Republic the tribunal came to the opposite conclusion that “notions of "protection and constant security" or "full protection and security" in international law have traditionally been associated with situations where the physical security of the investor or its investment is compromised.”[87]

As result of having two different decisions regarding interpretation of the same provision of the investment agreement ISDS loses the level of user confidence in the reliability of the system. The relevance of the existence of the whole concept is questioned, because there is no point for an investor to go to unpredictable and contradictive in their decisions tribunals.

The second reason for criticizing ISDS araise from the first and this is the need for an appellate body.

According to various sources, the appellate court is exactly what ISDS lacks.[88] The main points with which the presence of such a institution will cope are:

1. Lack of predictability;
2. Coherence in the practice of ISDS;
3. Limited possibility of checking the final decision for its correctness.

As seen from the example of the judicial system (in my case of Ukraine, but same is applicable for almost each state), the appellate instance is the usual way to deal with inconsistancy. This position reasonably exists, because it is difficult to imagine how separate institutions without hierarchical subordination will really take into account each other's decisions and how it will be determined which provisions are correct and which should be used in resolving cases. Basically, this situation exists now, the cases are independent, the decisions are unique and not binding on

[86] National Grid plc v. The Argentine Republic, UNCITRAL, 2006, paragraph 182 “As the term ‘investment’ has expanded to include a broader variety of intangible forms of property, the range of protection that an investor may argue is required by the obligation of full protection and security has potentially expanded. For example, where ‘investment’ includes intellectual property, an investor may contend that the obligation to exercise reasonable care to protect intellectual property against private infringement may require making available some form of remedy against those who infringe copyrights or patents.” retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0553.pdf ;

[87] BG Group Plc. v. The Republic of Argentina, UNCITRAL, 2007, paragraph 324, retrieved https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf

[88] Juan Pablo Charris-Benedetti, The proposed Investment Court System: does it really solve the problems?, Revista Derecho del Estado, no.42 Bogotá Jan./Apr. 2019, pharagraph 2.1.2, retrieved from http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0122-98932019000100083#fn23

future cases. Therefore, tribunals have no obligation to take them into account. This results in the unpredictability of the system.

But on the other hand, if returned to the cases dealt with in the previous paragraph, the tribunals refer to the previous decisions of other tribunals to support their own position.[89] This phenomenon could be defined as self-regulation. It is natural that arbitrators seek support for their decisions. And the most obvious place for this will be the decisions of previous tribunals.

It will be appropriate to pay attention to the thought from the Report of Working Group III regarding review of avords: "It was noted that existing review mechanisms addressed the integrity and fairness of the process rather than the correctness of the outcomes, and therefore consideration should be given as to whether they were adequate to address issues of consistency, accuracy and correctness of awards[90]".

This remark of the working group is directly related to the third point mentioned above. It looks like the system has reached a stalemate, because it is impossible to choose between process and result. Both elements are important for the proceedings.

However, will the appeal body really solve all the problems? It is difficult to answer this question unequivocally. We know how the appellate court works in the judicial systems of the states, so lets transfer this template to the ISDS and predict the consequences.

What are the risks of having an appellate instance?

1. At stake is one of the main benefits of investor state dispute settlement – finality of the decision. It cannot be said that they will challenge every case lost by the state or the investor, but there is a great potential risk that the dissatisfied party will appeal. A relatively higher price for appellate proceedings can be set as a precautionary mechanism, but reasonable limits must be met, as the decision may indeed be erroneous.
2. Increasing the cost of the process. No matter if the cost will be greater than the main dispute settlement, appeal is always additional outlay. Arbitration already is not a cheap process and it will make it even more expensive.[91]
3. Extension of dispute resolution time. According to 2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration: "Of the 110 new cases published between June 2017 and May 2020, the mean length of proceedings is five and a half years. This means

[89] National Grid plc v. The Argentine Republic, UNCITRAL, 2006, par 188, https://www.italaw.com/sites/default/files/case-documents/ita0555.pdf

[90] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018), paragraph 23, United Nations Commission on International Trade Law, retrieved from https://undocs.org/pdf?symbol=en/A/CN.9/935

[91] Matthew Hodgson, Yarik Kryvoi, Daniel Hrcka, 2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration, page 10, retrieved from https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf

that recent proceedings last one year and six months longer than those which decisions were published before June 2017."[92] It is difficult to adequately predict the duration of appeals, but it will definitely be extra time and thus the case will take more than six years on average.

Finally, let's pay attention to statistics from the International Arbitration Survey: Improvements and Innovations in International Arbitration.[93] According to it 61% of respondents did not favour the inclusion of an appeal mechanism in investment treaty arbitration, the majority (51%) of those who support the introduction of this mechanism would prefer external appellate supervision by an international court. Understanding the existence of a reason for the establishment of an institution for the review of cases, but the reluctance to create an appellate court may primarily be associated with the fear of continuing the already long duration of investment cases. One way to resolve this situation may be to set clear time limits for the case.

As for the third it is worth to consider lack of impartiality.

As originally constructed in the ISDS system, the parties independently select arbitrators to resolve the dispute. The arbitrator may be one and the parties jointly agree on the candidate, or usually 3 of them so that each party can choose 1 person whom it trusts and the arbitrators chose a third party or also by agreement of the parties. This appointment mechanism aims to eliminate bias. No complaints of bias on the part of the arbitrators were found during the study, but the issue of impartiality still arises.

First of all, let's pay attention to the **"double-hat dilemma"**. It concerns the appropriateness of lawyers acting as counsel and arbitrator in cases that raise largely the same or similar legal issues.[94]

The danger is the presence of previous experience in a particular issue, which on the one hand could be considered positive, because such a person will be deeply versed in specific legal issues, but on the other hand it more than likely leads to a narrow view of the situation. Having previous experience, consciously, and sometimes unconsciously, a person tends to base all his subsequent judgments on it.

[92] Supra note 87, page 32
[93] 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, Retrieved from https://iaa-network.com/wp-content/uploads/2018/11/White-Case-and-Queen-Mary-2015-survey.pdf
[94] Horvath, G. J. and Berzero, R. Arbitrator and Counsel: The Double-Hat Dilemma. Transnational Dispute Management (TDM). 2017. Retrieved from: https://www.transnational-dispute-management.com/article.asp?key=1985

Secondly existence of this issue affects the reputation of the ISDS system. This is very undesirable to have a situation in which one person combines two roles at the same time and thus loses the trust of the parties in both cases.[95]

As an example where arbitrator was challenged by one of the party the case ICS Inspection and Control Services v Argentina could be taken. The Responded stated that the appointed by the Claimant arbitrator and his law firm was simultaneously representing investors in another ISDS proceeding against the Respondent. Despite the fact that this information was disclosed upon acceptance of appointment and factually cases were unrelated, the deciding authority stated that the arbitrator's role as counsel placed him "in a situation of adversity" against the Respondent, giving rise to objectively justifiable doubts as to the arbitrator's impartiality and independence.[96]

Examples[97] of unsuccessfully challenged arbitrs could be also given. The statistic provided in the article "The Ethics and Empirics of Double Hatting"[98] that in 509 of the examined cases (47%) at least one of the appointed arbitrators was simultaneously acting as legal counsel in at least one other ISDS proceeding and in 118 of the examined cases (11%), while there was no double hatting by the relevant arbitrators, at least one of the legal counsel involved in the case was simultaneously acting as an arbitrator in at least one other ISDS proceedings.

On the one hand, this issue can be addressed by introducing appropriate safeguards in international investment treaties as has been done in the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), the provision states: members of the permanent investment Tribunal established pursuant to CETA "shall refrain from acting as counsel or as

[95] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-sixth session Vienna, 29 October–2 November 2018, Possible reform of investor-State dispute settlement (ISDS) Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS, Retrieved from https://undocs.org/en/A/CN.9/WG.III/WP.151

[96] ICS Inspection and Control Services Limited v Argentine Republic (I), PCA Case No. 2010-09, Decision on Challenge to Arbitrator (17 December 2009), Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0415.pdf

[97] See as examples: Telekom Malaysia Berhad v The Republic of Ghana, District Court, The Hague, Challenge No. 17/2004, Petition No. HA/RK 2004.778 (5 November 2004), "After it is generally knovvn that in (international) arbitrations. Iawyers frequently act as arbitrators. Therefore, it could easily happen in arbitrations that an arbitrator has to decide on a question pertaining to which he has previously. in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had not defended such a point of view before. Therefore, in such a situation. there is, in our opinion, no automatic appearance of partiality vis-a-vis the party that argues the opposite in the arbitration" Retrived from https://www.italaw.com/sites/default/files/case-documents/ita0922.pdf
Also Vito G. Gallo v The Government of Canada, UNCITRAL, PCA Case No. 55798, Decision on the Challenge to Mr
J Christopher Thomas, QC (14 October 2009). According to Claimant "circumstances exist that give rise to justifiable doubts as to [Mr. Thomas'] impartiality and independence to continue serving as arbitrator appointed by the Government of Canada." The arbitrator was simultaneously advising the government of nondisputing State Party of NAFTA and as result requested to choose between continuing to advise Mexico and serving as an arbitrator in following case. Retrived from https://www.italaw.com/sites/default/files/case-documents/ita0352.pdf

[98] Malcolm Langford, Daniel Behn, and Runar Hilleren Lie, 'The Ethics and Empirics of Double Hatting', 6:7 ESIL REFLECTION (2017), retrieved from https://esil-sedi.eu/post_name-118/

partyappointed expert or witness in any pending or new investment dispute under this or any other international agreement."[99] This is quite a possible way out of the situation, but a large number of agreements have already been signed and their revision and addition will create an excessive burden on the contracting countries, which can be avoided by choosing the introduction of general regulation.

