

- Araştırma Makalesi -

BACKLASH AGAINST INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) AND ITS REFORM MOVEMENT*

(YATIRIMCI-DEVLET UYUŞMAZLIK ÇÖZÜM YOLUNA TEPKİLER VE BU DOĞRULTUDA GERÇEKLEŞTİRİLEN REFORM HAREKETİ)

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ABSTRACT

The most debated topic of contention in international investment law of the last decades has been observed as the Investor-State Dispute Settlement. The main purpose underlying this alternative mechanism is to solve the disputes between the safeguard of foreign investors from the host state's instability and the state's sovereignty. It is an unconcealable fact that the current regime is unguarded to be abused and so under threat since it is not designed to find the balance between foreign investors rights and restricting the states' sovereignty rights by valuing the public interest above. It is seemed to be that the system was construed on a structure that does not separate commercial disputes and investor-state disputes, and so it can be said that the mechanism ignores to guarantee the public interest, which is a vital feature in investor-state disputes.

^H Hakem denetiminden geçmiştir.

* Bu makale 26.03.2021 tarihinde Yayinevimize ulaşmış olup, 03.05.2021 tarihinde birinci hakem; 12.05.2021 tarihinde ikinci hakem onayından geçmiştir.

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Hakem Değerlendirmesi: Dış bağımsız.

Çıkar Çatışması: Yazar tarafından çıkar çatışması bildirilmemiştir.

Finansal Destek: Yazar bu çalışma için finansal destek almadığını beyan etmiştir.

Bu makaleye atıf için; TEOMETE YALABIK, Fulya, "Backlash Against Investor-State Dispute Settlement (ISDS) and Its Reform Movement", REGESTA, Cilt: 6, Sayı: 1, 2021, s. 153-184.

Keywords: Investor-State Dispute Settlement, Transparency, Third-Party Funding, Energy Disputes

ÖZ

Son yıllarda uluslararası yatırım hukukunda en çok ele alınan tartışma konusunun Yatırımcı-Devlet Uyuşmazlık Çözümü olduğu gözlenmektedir. Bu alternatif mekanizmanın temel amacı, yabancı yatırımcıların ev sahibi devletin istikrarsızlığından korunmasının sağlanması ile ev sahibi devletin egemenlik hakları arasındaki menfaat çatışmasından doğacak uyuşmazlıkları çözümlenektir. Mevcut rejimin, yabancı yatırımcı hakları ile ev sahibi devletlerin egemenlik haklarının kısıtlanması arasındaki dengeyi sağlayarak, kamu menfaatini üstün tutmak üzere tasarlanmaması nedeniyle suiistimal edilmeye açık ve bu nedenle de tehdit altında olduğu saklanamaz bir gerçektir. Bu uyuşmazlık çözüm sisteminin ticari ihtilafları ve yatırımcı-devlet ihtilaflarını birbirinden ayırmayan bir yapıya sahip olması, yatırımcı-devlet ihtilaflarında, aynı zamanda kamu yararını garanti altına alma gereğinin görmezden gelinmesine neden olmaktadır.

Anahtar Kelimeler: Yatırımcı-Devlet Uyuşmazlık Çözümü, Şeffaflık, Üçüncü Taraf Finansmanı, Enerji Uyuşmazlıkları

Introduction

The most debated topic of contention in international investment law of the last decades has been Investor-State Dispute Settlement (ISDS). ISDS is simply a system that secures foreign investors access to a specialised adjudication that is independent of the national jurisdiction of the host state.¹ In other words, this mechanism focuses on providing legal certainty and protection of foreign investors against the risks of policy changes and the possible lack of neutrality and impartiality of do-

¹ Sergio Puig and Gregory Shaffer, “Imperfect Alternatives: Institutional Choice and the Reform of Investment Law” (2018) 112 (3) The American Journal of International Law 361, 395.

mestic courts of the host State.² Investment regime is not a pure system; it is the combination of private and public aspects.³ The main purpose underlying this alternative mechanism is to solve the disputes between the safeguard of foreign investors from the host state's instability and the state's sovereignty.⁴

As a result of the criticisms of ISDS, in July 2017, United Nations Commission on International Trade Law (UNCITRAL) authorised its Working Group III to determine and examine concerns respecting ISDS and the expediency of reforming ISDS. The Working Group is also empowered to develop and recommend solutions. The decision to develop solutions was rendered in New York, April 2019.⁵ The debates for reforming ISDS are realising in many countries by generating new dispute settlement method and concepts, exploring alternatives for dispute prevention, and discussing substitute form of bilateral and regional treaties and renegotiating or concluding actual ones.⁶

In this regard, in the UNCITRAL Secretariat's Note⁷ blueprinting the performance of ISDS and various criticisms of the regime, it is observed that these transmitted considerations were pertinent to its legitimacy and democratic accountability. Based on this, at first, instead of a simple reform of ISDS, a complete reform of international investment law was considered. But later, Secretariat decided not to explore a comprehensive shift of the structure all at once. Accordingly, it is suggested that reform would be more efficient if the proposals and implementation process

² Fact Sheet, Investor State Dispute Settlement (ISDS), OFFICE US TRADE REP, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-statedispute-settlement-isds> (accessed 20.05.2021).