As a means of regulation that will close the problem can be considered the introduction of a code of conduct. There is currently no such binding code for lawyers and arbitrators in international investment arbitration. In May 2020[100] ICDIS and UNCITRAL published the first and than in April 2021 the second[101], and recently in September 2021 the third[102] draft of the Code of Conduct for Adjudicators in International Invesment Disputes.

In the last draft, Article 4 refers to the "double hatting" question. An unambiguous position does not yet exist, there are three options for a possible settlement:

The first is an absolute prohibition on double hatting. It should be noted that such an extreme approach to resolving the issue on the one hand will completely solve it, and on the other hand will significantly limit the freedom of the parties to choose an arbitrator independently and at their own discretion.

The second is a modified prohibition. According to option 2 parties have the right to agree. In the absence of direct and prior consent, the ban on the combination of roles can be equated to that specified in the first option.

The third is a full disclosure with option to challenge. The most flexible version of the rule, which on the one hand imposes on the future arbitrator the obligation to fully inform the parties of his involvement in other similar cases, but does not require separate consent of the parties. They have the right to reject the candidacy of an arbitrator or to challenge it in the future. Such regulation seems to be the mildest and at the same time really able to positively affect the problem.

[99] Comprehensive Economic and Trade Agreement, 30 October 2016, Ch 8, art 8.30, Retrieved from https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/

[100] Draft Code Of Conduct For Adjudicators In Investor-State Dispute Settlement, May 2020, the Secretariats of ICSID and UNCITRAL, Retrieved from https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_ISDS.pdf

[101] Draft Code of Conduct for Adjudicators in International Investment Disputes April 19, 2021, Version Two, the Secretariats of ICSID and UNCITRAL, Retrieved from https://icsid.worldbank.org/sites/default/files/draft_code_of_conduct_v2_en_final.pdf

[102] Draft Code of Conduct for Adjudicators in International Investment Disputes September 2021, the Secretariats of ICSID and UNCITRAL, Retrieved from https://icsid.worldbank.org/sites/default/files/documents/Code_of_Conduct_V3.pdf

Another aspect of lack of impartiality is the issue of reappointment.[103] It is seen as a hidden financial motivation of arbitrators to be involved in the following cases. It is obvious that a professional with a qualification in a certain field will have an interest in staying in it and leading an active practice. Most likely, such a narrow profiling would lead to positive consequences and high professionalism, but there is always a risk that participation in a large number of similar cases will lead to the formation of a one-sided position and prejudice. It is also worth looking at this issue from the other side, namely the arbitrator's sense of duty to the party that elected him. Such a subtle inner feeling will be difficult to detect or directly regulate through the rules of the same Code of Conduct, but according to the critics there must be a limit to the number when the choice by the same party of the same arbitrator in several cases will arouse suspicion. As an example of such a situation we can consider the arbitrator Prof. Brigitte Stern who has been elected seven times in arbitration involving the Bolivarian Republic of Venezuela.[104]

The complexity of regulating this issue is obvious, because it will be very difficult to call the simple establishment of a limit in a certain number of cases objective. How to calculate a specific number? Perhaps this is the reason why the Draft Code of Conduct for Adjudicators in International Investment Disputes address this issue otherwise. The provisions of paragraph (b) of Article 3 (1) "encompasses the obligation not to (b) be influenced by loyalty to a Treaty Party, or by loyalty to a disputing party, a non-disputing party, or a non-disputing Treaty Party in the IID" seems like an attempt without naming the problem as such to resolve it through preventive provisions.

As the fourth point of criticism lack of transparency will be considered.

As mentioned earlier in the section on the history of the formation of the system of international investment arbitration, the principles and rules used for international private arbitration are taken as a basis. The problem is that investment arbitrage involves not only private parties trying to resolve a dispute between them, one of such parties is the state, a public entity and, accordingly, the issues it decides are in **the public interest**.

[103]Juan Pablo Charris-Benedetti, The proposed Investment Court System: does it really solve the problems?, Rev. Derecho Estado no.42 Bogotá Jan./Apr. 2019, para. 2.2.2. Reappointment, Retrieved from http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0122-98932019000100083#fn23

[104] Prof. Brigitte Stern, International Centre for Settlement of Investment Disputes, World Bank Group, Experience in ICSID Proceedings, namely Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U., and Kimberly-Clark BVBA v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/18/3); Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/14/10); Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/23); Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/9); Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/5); Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/08/3); Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/04/6); Retrieved from http://icsiddev.prod.acquia-sites.com/resources/databases/arbitrators-conciliators-ad-hoc-committee-members/profile?cvid=91

Failure to take into account the public interest puts the interests of the population of a particular state at risk. Closed process and confidentiality block the access of state democratic entities to monitoring the balance and adequacy of both the process and the decision taken. On the one hand, the reasons for the importance of confidentiality are clear, it is easier for the parties to discuss and resolve internal issues without involving outside audiences. This best ensures the investor's interest in keeping important sensitive information secret.

On the other hand, it should be noted that when investing in a foreign country, any investor must be aware of the public component, namely the public interest, and agree in advance, in case of contradictions, to resolve them openly. As of now, investment and free trade agreements have begun to include provisions for publication in Web-accessible versions of all key documents or at list general transparency provisions.[105]

Related to this issue can be considered **the possibility of third party to participate in the process as amicus curia**. An amicus curiae brief is a written submission to a court in which an amicus curiae (literally a "friend of the court:" a person or organization who/which is not party to the proceedings) can set out legal arguments and recommendations in a given case.[106]

One of the cases in which the amicus curiae brief mechanism was used is Methanex Corporation v. United States of America[107] The reasoning for requesting to submit an Amicus Curiae brief to the Tribunal by the International Institute for Sustainable Development was folloving: "The legal issues raised in this case are of immense public importance. The claim of Methanex under Article 1105 raises both procedural and substantive issues concerning how a government can make environmental laws and the scope of those laws. The Methanex claim under Article 1110 raises critical questions concerning the definition of the concept of "expropriation" and its relationship to the regulatory function of governments, often referred to under international law as the government's "police powers."[108] In the case the commercial issue of investment was considered and resolved as the main, but form the view of the IISD the consequences of such a decision were important for the public regarding the limits placed by NAFTA on governmental authority. With regard to such a request, the tribunal concluded that no rules under which the arbitration process is conducted prohibit the involvement of a third party. There is no rule in

[105] Howard Mann, Aaron Cosbey, Luke Peterson, Konrad von Moltke, Comments on ICSID Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration", page 8, 4.3 Publication of awards, retrieved from https://www.iisd.org/system/files/publications/investment_icsid_response.pdf

[106] Term Amicus curiae brief, European Center for Cpmstitutional and Human Rights, retrieved from https://www.ecchr.eu/en/glossary/amicus-curiae-brief/

[107] Methanex Corporation v. United States of America, UNCITRAL, 1999, Retrieved from https://www.italaw.com/cases/683

[108] PETITION TO THE ARBITRAL TRIBUNAL, In the Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules between Methanex Corporation, Claimant/Investor and United States of America, Respondent/Party, para. 3.1, retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw9096.pdf

NAFTA that explicitly provides for the procedure of involving a party as amicus curiae. However, the provisions of Article 1120 (2) of the NAFTA instructs in pertinent part that the UNCITRAL Arbitration Rules "shall govern the arbitration except to the extent modified" by Section B of the NAFTA. That is, the governing rules allow the Tribunal to accept amicus submissions to the extent it finds them appropriate.[109]

One of the critics' prejudices about such third-party involvement is the fear that it will overwhelm the role or resources of the litigating parties, or distort the process due to overwhelming (but one-sided) third party submissions[110] Subsequently, in the case of Methanex Corporation v. United States of America three independent and non-governmental institutions have applied to join. However, it is difficult to call such a number burdensome, because all requests were submitted by institutions together as a solid one. The risk of overloading the tribunal cannot be ruled out, but it should be treated in balanced way.

It is not possible to state unequivocally whether the positions and arguments of the institutions involved as a third party had sufficient influence on the process, but in the end the tribunal ruled in favor of the United States stating that the ban on the use or sale in California of the gasoline additive MTBE was lawful.[111]

As a positive consequence of the participation of third parties should be considered primarily the raising of issues of public interest. Because even though one of the participants in the investment arbitration is a public entity, the state, the issues considered in the process are commercial in nature. Ensuring the right of independent entities to express a position on issues of public interest on the one hand will ensure that this interest is taken into account on the other hand will simplify the task of the tribunal to study specific legal issues of public nature.