³ Alexis Galan, "The Search for Legitimacy in International Law: The Case of the Investment Regime" (2019) 43 Fordham Int'l LJ 79, 83-84.

⁴ *ibid* 93; Alex Mills, "Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration", (2011) J INT'L ECON L 469.

⁵ Marc Bungenberg and August Reinisch (eds), Special Issue: From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, European Yearbook of International Economic Law (2nd edn, Springer 2020) 1.

⁶ UNCITRAL Draft Report of Working Group III, https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf (accessed 20.05.2021).

⁷ United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session, "Possible reform of investor-State dispute settlement (ISDS)", <https://undocs.org/en/A/CN.9/WG.III/WP.149> (accessed 20.05.2021).

would be in several steps in which the first phase will be reconstructing the system.

Potential reforms to ISDS suggested in the Note comprises two alternatives for more comprehensive analysis. These are tailoring the current system with the establishment of an autonomous appellate mechanism; or designing a `multilateral investment court` (MIC) by a total shift from the ongoing ISDS regime which is in the line of fire.

It is an unconcealable fact that the current regime is unguarded to be abused and so under threat since it is not designed to find the balance between foreign investors rights and restricting the states` sovereignty rights by valuing the public interest above. It is seemed to be that the system was construed on a structure that does not separate commercial disputes and investor-state disputes, and so the mechanism ignores to guarantee the public interest, which is a vital feature in investor-state disputes.

With case examples, this article evaluates the main concerns regarding the ISDS system and examines the predominant legal issues that may impede the settlement of “energy disputes” between investors and states. In this regard, appropriate recommendations for reforms, which might mitigate these issues, are suggested. This article concludes that the biggest change would be adopting an appeal mechanism that will provide a decentralized and consistent system. Other than that, the fundamental elements of the current regime would be maintained, however countries may agree separately on bespoke changes to their new IIAs. This would be a model or a preparation process for future transformation.

I. Evaluation of the concerns regarding ISDS

It has been argued that the core of the problems that exists in ISDS regime is linked with the ignorance that international commercial and investment arbitration are two different forms of adjudication.⁸ Invest-

⁸ Jan Paulsson, “International Arbitration is not Arbitration” (2008) 2 Stockholm International Arbitration Review 1; Gus Van Harten, “The Public-Private Distinction in the International Arbitration of Individual Claims Against the State” (2007) 56 ICQL 372; Chrispas Nyombi and Tom Mortimer, “Towards a New World Economic Order: Proposal For a World Investment Court” (2019) 3 JBL 200, 206-7; Ana M Lopez-

ment arbitration is envisaged to be public in nature since the states are party to the proceedings which leads to the involvement of public interest and public policy matters.⁹ It depends on ad hoc tribunals of party-appointed arbitrators that have to analyse ambiguous treaty rules like “fair and equitable treatment”.¹⁰ Since the arbitrators are appointed on an ad hoc basis and are allowed to be involved in other arbitrations (“Double Hats”), it is possible that their approach may favor the party that appointed them which impair their independence and impartiality.¹¹ The decisions of investment tribunals have broader implications for both other states and international law as a whole.¹² For that reason, investment arbitration is considered to be not suitable to adapt the quality of review necessary for public law.¹³

Unfortunately, tribunals in investor-state disputes still indicate the values of the system of commercial arbitration, which is not generated public law concerns. In this respect, the awards do not strengthen the improvement of coherent case law and are unsatisfactory in regards to legitimacy compared to permanent courts.¹⁴ Even though investment disputes require greater consistency in decision-making, investment arbitration does not support the *de jure* doctrine of precedent.¹⁵ Failure to recognise the vital difference between international commercial and investment arbitration has contributed a lack of consistency in decisions rendered by investment tribunals.¹⁶

In recent years, India, Indonesia, South Africa, Bolivia, Ecuador and Venezuela have all began to terminate investment treaties; Argentina, El Salvador and Nicaragua warned to leave their investment treaties,

Rodriguez, “Investor-State Dispute Settlement in the EU: Certainties and Uncertainties (2017) 40 *Hous J Int’l L* 139, 147.