In conclusion, ISDS is currently the most common dispute resolution mechanism between the investor and the host country. The advantages of ISDS include: first of all, the launch of a universal and unique solution to ensure the rights of investors and states. After all, the system as such is already an achievement. The arbitration process is entirely aimed at serving the parties with the maximum allowable flexible adaptation of the rules to their needs. Next is the depoliticization of disputes by removing them from the jurisdiction of national courts, as well as involving the

[109] Statement Of Respondent United States Of America Regarding Petitions For Amicus Curiae Status, In The Arbitration Under Chapter Eleven Of The North American Free Trade Agreement And The Uncitral Arbitration Rules Between Methanex Corporation And United States Of America, page 2, part I, Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw9100.pdf

[110] Howard Mann, Aaron Cosbey, Luke Peterson, Konrad von Moltke, Comments on ICSID Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration", page 8, 4.4 Participation of third parties, amicus curiae, retrieved from https://www.iisd.org/system/files/publications/investment_icsid_response.pdf

[111] Final Award Of The Tribunal On Jurisdiction And Merits, 2005, In The Arbitration Under Chapter Eleven Of The North American Free Trade Agreement And The Uncitral Arbitration Rules Between Methanex Corporation And United States Of America retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf

investor directly in resolving an issue that concerns and is primarily important to him. The fourth is the finality of the decision. Although the recognition and enforcement of a decision will vary depending on the rules under which the specific proceedings were conducted, the provisions on possible revision, revocation or non-enforcement are very limited. This first and foremost provides legal certainty, saving time and money.

Regarding the criticism of ISDS, it should be noted the lack of consistency due to the fragmentation of the platforms on which cases are resolved and the lack of a universal body with the authority to unify legal positions from the decisions taken. This leads to legal uncertainty, calls into question the effectiveness of the system, since different solutions to substantially the same issues on the basis of the same BIT seems to be unacceptable.

An additional point is the lack of an appellate body. Although the positive characteristics of the system indicate the finality of the decision, there is a position on the need to pay more attention to the predictability, consistency and legal correctness of the decision, even if it will lead to additional time and material costs.

The question of impartiality arises in the context of the "double-hat dilemma". The limited offers of the professional arbitrators market, the right of the parties to choose a particular arbitrator and the involvement of arbitrators in related roles of counsels, legal advisers or experts have led to community concern as to whether such an arbitrator can remain impartial in each case. In the case of related roles, the presence of experience and the formed position is a positive aspect. After all, such participants in the process are not required to be impartial. However, when the experience and the formed position are combined in the person of the arbitrator, who is called to make the final decision in the case, this doubt has no place.

The issue of reappointment is also worth mentioning here. The risk of subconscious loyalty of the person to the party who elected him, increases if such election occurs several times in a row. However, if the previous aspect is attempted to be regulated through the provisions of the Code of Conduct, the same approach in this matter does not seem possible. It may be prohibited to fully combine roles or require full disclosure of all information about the involvement as counsel, representative, legal advisor or expert in another case with one of the parties, but to determine so simply after which case with the same party the arbitrator ceases to be biased is not possible. A specific number will not be justified, and accordingly not be accepted by the community, the definition of a number of specific conditions or the creation of a test for "professional suitability" also seems insufficiently justified.

As already mentioned, investment arbitrage originated on the basic ideas of commercial arbitration, which includes as one of the characteristics - confidentiality. However, historical development and experience have shown that the public interest in matters involving the state is

significant. Failure to take it into account potentially through the adoption of legal positions and directly through the loss of the state budget endangers the entire population of the state.

In this context, not only is access to case materials and the publication of final tribunal decisions considered, but also the possibility of involving a third party as amicus curia. It is assumed that the combination of these inseparable provisions, because to be involved as a third party is needed to know about the existence and details of the case, will provide an acceptable level of consideration of public interest in the investor to state disputes.

2.2 Concept of an Investment Court System

Reasons for the need to introduce a new system for resolving investment disputes.

As discussed in the previous section, a number of shortcomings seen by members of the international community in ISDS have led to the development of draft changes. In such situations, there are two main possibilities: to change the old system through the introduction of new rules or to create a new system to completely replace the old one. One of the main tasks of this work is to determine which way will be more efficient and safer.

The entry into force of the Lisbon Treaty on 1 December 2009 set a changed vector for the EU's movement. In accordance with articles 206 and 207 Treaty on the Functioning of the European Union[112] the EU was endowed with exclusive competence over foreign direct investment. This enabled the EU to become an active player. Namely, by making changes to the TFEU, the Union was given the opportunity to[113]:

1. **form a common approach** to investment policy and, as a result, increase the importance of the EU as a market player and provide investors with better access to third country markets.
2. **provide investors with a better level of protection through control of investment agreements**. For countries with lower levels of development, transferring the right to conclude investment agreements to the EU level would potentially mean ensuring higher standards for their investors. First of all, due to the fact that one starting point will be chosen as the minimum standard of investor protection in BIT, below which it will not fall. Now

[112] TREATY OF LISBON, AMENDING THE TREATY ON EUROPEAN UNION AND THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, 17.12.2007, Official Journal of the European Union 2007/C 306/01, art. 206, 207, retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12007L%2FTXT

[113] WOOLCOCK, Stephen, London School of Economics, UK Overseas Development Institute, UK, THE EU APPROACH TO INTERNATIONAL INVESTMENT POLICY AFTER THE LISBON TREATY, 21/10/2010, page 9, retriewed from https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/433854/EXPO-INTA_ET(2010)433854_EN.pdf

there is a position that such a minimum standard will be the German Model BIT.[114] On the other hand, the EU as an active and powerful player in the international market will have an influence in the formation and signing of agreements. This can be both a positive and a negative point and will depend only on the course chosen by the union.

3. **promote EU norms and values in the field of sustainable investment.** This means being able to fulfill the objectives for the EU's external actions set out in Arts 206 and 207 TFEU. The main ones are the harmonious development and liberalization of world trade. This also includes the promotion of democracy, deepening respect for human rights, and sustainable development.[115]

Involvement is manifested through the power to influence the system of international investment law and arbitration regulating the policies of member states in this area.

Significant and abrupt changes never take place in one stage. Thus, the amendments to the exclusive competence of the Union have raised a number of pressing issues that need to be addressed for the proper functioning of the investment system.

In general, **the EU faces two main issues - need for:**

1. determination of the position of the Union on international investment policy;

2. transition from disparate bilateral investment treaties of MS to a common EU approach.

Both issues are important, but the second can be considered as more pressing. This can be explained by the fact that the absence of an EU position on investment has not previously led to global problems. This is a general issue that is extremely important for the development of the system as a whole, but does not directly affect the affairs of investors here and now. However, uncertainty in the legal legitimacy of the BIT on the basis of which the investments made put existing investors in a weak position and prevent new ones from entering the market.

To adress BIT issue Regulation No. 1219/2021 establishing transitional arrangements for bilateral investment treaties (BITs) between Member States and third countries[116] was issued. Regulation deals with the treaties in the way of giving the transitional period for staying inforce before being replaced with EU BITs. Summing up, the treaties signed before the entry into force

[114] Marc Maes, Ross Eventon, Myriam Vander Stichele, Antonio Tricarico, Roberto Sensi, Roos van Os, Pia Eberhardt, Cecilia Olivet, Reclaiming Public Interest in Europe's International Investment Policy EU INVESTMENT AGREEMENTS IN THE LISBON TREATY ERA: A Reader, Section 1 Europe's current and future investment policy, . Future forms of EU investment competence The German model BIT as a minimum level of protection, 2010, retrieved from https://www.somo.nl/wp-content/uploads/2010/07/A-Reader.pdf

[115] WOOLCOCK, Stephen, London School of Economics, UK Overseas Development Institute, UK, THE EU APPROACH TO INTERNATIONAL INVESTMENT POLICY AFTER THE LISBON TREATY, 21/10/2010, WHAT ARE THE BENEFITS OF EXCLUSIVE EU COMPETENCE FOR FDI?, page 13, retriewed from https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/433854/EXPO-INTA_ET(2010)433854_EN.pdf

[116] Regulation (EU) No. 1219/2012, OJ L 351/40, 20.12.2012

of the Lisbon Treaty remain in force until they are revised, and special requirements are put forward for the entry into force of the BITs prior to the entry into force of the Regulation. Only the issue of extra-EU BITs have been resolved in regulation, nothing is said about the status of investment agreements between EU Member States (intraEU BITs).[117]

It is necessary to look at the first question and determine which aspects have become important for defining EU policy. It is needed to be taken into account, that a large number of bilateral investment agreements[118] contain provisions for resolving the dispute through ISDS, mainly ICSID. After the direction of investment policy development was transferred to the EU, the question of the legality of these provisions arose. After all, the EU is not a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which calls into question whether the investor-state dispute settlement provision is compatible with EU law.

The answer to this question can be found in **the Achmea case**.[119] In short, the essence of the case was the expropriation of the insurance company Achmea. Initially, the insurance market in the Slovak Republic was privatized and the Dutch health insurance company invested in it. Subsequently, the state decided to re-nationalize the market and as a result, the company Achmea. The basis for the arbitration proceedings initiated by the investor was the BIT between the Netherlands and Slovakia. In arbitration proceedings the Slovak Republic raised an objection of lack of jurisdiction of the arbitral tribunal. It submitted in that respect that, as a result of its accession to the European Union, recourse to an arbitral tribunal provided for in Article 8(2) of the BIT was incompatible with EU law.[120] The arbitral tribunal dismissed the objection ans as result the arbitral award[121] was made in favor of the investor.

Nevertheless, the Slovak Republic first made an unsuccessful attempt to annul it in the Frankfurt Court, and then appealed to the German Federal Civil Court. The last appealed to the EU Court of Justice for a preliminary ruling. Main question for Court of Justice to deal with was: "Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT)

[117] Latham&Watkins LLP, International Arbitration, New European Regulation Clarifies the Status of Extra-European Bilateral Investment Treaties, April 2013, page 1, retrieved from https://m.lw.com/thoughtLeadership/international-arbitration-eu-regulation-extra-european-bits

[118] Investment Policy Hub, Unated Nations, UNCTAD, See Germany - Ukraine BIT (1993), Italy - Mexico BIT (1999) Finland - Poland BIT (1990) and others. Retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1774/germany---ukraine-bit-1993-

[119] Slowakische Republik (Slovak Republic) v Achmea BV, JUDGMENT OF THE COURT (Grand Chamber), 6 March 2018, retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CJ0284

[120] JUDGMENT OF THE COURT (Grand Chamber), Case C-284/16, 6 March 2018 , Para 11, Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw9548_0.pdf

[121] FINAL AWARD, ACHMEA B.V. (formerly known as "Eureko B.V.") ("Claimant") – and THE SLOVAK REPUBLIC, Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf

under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?"[122]

Which shortly means whether the investor-state dispute settlement provision is incompatible with EU law. The issue is extremely important, as it calls into question the possibility of protecting the rights of investors of one EU member state in another member state through the mechanism of international investment arbitration.

The answer of the Court of Justice was that investor-state arbitration provision in BIT between MS is incompatible with EU law. The reason is that by granting the right to an entity outside the system to decide cases with the participation of one of the States Parties, the court would recognize and legalize the lack of its control over the application and interpretation of the law of the Union. Which clearly had no right to happen. That is why the court ruled that due to the impossibility of arbitral tribunals to request a preliminary ruling, they do not have the possibility to obtain a legal position of the Court of Justice in matters of EU law, and decisions taken on such matters without the Court's supervision will endanger the uniformity of the Union Law and therefor do not comply with it.[123]

This decision is particularly interesting because from the beginning one of the directions of development of the EU investment policy was the intention to change the old ISDS first to the Investment Court System and as a result to the Multilateral Investment Court.[124] To implement this plan, all bilateral agreements between the MS must be annulled as soon as possible, as this will allow the new system to take effect.

Proposals for reforms in FDI sector

Following the entry into force of the Lisbon Treaty, discussions began between EU member states and in the circles of international organisations on the further possible development of investment policy. A number of approaches have been proposed. Below are some of them.

A. At the 38th session of the United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) expressed support for the

[122] JUDGMENT OF THE COURT (Grand Chamber), Case C-284/16, 6 March 2018 , Para 23 (1), Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw9548_0.pdf

[123] Prof. Dr. Nikos Lavranos, Secretary General of EFILA and Mediator at the Energy Community, The impact of the Achmea decision, retrieved from file:///C:/Users/%D0%A5%D0%B5%D0%B3/Downloads/DRF_Keynote_Lavranos_092018.pdf

[124] Commission presents procedural proposals for the Investment Court System in CETA, News archive, European Commision official website, Brussels, 11 October 2019, retrieved from https://trade.ec.europa.eu/doclib/press/index.cfm?id=2070

establishment of an advisory center, hereinafter referred to as the Advisory Center on International Investment Law (ACIIL). This is an attempt to repeat the successful introduction of a similar advisory agency for the World Trade Organization.[125]

Potentially the assistance of the Center can be directed to:

1. attempts to find ways to avoid conflicts. This would include assistance in writing government contracts or even laws with investment regulations;
2. dealing with conflicts that arise between investors and the host country at a stage when they still remain within the national level;
3. providing technical and legal support to under-resourced governments in disputes that have moved to the international stage of resolution - international arbitration.[126]

It is difficult to call this decision one that will be able to solve all the shortcomings of the existing system, but rather that can help it live for some time. In case of acceptance of this position and the beginning of work on creation of the center the important aspect will be consideration of competences of the Center from the angle of their uniqueness. It would be inappropriate to provide the Center with tasks that are already being solved by other organizations.

B. In the Note by the Secretariat regarding Appellate mechanism and enforcement issues[127] could be found the main models of the proposed Appellate body. Basically three options have been developed, an appeal that:

1. will be included as a possibility in the agreements between the parties - thus, bilateral investment agreements should be amended or renegotiated to include this provision. In addition, in order to be able to use the appeal, such an instance will have to be created.;

2. will be assaceble for use on an ad hoc basis by disputing parties - this model resembles not so much an appeal in its usual sense as a second step after the first instance, as arbitration after the initial arbitration. In this case, the model will delay the process of resolving the case through the leveling of the principle of finality of the decision;

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[125] Possible reform of investor-State dispute settlement (ISDS), Advisory Centre, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), retrieved from https://webcache.googleusercontent.com/search?q=cache:Y6THEO9jLqgJ:https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_wp_advisory_centre_for_comment.docx+&cd=11&hl=ru&ct=clnk&gl=ua

[126] Karl P. Sauvant, 'An Advisory Centre on International Investment Law: Key Features', Academic Forum on ISDS Concept Paper 2019/14, 10 September 2019, retrieved from https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/sauvant-advisory-center-isds-af-14-2019.pdf

[127] Possible reform of investor-State dispute settlement (ISDS), Initial draft on Appellate mechanism and enforcement issues, Note by the Secretariat United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), retrieved from https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/appellate_mechanism_and_enforcement_issues.docx

3. will be provided as one of the stages by the institutions handling ISDS cases - this model can be considered as the creation of a separate special body within the ISDS. By providing it with comprehensive competence and grounds for appeal, it will be possible to ensure the real realization of the right to appeal.

Regardless of the choice of model, it will be necessary to answer questions about scope and standard of review, appealable decisions, effect of appeal, manageable case load, timelines, enforcement.[128] Potentially, the realization of a significant amount of work to ensure the proper existence of the appellate court has led to a third proposal, which will be discussed in detail in the next part of the section.

C. Submission by the European Union and its Member States in preparation for the thirty-seventh session of Working Group III[129] expressed a position on the establishment of a standing mechanism for the settlement of international investment disputes. The main reasons were the need to address concerns[130] about the existing ISDS. Mainly the proposal is not about to supplement the existing ISDS, but to completely replace it with an independent two-tier body, which will take over most of the features from the usual judicial body than from the arbitral tribunal. From the point of view of the EU and its Member States, the shortcomings of the ISDS are systematic. If measures are taken to address one, it will not solve the other. Therefore, the applicants consider an adequate solution in this case to completely replace the system with a new one, which will protect the regime from previous errors.

One of the objectives of this work is to systematize the information on the Investment court system proposed by the EU, highlight its main characteristics and implementation risks. This will be discussed below.

Main characteristics of the Investment Court System and problems they intend to deal with.

Choosing a way to create a completely new body, rather than gradually making changes to the existing system can be called radical. It is necessary to study in detail and analyze the main characteristics proposed for implementation in ICS in order to be able to conclude whether they will have a real impact on the factors of criticism of the existing ISDS.

Dispute avoidance mechanisms

[128] Possible reform of investor-State dispute settlement (ISDS), Appellate and multilateral court mechanisms, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session (resumed) Vienna, 20–24 January 2020, A/CN.9/WG.III/WP.185, retrieved from https://undocs.org/en/A/CN.9/WG.III/WP.185

[129] Establishing a standing mechanism for the settlement of international investment disputes, Submission from the European Union and its Member States, retrieved from https://undocs.org/A/CN.9/WG.III/WP.159/Add.1

[130] A/CN.9/964 – Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (advance copy), 6 November 2018, para. 40, retrieved from https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf.

As first desirable step for the ICS dispute avoidance mechanism has been identified. According to Article 3.2 of the EU-Singapore investment protection agreement[131] "Any dispute should as far as possible be resolved amicably through negotiations and, where possible, before the submission of a request for consultations". This way of dealing with conflicts is so desirable that IPA allowes it even after dispute settlement proceedings.

The agreement also provides for the possibility of recourse to mediation as an alternative means of resolving the conflict. If the mediation fails, or the parties do not resort to this method, the plaintiff has another obligation - to request a consultation with the other party.