⁹ Nyombi and Mortimer (n 8) 3.

¹⁰ Puig and Shaffer (n 1) 366.

¹¹ Sergio Puig, “Blinding International Justice” (2017) 56 *VA J INT’L L* 647, 661, 672.

¹² Surya Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2016) 172.

¹³ Harten (n 8).

¹⁴ Georgios Dimitropoulos, “National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform” (2020) 21 *Journal of World Investment & Trade* 71, 100.

¹⁵ Nyombi and Mortimer (n 8) 5.

¹⁶ *ibid.*

and some countries such as Norway and New Zealand initiated new restraints on using ISDS.¹⁷ This is because of the disappointment of treaties that did not achieve the promise of foreign investments that appears to produce the peril of destructive awards. Nowadays, the complaints about ISDS reveals in Europe, where the architects of this mechanism are rooted.¹⁸ This fact questions the assumption that only developing countries or those with weak legal systems may encounter ISDS.¹⁹

In other words, it seems to be the struggle to the investor-state regime is not confined to developing countries anymore. Conflicting attitudes towards ISDS are expanding to developed countries like Canada, Germany, and Australia. Even though the United States has a strongly favourable case history in ISDS, she has opposed ISDS during NAFTA negotiations. While some countries resist ISDS due to adverse results or excessive costs, others are withdrawing for sovereignty.²⁰

Legitimacy concerns regarding the ISDS mechanism, such as lack of transparency, coherence, and arbitrators' impartiality finally received the attention of the European Union (EU) and became a global problem when private companies began to file claims against EU states.²¹ Accordingly, the EU also followed the anti-ISDS movement, which was characterised the "backlash against investment arbitration".²² The EU supported only for a state-to-state dispute settlement mechanism and denied circumventing national courts.²³ This approach was taken by the EU in

¹⁷ Puig and Shaffer (n 1) 365.

¹⁸ George III Kahale, "Rethinking ISDS" (2018) 44 Brook J Int'l L 11, 13-14.

¹⁹ Roberto Echandi, "The Debate on Treaty-Based Investor-State Dispute Settlement: Empirical Evidence (1987-2017) and Policy Implications" (2019) 34 (1) ICSID Review 32, 46.

²⁰ Tim R Samples, "Winning and Losing in Investor-State Dispute Settlement" (2019) 56 (1) American Business Law Journal 115, 145-6.

²¹ Between 1999 and 2018, there are 213 claims brought against EU states, Investment Dispute Settlement Navigator, <https://investmentpolicy.unctad.org/investment-dispute-settlement>, (accessed 20.05.2021).

²² Alan Uzelac, "Why Europe Should Reconsider Its Anti-Arbitration Policy in Investment Disputes" (2019) 1(2) Access to Justice in Eastern Europe, 9.

²³ European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)),

the context of negotiations regarding the EU-US trade agreement, Transatlantic Trade and Investment Partnership (TTIP). In the end the treaty negotiations were terminated for a different reason, but these seemingly failed negotiations led to the adoption of another instrument for the protection of trade and foreign investments.²⁴ By this way, the EU declines ISDS provisions and embraced provisions of a hybrid investment tribunal which does not allow the typical features of arbitration such as party-driven selection of adjudicators.²⁵ In this regard, growing concerns about investor-state dispute settlement systems pressured the EU to promote an investment court system (MIC) and devise to adopt an institutional structure of the World Trade Organisation (WTO) Appellate Body as a model for reform.

Turkey's ISDS participation demonstrates that even though the ongoing system operates moderately, it could be advanced to become more 'reliable, cost-effective and efficient'. Accordingly, Turkey has been modifying and renegotiating its bilateral investment treaties (BITs) to maintain a better legal support for the settlement of investment disputes. Nevertheless, given the high number of BIT's that should be revised, Turkey contemplates concurrent reforms in the other parts of the ISDS system with the contributions and involvement of all stakeholders. For this reason, Turkey also supports UNCITRAL as a convenient multilateral platform to analyse and adopt the reforms.²⁶

1. Inconsistency of Decisions and Lack of an Appeal Mechanism

One of the core aspects of international investment law is the fragmented and decentralized structure in which 3,367 separate International Investment Agreements (IIAs)²⁷ co-exist and constitute legally binding norms on a bilateral base. There is no multilateral agreement administe-

https://www.europarl.europa.eu/doceo/document/TA-8-2015-0252_EN.pdf?redirect (accessed 20.05.2021).

²⁴ Comprehensive Economic and Trade Agreement (CETA) with Canada.