As a result, three articles of the Agreement are devoted to alternative out-of-court methods of resolving the dispute. This approach can be important in reducing the number of cases and relieving the court. Additionaly, if there will be a clear court practice on certain issues, the parties to the dispute may no longer need to go to court, because they will have an understanding of how the case will end. Such clarity and predictability will open the field for negotiations and amicable settlements.

First instance

The activities and tasks of the first instance are proposed to remain the same as they are now. The main function will be to consider the case and apply the relevant law. In addition, due to the presence of an appeal, the case will be referred to the court of first instance after consideration in the appeal, if at this stage the court has not been able to dispose of them.[132]

This approach to the role of the first instance can be called predictable and obvious, as it was endowed with the basic necessary powers to resolve the dispute. In the activities of the first instance, the rules according to which disputes will be considered will play an important role. It is worth noting that the EU proposal to create an ICS does not mention the creation of a unique set of rules.

As an example, the agreement with Singapore stipulates that the claimant must file a claim based on the existing arbitration rules. It can be the Convention on the Settlement of Investment Disputes between States and Nationals of Other States if both parties are parties to the convention, the ICSID Convention in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes in a situation where only one party is a signatory to the convention, the

[131] Investment Protection Agreement Between The European Union And Its Member States, Of The One Part, And The Republic Of Singapore, Of The Other Part, retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download

[132] Establishing a standing mechanism for the settlement of international investment disputes, Submission from the European Union and its Member States, 3.2 First instance, retrieved from https://undocs.org/A/CN.9/WG.III/WP.159/Add.1

arbitration rules of the United Nations Commission on International Trade Law, as an alternative if the parties so decide or neither party is a party to the Convention. There is also an option to use any other rules by agreement of the parties. Additionally, the note explains that the use of the rules will be in addition to the main provisions of the procedure defined in the contract.[133]

Appellate tribunal

Second level - appeal under Article 8.28 Comprehensive Economic And Trade Agreement (CETA) Between Canada, Of The One Part, and The European Union And Its Member States of The Other Part he will have the right to uphold, modify or reverse a Tribunal's award based on:

(a) errors in the application or interpretation of applicable law;

(b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law;

(c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).[134]

Additionally, as stated in the Submission from the European Union and its Member States regarding Possible reform of Investor-State dispute settlement (ISDS) an appellate tribunal should not undertake a de novo review of the facts. This limit of the activity of the second instance is natural and will contribute to the absence of delays in the consideration of the case.

Full-time adjudicators

One of the recognized shortcomings of ISDS was the lack of impartiality on the part of the arbitrators. The main reason is their involvement in different cases against the same parties, or in very similar cases in different roles. This consequence is natural because the parties have the right to independently choose the participants of the tribunal from among the approved arbitrators or by agreement of the parties.

In the above mentioned propousal in paragraph 3.4 is stated that adjudicators would be employed full-time and would not have any outside activities. The only activity previously considered to be permitted in parallel with a seat on the Tribunal is teaching.[135] The agreement with Singapore states that judges will be elected for a certain term with the possibility of renewal once, to ensure their continued availability they receive a monthly fee that will be comparable to

[133] Investment Protection Agreement Between The European Union And Its Member States, Of The One Part, And The Republic Of Singapore, Of The Other Part, Chapter Three, Dispute Settlement, Section A Resolution of Disputes between Investors and Parties, Article 3.6, Submission of Claim to Tribunal, retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download

[134] Comprehensive Economic And Trade Agreement (CETA) Between Canada, Of The One Part, and The European Union And Its Member States Of The Other Part, Article 8.28, retrieved from https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

[135] Establishing a standing mechanism for the settlement of international investment disputes, Submission from the European Union and its Member States, para 3.4, retrieved from https://undocs.org/A/CN.9/WG.III/WP.159/Add.1

those paid to adjudicators in other international courts.[136] The agreement with Canada provides for an interesting provision on the same issue: “The Members of the Tribunal shall ensure that they are available and able to perform the functions set out under this Section”[137]

The provision of the article mentions the payment of a monthly salary, but does not say anything about the possibility of combining such activities with other paid work. This issue is extremely important not only to ensure the full presence of arbitrators at meetings, but also to ensure that they do not have any links with public authorities or private enterprises. The risk is the financial burden of payment that will be placed on the founding states of the institution. If they do not cope with this task, there is a risk of either a decrease in the demand of the institution as a place of work and, consequently, a lack of potential candidates for positions, or a decrease in the quality of those interested in the position. As the worst option, this will lead to the granting of permission to engage in related legal services, which will return us to the current situation within the ISDS and all activities to make changes will be ineffective.

Ethical requirements

The provisions of EU agreements with partner countries that provide for the establishment of ICS contain requirements for the independence of potential Members of the Tribunal. In the existing four treaties, the phrase can be found - "shall be chosen from persons whose independence is beyond doubt"[138]. Naturally, the question arises as to how this should be ensured.

Within the ISDS, tribunal participants must also be independent. Lack of a mechanism that can provide minimal or no likelihood of lack of independence has drawn criticism from the entire system. As discussed in the previous section, there is a practice of both recognizing tribunal participants as having a conflict of interest and unfoundedly accusing them of dependence. Also, as discussed earlier, several years in a row, an attempt has been made to develop a Code of Conduct to deal with bias.

Codes of conduct can be found in the latest EU investment treaties. The content of the first and most general norm of the Code of Conduct in the Transatlantic Trade and Investment Partnershipis defined as: “Candidates and members shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interest

[136] Investment Protection Agreement Between The European Union And Its Member States, Of The One Part, And The Republic Of Singapore, Of The Other Part, Chapter Three, Dispute Settlement, Section A Resolution of Disputes between Investors and Parties, Article 3.9 Tribunal of First Instance, retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download

[137] Comprehensive Economic And Trade Agreement (CETA) Between Canada, Of The One Part, and The European Union And Its Member States Of The Other Part, Article 8.27, Constitution of the Tribunal, retrieved from https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

[138] Investment Protection Agreement Between The European Union And Its Member States, Of The One Part, And The Republic Of Singapore, Of The Other Part, Chapter Three, Dispute Settlement, Section A Resolution of Disputes between Investors and Parties, Art. 3.11, Ethics, retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download

and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved" [139] This rule is declarative in nature, it only names the requirements without in any way determining how to ensure them.

To determine the mechanism laid down in this agreement, it is necessary to refer to the following rules, first of all to the third article - disclosure obligations.[140] The norm determines the obligation to disclose any past or present interest until the moment of election as members. This requirement can be considered progressive and able to make a real contribution to the impartiality of arbitrators. Since members are required not only to be independent but to appear clearly and fully free from direct and indirect conflict of interest before, during and after appointment.[141]

Additionally, Article 5[142] prohibits the influence of self-interest, outside pressure, political considerations, public clamor, loyalty to a Party or disputing party or fear of criticism on decision making. This will be ensured by prohibiting the direct or indirect acceptance of benefits. In support of this requirement, the provisions establishing the ICS require the payment of competitive salaries to tribunal participants. This will greatly reduce the risk that one of the members will decide to accept any benefit from the conflict. The situation of accepting illegal benefits is observed as an example in Ukraine and one of the reasons scientists determine the low level of wages[143].

The only concern in this regard is whether the EU and the relevant party to the agreement will be able to provide adequate remuneration to arbitrators. The absence of the right to any other activity, except potentially teaching[144], places high demands on the founders of the institution in calculating the appropriate amount. It should also be borne in mind that, as of now, the investment court is not multilateral, but only bilateral, which limits the number of potential cases to be resolved and further risks the presence of a sufficient number of cases on appeal. Without the latter, it will be difficult to ensure an adequate level of remuneration for the members of the appellate body.

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[139] Transatlantic Trade and Investment Partnership, Annex II, Art. 2, Code of Conduct, retrieved from https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

[140] Transatlantic Trade and Investment Partnership, Annex II, Art. 3, Code of Conduct, retrieved from https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

[141] Hannes Lenk, An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada, II.3. Ethical requirements, retrieved from https://www.europeanpapers.eu/en/europeanforum/investment-court-system-new-generation-eu-trade-and-investment-agreements

[142] Transatlantic Trade and Investment Partnership, Annex II, Art. 5, Code of Conduct, retrieved from https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

[143] Сутність та причини корупції в системі органів державної влади, Побережний В.В., аспірант кафедри ержавного управління і менеджменту НАДУ, page 4, retrieved from http://academy.gov.ua/ej/ej12/txts/10pvvodv.pdf

[144] Establishing a standing mechanism for the settlement of international investment disputes, Submission from the European Union and its Member States, para 3.5, note 14, retrieved from https://undocs.org/A/CN.9/WG.III/WP.159/Add.1

Characterizing the norms of the Code of Conduct, a conclusion can be made - they are formulated very broadly. This may be primarily due to the desire to cover all potential situations, as well as the lack of real experience of the institution activity. It can be also predicted that over time the rules will be supplemented and some of them become more specific.

Qualifications

With regard to qualifications the next requirement could be found in CETA: "The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence."[145] Although in the text of the agreement the arbitrators of the investment court are never called judges in this rule, the requirements for their competence are compared with the requirements of the courts in their countries. An alternative requirement to be a lawyer of recognized competence is a very general concept. Potentially, if this norm is not specified or the characteristics of the concept of "recognized competence" are not singled out, a number of problems may arise in the selection of a candidate and in the future the opportunity to challenge such a choice.

It is also worth mentioning the areas of law that are considered appropriate for possession by potential participants in the court. These include, in general, public international law. More specifically, the provisions of the contract include competencies in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements.

Appointment process

In order to be able to ensure high standards of impartiality of judges, a proper process of selection and admission of candidates must be established. The EU proposal on establishing a standing mechanism for the settlement of international investment disputes as examples of recent international courts meeting the requirements of a transparent creation mechanism the International Criminal Court, the European Court of Human Rights, the Caribbean Court of Justice and the Court of Justice of the European Union are named.[146]

If the International Criminal Court is considered as an example, the following conclusions will be relevant: the countries party to the treaty have the right to nominate a certain number of candidates for a certain period before the election of judges. Each nomination application must contain information on the specific candidate's compliance with the statute. An alphabetical list of

[145] Comprehensive Economic And Trade Agreement (Ceta), Between Canada, Of The One Part, And The European Union [And Its Member States, Article 8.27, para. 4, Constitution of the Tribunal, retrieved from https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

[146] Establishing a standing mechanism for the settlement of international investment disputes, Submission from the European Union and its Member States, para 3.8, note 16, retrieved from https://undocs.org/A/CN.9/WG.III/WP.159/Add.1

candidates is formed from all applications and voted on. Each party must vote for the minimum number set for each group of candidates. This rule eliminates the risk that each party will vote only for its own candidates and will not vote for others. In addition to the requirements directly for candidates in the Procedure, it is stated that the parties must take into account the need to ensure geographical and gender diversity. And also belonging of potential candidates to each of the basic legal systems of the world. It is important not just to have the necessary experience for the position.[147]

The provisions of the process indicate that it is possible to determine the specific experience that should be at least in a certain number of judges. In the case of ICS, this provision would be very practical and could be used to provide judges with experience in resolving international investment disputes, and not just with general experience in public international law. Once adjusted to the needs of the investment court, the experience of other international courts in electing judges would be very useful for the system and has the potential to ensure the maximum quality of the final candidates at the same time as the transparency of the process.

In the ICSD, the fact that the parties to a dispute have the right to elect tribunal participants has potentially led to the "division" of all potential judges into pro-investor or pro-state. Accordingly, each party is looking for someone who will be more profitable. The topical question is whether this risk closes or worsens the lack of the parties' right to choose an arbitrator, and the transfer of this function to the states that first enter into an investment agreement? Until a particular case arises, it is difficult to predict which judge the state will want more, although of course we can talk about prejudice against a particular state. However, it is likely that it is important for states that judges strike a balance between investor protection and the recognition of state rights to dispose of within their territory. Potentially important for states will be respect on the part of the candidates for the approved agreements and the principles established in them.[148]

Mechanisms for dialogue with treaty parties

As noted in the work on ISDS problems and their possible solutions - the specification of the provisions of investment agreements and additional information on the peculiarities of the interpretation of certain provisions could serve as real mechanisms to improve the process of resolving cases.

[147] Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court (ICC-ASP/3/Res.6), section A, B, retrieved from https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-3-Res.6-CONSOLIDATED-ENG.pdf

[148] Anthea Roberts, Would a Multilateral Investment Court be Biased? Shifting to a treaty party framework of analysis, EJIL:Talk!, 2017, retrieved from https://www.ejiltalk.org/would-a-multilateral-investment-court-be-biased-shifting-to-a-treaty-party-framework-of-analysis/

The proposal of the EU and its member states mentions a mechanism for dialogue with the treaty parties. It is noted that the mandatory interpretation of certain provisions in a specific way should remain and apply to those agreements in which it is not explicitly spelled out. This is done in order to ensure the control of the parties over the provisions of the contract. An interesting question arises as to the possibility of involving non-signatories to the agreement in the interpretation of its provisions in the dispute resolution process. This issue will be particularly important at the stage of establishing a multilateral investment court.[149]

On the one hand, if the provisions are of a systemic nature and the disclosure of their essence in a particular case will determine the specifics of the application of similar provisions in subsequent cases, then for all parties affected by such a decision, the results will be important. In addition to the possibility of a multilateral view of the legal problem, due to the presence of the means of involving other parties, it will be possible to make a final decision, assume a legal position, and eliminate in the future any disputes over these provisions. This will lead to legal predictability, saving time and money.

Returning to the ICS, the EU-Singapore treaty provides for the right of the non-disputing Party to the Agreement to join the process in interpreting the provisions of the treaty. It is noted that submissions on these issues should not be excessively disturbing or excessively burdensome. Reasonable opportunity remains for the parties to express their own position on each proposed opinion of the non-party to the dispute.

Transparency and third parties

As noted earlier, one of the points of criticism of ISDS is lack of transparency.[150] That is due to the fact that the idea of its creation arose on the basis on commercial arbitration. In matters of transparency, a characteristic feature of commercial arbitration is the complete secrecy of the process. Unless the parties agree otherwise, no document will be available to the public.[151]
To address this issue, there are particular provisions in Annex 8 to the EU-Singapore Treaty[152]:

[149] Establishing a standing mechanism for the settlement of international investment disputes, Submission from the European Union and its Member States, para 3.10, retrieved from https://undocs.org/A/CN.9/WG.III/WP.159/Add.1
[150] Nathalie Bernasconi-Osterwalder and Lise Johnson, Bulletin #2 Transparency in the Dispute Settlement Process: Country best practices, The International Institute for Sustainable Development, 2011, retrieved from https://www.iisd.org/system/files/publications/transparency_dispute_settlement_processes.pdf
[151] Faraz Alam Sagar & Samiksha Pednekar, International Investment Arbitrations and International Commercial Arbitrations: A Guide to the Differences, 2019, retrieved from https://corporate.cyrilamarchandblogs.com/2019/05/international-investment-arbitrations-international-commercial-arbitrations-guide-differences/
[152] Investment Protection Agreement Between The European Union And Its Member States, Of The One Part, And The Republic Of Singapore, Of The Other Part, Chapter Three, Dispute Settlement, Section A Resolution of Disputes between Investors and Parties, Annex 8 Rules On Public Access To Documents, Hearings And The Possibility Of Third Persons To Make Submissions, retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download

With regard to the documents, it is stated that the defendant must immediately after receiving the first package of documents from claimant or any other documents from a wide range of documents that take place during the settlement of the dispute pass them to the undisputed party for disclosure. This would be an omission if all information, without exception, were made available to the public. If the information is considered confidential business information, or if under the investment agreement or the right of the defendant the information is considered protected from disclosure - such data have the right to be kept secret.

With regard to the hearings the general rule determines the obligation to hold them with the possibility of public access. As in the legal system, for example in Ukraine[153], if non-disclosed information is used during the hearing, the tribunal has the right to make adjustments to the procedure. It is important to note that the tribunal further agrees with the parties on logistical issues. This indicates the seriousness of the intention to implement this rule in life.

With regard to the the right of any person unrelated to a dispute or contract to enter into proceedings for a specific purpose the agreement determines the right of the tribunal to grant such permission, however, after consultation with the parties. On the one hand, such a provision can be used by one of the parties to delay the process or manipulate the facts. To cover this risk, the provision does not provide for the unconditional right of third parties to file a submission, but only with the permission of the tribunal.

On the other hand, such a provision entitles interested environmental organizations, as an example, to be involved. In determining whether to grant permission, arbitrators should take into account whether the person has a significant interest in the proceedings and whether the involvement of that person in the context of obtaining a new perspective, factual or legal information or knowledge will have a positive effect on the case.

Finality and enforcement.

No action will matter unless there is an effective mechanism for enforcing the final tribunal's decision. The simplest and most cost-effective and time-efficient way would be to enforce judgments unconditionally without the need for review by national courts as this may lead to losses on the part of the investor or the state, legal uncertainty due to the inability to control the quality of litigation in the state court and as a result of full useless of ICS.

Thus, the agreement between the EU and Vietnam provides: the disputing parties shall refrain from seeking to appeal, review, set aside, annul, revise or initiate any other similar procedure before an international or domestic court or tribunal, as regards an award pursuant to

[153] Law of Ukraine on the Judiciary and the Status of Judges, Verkhovna Rada of Ukraine, Article 11, Publicity and Openness of Judicial Procedure, 2016, retrieved from http://www.vru.gov.ua/add_text/358

this Section.[154] This provision covers possible risks of system failure in the context of the party's search for ways to review the decision or otherwise delay completion of the proceeding.

Also worth noting is the issue of enforcement of the decision in the territory of the respective state of disputing parties. In order for the system to function properly, it is not enough to limit the right of the parties to find alternative ways of consideration after the final decision. There must be a real mechanism for enforcing the decision in the respondent state. The provisions provide that after the expiration of five years from the entry into force of the Agreement each party shall recognize the decision as if it were the final decision of the court of contracting State. Execution of the decision is carried out according to the laws of the executing state. Special attention should be paid to the enforcement of awards as arbitral awards according to provisions of the New York Convention of 1958.[155]

It can be assumed that this rule exists as an additional insurance to secure the enforcement of the decision. Article 4 of the Convention provides that a party must apply to a national court for recognition and enforcement in the territory of the State concerned.[156] This approach returns the parties to the current situation, which provides additional costs for the decision to have real legal consequences. However, if it is taken into account that this is only an additional and probably temporary mechanism to ensure the rights of the parties to the final decision, it can be accepted.

Financing

According to the information on the official website of ICSID, the first payment in advance is set in the amount of 100,000 - 150,000 dollars from each party of the dispute. This appropriation is intended to cover the salaries and expenses of the Commission, the Tribunal or ad hoc Committee members.[157]

The proposal from the EU states that the main costs of maintaining the court will be borne by the signatories of the agreement. In this case, the distribution of funding responsibilities will not be equal, but relative depending on the level of development of the country. So more developed countries will incur higher costs. It is noted that the parties will also pay for court services, but it will not correlate directly with the payment of arbitrators. This will be an amount that will help in

[154] The Investment Protection Agreement between Viet Nam and the EU and its Member States, Sub-Section 3, Submission Of A Claim And Conditions Precedent Articles 3.36(3)(b), retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0693

[155] The Investment Protection Agreement between Viet Nam and the EU and its Member States, Sub-Section 3, Submission Of A Claim And Conditions Precedent, Article 3. 3.57, retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0693

[156] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Art. 4, retrieved from https://www.newyorkconvention.org/english

[157] Services, Costs of Proceedings, ICSID, World Bank Group, retrieved from https://icsid.worldbank.org/services/content/cost-of-proceedings

the financial support of the institution but will not be too burdensome for small and medium-sized enterprises.[158]

In support of this intention, there is a provision in the EU-Singapore agreement for the Committee to introduce additional rules on the amount that may be imposed on certain categories of unsuccessful disputing parties. Potentially, these rules will take into account the financial capabilities of the party represented by an individual or a small or medium-sized enterprise.[159]
The European Commission argues that the new system of investment courts has benefits for both states and investors. In terms of the cost of the case, the following arguments are given[160]:

- the investment court system has clear procedural deadlines. They are aimed at ensuring the speedy consideration of the case and, accordingly, the preservation of funds. Thus, the consideration of the case is limited to 2 years, including the appeal, although it is stated that the average duration of cases in the ISDS is 4-6 years. Duration in the context of funds is important not only because of the remuneration of arbitrators, but also because most of the costs are related to attracting outside legal assistance. Accordingly, the shorter the case, the lower these costs.

- the salaries of the members of the Appeal Tribunal will be paid exclusively by the EU and the US. It is envisaged to determine a clear amount of daily salary for judges. This issue will not be considered and resolved by the parties.

- Some provisions provide ways to reduce costs for SMEs. Mediation is suggested as a first step. This method will be faster, easier and less expensive thanks to the proposed list of mediators ready to intervene. As a second way, it will be possible to appeal to the sole judge thus significantly reducing procedural costs. As noted in the previous paragraphs, the payment of the arbitrators of the appeal will be provided by the states signatories to the investment agreement, which will limit the costs of the parties only to the costs of legal aid.

Application to existing treaties, opt-in mechanism and jurisdiction

All efforts to create a new mechanism for resolving investment disputes will be in vain if it does not have jurisdiction to resolve disputes. Given that the establishment of a multilateral investment court is planned in the future[161], it is important to have ways to attract additional

[158] Establishing a standing mechanism for the settlement of international investment disputes, Submission from the European Union and its Member States, para 3.13, Financing, retrieved from https://undocs.org/A/CN.9/WG.III/WP.159/Add.1
[159] Investment Protection Agreement Between The European Union And Its Member States, Of The One Part, And The Republic Of Singapore, Of The Other Part, Chapter Three, Dispute Settlement, Section A Resolution of Disputes between Investors and Parties, Art. 3.21 Costs, retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download
[160] European Comission, Why the new EU proposal for an Investment Court System in TTIP is beneficial to both States and investors, Retrieved from https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_15_6060
[161] Investment Protection Agreement Between The European Union And Its Member States, Of The One Part, And The Republic Of Singapore, Of The Other Part, Chapter Three, Dispute Settlement, Section A Resolution of Disputes between Investors and Parties, Art. 3.12 Multilateral Dispute Settlement Mechanism, retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download

jurisdictions. There are some important aspects to focus on. Extension of jurisdiction to existing and new treaties will take place in two steps, through accession of a state to the instrument establishing the standing mechanism in combination with opt-in mechanism. It stipulates that from the moment the signatory to the MIC state notifies of a certain contract, it will be subject to court jurisdiction. For contracts that will be concluded in the future, both the method just mentioned and the provision of extending the jurisdiction of the court to a specific contract in its text can be used.[162]

Open architecture

Interesting is the opinion of Anthea Roberts that potentially some states will be rather against the two-tiered Multilateral Investment Court than for, but they will be interested in the possibility of creating an Appellate Body. He considers it appropriate to introduce an open court architecture with the possibility for the parties to be involved in two parts or only one, the court of first instance or appeal.[163] This possibility is considered in the EU proposal. However, as of now, this only looks like a prediction for the future, which is natural, since an international court has not yet been established. The text of the document states that some flexibility will be built into the mechanism, which will allow states to choose between using the mechanism entirely, only for state-to-state dispute settlement, or to limit the jurisdiction to only one of the courts tiers.[164]

As a result, it can be concluded that the signing of the Lisbon Treaty has led to the possibility for the European Union to have better access for investors to third country markets. This can be achieved thanks to the fact that the EU will act as a player in the international arena with direct powers from its Member States and as a supranational entity will have a greater influence than individual countries, especially with a lower level of economic development. The power to shape policy in one body will ensure its consistency and uniformity, as a result it can be the basis for the promotion of European values. On the one hand, this can have a positive impact on the overall development of world markets, harmonization and liberalization of trade. On the other hand, a significant impact of the EU on the investment sphere can lead to politicization. Definitely everything will depend on the content of the implemented standards. However, in the context of European values, the inclusion of social and environmental norms may be raised, which

[162] Establishing a standing mechanism for the settlement of international investment disputes, Submission from the European Union and its Member States, para 3.14, Application to existing treaties, opt-in mechanism and jurisdiction, retrieved from https://undocs.org/A/CN.9/WG.III/WP.159/Add.1

[163] Anthea Roberts, UNCITRAL and ISDS Reforms: Moving to Reform Options … the Politics, EJIL Talk, 2018, retrieved from https://www.ejiltalk.org/uncitral-and-isds-reforms-moving-toreform-options-the-politics/#more-16628

[164] Establishing a standing mechanism for the settlement of international investment disputes, Submission from the European Union and its Member States, para 3.16, Open architecture, retrieved from https://undocs.org/A/CN.9/WG.III/WP.159/Add.1

is extremely important to protect the interests of local stakeholders, but which in turn will expand the potential for states to indirectly expropriate enterprises on their basis.

The expansion of the EU's competence has led not only to increased opportunities but also to the need to define a common position of the Union on the foreign direct investment sector and its future. As well as the urgent need to move from the separate treaties of the 27 countries of the Union to a common EU approach. As a result of the Achmea case, the EU Court of Justice found that the provision on the possibility of considering a case with the participation of the MS by a body outside the jurisdiction of court supervision was inconsistent with EU law. This decision at one point put all investors in the European Union in a precarious and uncertain position, as it meant that potentially, even if they appealed to arbitration and the arbitral tribunal made a positive decision in their favor, such a decision would no longer have legal force within the EU.

Various ways to reform the FDI sector have been proposed. These include the establishment of an advisory center, an appellate body or a standing mechanism for the settlement of international investment disputes. Due to the main essence of the master's thesis, special attention was paid to the last proposal. In summary, it should be noted that the Investment Court System is a set of stages of consideration of dispute between the investor and the host country, as the main task of the body, herewith the use of the court to resolve disputes between states is not excluded. It is based on a two-tier institution with a list of possibilities for pre-trial amicable settlement of the dispute. In particular, this will be provided through negotiations, mediation and request for consultation with the respondent. One of the key novelties is the introduction of an appeal. The grounds for appeal in the currently signed agreements, namely errors in the application and interpretation of applicable law or appreciation of the facts or relevant domestic law, are sufficient for the possibility of appeal, but it is assumed that it is not sufficient for abuse. The first and appellate instances provide for the involvement of qualified arbitrators on a permanent basis.

CONCLUSIONS

The results of the study allow to conclude that there are following problems in ISDS:

first of all is lack of consistency which is expressed through a situation when radically opposite decisions are made in very similar circumstances of the case. One of the reasons is the lack of hierarchical subordination of tribunals or at least any relationship between them. This negative aspect of the system jeopardizes the confidence of the international community in general and investors and host countries in particular in court and calls into question their willingness to rely on the tribunal's ability to resolve a dispute fairly and lawfully.

The second negative factor is the lack of appellate body. The grounds for appealing against the decisions, available in the rules of the arbitral tribunals, proved to be too narrow in practice, which led to a restriction of the parties' right to seek justice after the decision was made. An appeal could also solve the first problem as one of the functions assigned by the state to the appellate court is to bring judicial practice in line.

The third factor is the lack of impartiality. which is expressed in the conscious or unconscious more positive attitude of the arbitrator to one of the parties. This could be due to: the parties having the right to choose a tribunal participant and a potential subconscious sense of loyalty to the chosen one; involving the same person in different roles, as an example of a judge and an expert in different cases but for the same party. This is a natural situation of the free market of arbitrators, where it is possible to independently determine the candidate to consider their dispute or serve otherwise. But this gives rise to the idea of the existence of prejudiced arbitrators towards the state or the investor. The dangerous consequence is a loss of trust.

Fourth, it is worth mentioning the lack of transparency. For the parties, this is a positive and desirable characteristic because it gives the freedom to feel comfortable, for example, without fear of disclosure of confidential information. However, such a sign excludes the consideration of the interests of third parties, for example, nature protection organizations or local residents of the area around the enterprise, when considering the case. It also harms the democratic regime of states, because the cases in which the state is involved and on which taxpayers' money is spent are in the primary interest of citizens. Related to this is the issue of the inability of third parties to join the case to express an opinion or to bring a certain point of view to the situation. Such a mechanism can be seen as complicating the process or providing grounds for delaying it on the one hand, but with the correct formulation of permits, this risk will be significantly reduced.

To address the negative aspects mentioned above, the EU has proposed the introduction of the **Investment Court System**. It is proposed to establish a two-tier institution. Its features will be:

a wide range of possibilities to resolve the dispute without litigation, through negotiations, mediation and mandatory request consultation with the other party,

appellate instance, to ensure the possibility of appealing decisions and forming a unanimous practice of the courts of first instance.

This takes into account the risk of delaying the case and sets the **time limits** of its consideration in two years, including the appeal. In the matter of alleviating the financial burden of the parties, it is determined that the payment of the work of the arbitrators of the appellate instance will be provided by the founding states.

Full-time adjudicators will be involved in the work which aims to increase their level of independence. For this purpose, namely to avoid the risk of fidelity, arbitrators will not be appointed by the parties, but will be elected according to the rules of the institution.

The high **standard of ethical requirements for the independence** of potential Members of the Tribunal should be singled out. Excessive criticism from ISDS users has drawn particular attention to this point. The treaties signed by the EU, which contain provisions on the establishment of ICS, also contain the Code of Conduct with declarative norms and real requirements that will ensure their implementation, for example, the disclosure in advance of any information of interest. Selection and admission of candidates will be carried out by states, which on the one hand can ensure a high standard of elected candidates, on the other hand can lead to politicization.

An approach is proposed according to which the whole arbitration process will be **transparent**. All documents, except those containing confidential information, the concept of which is limited, will be provided to a third party for posting on the online resource, all hearings will be held openly with access to any person. In the same context, the right of non-involved parties to join the process will be ensured. This can be considered as the openness of the process, and as a norm of quality assurance and consideration of the public interest in resolving disputes.

The final stage in the formation of ICS is the creation of an international multilateral investment court. As of now, the formation of separate courts looks like a long and inefficient process. It has been 12 years since the entry into force of the Lisbon Treaty, during which time only 5 treaties have been signed, containing provisions establishing the ICS. The foreign direct investment market has not ceased to exist, disputes arise and are considered by tribunals within the ISDS.

RECOMMENDATIONS

After analyzing the characteristics and omissions of the existing system of investment disputes, as well as studying the proposed system of investment courts, it may be proposed to improve the existing system by:

1) the creation of an independent institution – **International Investment Institute of Consolidation** with the task to review the cases of tribunals, to systematize the legal positions and practices of interpretation and application of international investment treaties. Former judges of international courts and investment arbitrators may be invited to participate in its work. This institution will not review cases on the merits, will not make adjustments or suggestions for consideration of cases, its task will be a legal analysis of the legal positions of tribunals in court cases for compliance with international law and general principles of law. As a result, collections of recommendations will be issued, their provisions do not necessarily have legal force, they will serve as rules of soft law.

As well as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States were not mandatory to be signed and applied, the recommendations have the potential to be actively applied by arbitrators, as for them it will be a respected and recognized in the international community source to rely on. Of course, the good will for creation and diplomatic support of such an institution from states and key international institutions, including the Center, the United Nations Commission on International Trade Law, WTO will be required. This will help to cope with the lack of consistency.

2) Adoption of a Code of Conduct for arbitrators. It must contain general rules requiring the avoidance of any impropriety and the appearance of impropriety. These may be the rules already proposed in the Draft Code of Conduct for Adjudicators in International Investment Disputes: Version Three. Importantly the following rule could be included to ashure actual implementation of mentioned above general rules: “Appon acceptance of an invitation to intervene in the case the arbitrator must disclose any information about any relationship, his or his close relatives, with each of the parties in the past or present.”

Close relatives concept could be defined taking into account the practice of identifying persons considered to be family for the purposes of anti-corruption legislation and include husband or wife, same-sex partner, regardless of the legal registration of marriage, children, parents, parents-in-law. Of course, this list can be expanded, but it should be borne in mind that this rule should not violate the rights of others and unduly burden the arbitrator.

3) Amendments to the arbitration rules in order to introduce **full transparency** in the consideration of investment disputes in three aspects proposed in the framework of the ICS and

mentioned earlier: on documents, hearings and the possibility of entering the process of non-involved parties. With keeping reasonable limits to protect confidential information. At the same time, it is important that the concept of classifying information as confidential is not too broad and is not used by the parties to circumvent the norm of transparency, and at the same time adequately protect the rights of the investor in the first place. The concept of Nondisclosable confidential business information from 19 CFR § 201.6 can be used to determine the scope of this information. In accordance confidential information will be considered as privileged information, classified information, or specific information (e.g., trade secrets) of a type for which there is a clear and compelling need to withhold from disclosure. Such information must be kept confidential in a reasonable effort to protect it by its owner.

Taken together, these changes should address the three main points of criticism of ISDS. If all three proposals are implemented, the need to establish an appellate court should disappear. As the analysis showed, the appellate court is necessary in case of misinterpretation or missapplication of the rules of the contract, the first proposed improvement must deal with it.

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ABSTRACT

This master thesis contains an introductory part, two main chapters with subchapters, conclusion and recommendations. This research has following objectives: **firstly,** to analyze the existing system for resolving investment disputes in the EU and identify the problems that led to the policy change; **secondly,** to systematize the information on the Investment court system proposed by the EU, highlight its main characteristics and implementation risks. The first section focuses on the concept of arbitration and the analysis of available dispute resolution options between the investor and the host country. The second section is analytical in nature, it is devoted to the Investor-to-State Dispute Settlement and the concept of a Investment Court System. In conclusion are presented the generalized results of the study, ISDS problems, causes and dangers are presented and the main distinguishing features of ICS are deduced. In the part «Recommendations» suggestions for improving the effectiveness of ISDS are included.

Key words: investment law, investment disputes resolution, Investor-to-State Dispute Settlement, Investment Court System.

SUMMARY

The master's thesis on “Investment Arbitration challenges in the EU” is devoted to the study and analysis of the resolution of investment disputes through arbitration. The paper offers a theoretical overview of the concept of investment arbitrage. International acts do not offer a definition of this concept, there are only different theoretical approaches, a new definition is proposed in this paper.

The work aims to identify existing problems of dispute resolution within Investor-to-State Dispute Settlement and analyze ways to improve it. Regarding objectives, the paper aims to analyze ways to resolve investment disputes in the EU thus identify the problems that led to the policy change and to highlight its main characteristics of the proposed by the EU Investment court system.

The work consists of two parts - general and special each of which contains two subsections.

The first part considers the concept of arbitration. It is noted that due to the desire to maximize the scope of application of the arbitration rules no statutory definition is given. The study offers its own definition. The section also discusses diplomatic protection, negotiation and litigation. The development of the concept resulted in the transition from protection under domestic law to international law, and later to the creation of an artificial concept of a system that contains the rules of procedure without substantive rules.

The second section examines the Investor-to-State Dispute Settlement and generalizes criticism into four main points: lack of consistency, lack of appellate body, lack of impartiality and lack of transparency. The paper examines the Investment Court System proposed by the EU in the context of the ISD problems it intends to address. So the main innovations are planned to be the creation of a two-tier body with appellate instance, and a completely transparent time-limited process. The work will involve Full-time adjudicators, who will be appointed, not elected by the parties and will be subject to the Code of Conduct.

The "Recommendations" section proposes three main changes, the introduction of which should solve the problems of ISDS and eliminate the need to create a new system for resolving disputes. These include the creation of an independent institution - International Investment Institute of Consolidation, adoption of a Code of Conduct for arbitrators and introduction of full transparency of proceedings.