²⁵ Uzelac (n 22) 10, 11.

²⁶ United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), Thirty-eight session, Submission from the Government of Turkey, <https://undocs.org/en/A/CN.9/WG.III/WP.174> (accessed 20.05.2021).

²⁷ Jaemin Lee, "Mending the Wound or Pulling It Apart? New Proposals for International Investment Courts and Fragmentation of International Investment Law", (2018) 39 *Nw J Int'l L & Bus* 1.

ring or harmonizing these various IIAs. For this reason, the same issues are sometimes concluded differently. Besides, investment tribunals follow different resolutions and may even reach controversial jurisprudence for essential points of IIAs. Since governing laws differentiate, it is incapable to have incompatible outcomes. However, disputing parties potentially consider this situation causing non-identical case law on substantially similar issues as an obstruction. On the other hand, there are some cases with the same parties, identical facts and governing laws that are controversial, which raise legitimacy concerns. In other words, some of the inconsistencies can be derived from differences in the provisions of the applicable investment treaties. Others, may emerge from different interpretations of identical provisions or provisions whose differences are unimportant.²⁸

Legitimacy criticisms in regards to inconsistent decisions of two tribunals can be seen between two cases: *CME v Czech Republic* and *Ronald Lauder v Czech Republic*.²⁹ In these seemingly two different cases, the same investor, by filing 'twin' claims under two investment treaties, with the same facts, legal norms and parties, causes abuse of process.³⁰ The CME tribunal held there was a treaty violation since the Czech Republic weakened the deal on which the investor committed when investing. On the contrary, the Lauder tribunal decided that there was no inconsistency resulting unfair and inequitable treatment.³¹

As another example, in *TECMED v Mexico*,³² the tribunal concluded that Mexico had violated the Fair and Equitable Treatment (FET) clause and in this respect reflected a noticeably restrictive approach. No-

²⁸ Andrea K Bjorklund, "The Legitimacy of the International Centre for Settlement of Investment Disputes" in N Grossman, H Cohen, A Follesdal, G Ulfstein (eds.), *Legitimacy and International Courts* (Studies on International Courts and Tribunals 246).

²⁹ *CME Czech Republic v Czech Republic*, Ad hoc-UNCITRAL Arbitration Rules, Final Award 14 March 2003; *Lauder v Czech Republic*, Ad Hoc-UNCITRAL Arbitration Rules, Final Award, 3 September 2001.

³⁰ Nyombi and Mortimer (n 8) 207; Bjorklund (n 28) 243.

³¹ See Susan D Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 *Fordham L Rev* 1521.

³² *Tecnicas Medioambientales Tecmed S A v The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (May 29, 2003), 19 ICSID REV 158 (2004).

netheless, in *Parkerings-Compagniet AS v Republic of Lithuania*,³³ the tribunal stated that Lithuania did not breach the FET clause, emphasizing that investors should anticipate regulatory modifications. According to these two incoherent awards, in *TECMED*, the principle of protecting investor's rights won the case; on the other hand, *Parkerings-Compagniet* was decided in favour of the state sovereignty, which raises concerns about the legitimacy of the ISDS regime.

Appellate mechanisms essentially serve two intersecting legal objectives. First, they grant the unsatisfied party the chance to get reviewed the decision; second, they contribute consistency and certainty by enforcing the principle of the equal treatment of factually identical cases. However, in ISDS, it does not exist a proper appeal mechanism that can review decisions and unify the fragmented jurisprudence.³⁴ For example, in *CMS Gas Transmission Company v The Republic of Argentina*,³⁵ ICSID annulment committee found itself incapable of setting aside or revising an award, even after determining "manifest errors of law". Arbitral tribunals are not bound by 'stare decisis', so they have no responsibility to resolve the dispute by considering preceding awards in similar issues.³⁶

The absence of an appellate system in ISDS is not just engendering inconsistent decisions. Since investor-states disputes are generally undertaking issues affecting public law and interest, the lack of a mechanism to review a decision may have important implications on a state's regulatory power.³⁷

2. Lack of Independence and Impartiality

The appointment of arbitrators has been a reason of contention in ISDS. It has been questioned that the current appointment design does not bar a "revolving door" issue that is called as "Double Hats" under

³³ ICSID Case No ARB/05/8, Award (Sep 11, 2007) para 335-36.

³⁴ Thomas Dietz, Marius Dotzauer and Edward S Cohen, "The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System" (2019) 26 (4) Review of International Political Economy 749, 757.

³⁵ ICSID Case No ARB/01/8, Decision of the ad hoc Committee on the application for annulment, 25 September 2007, para 97, 127, 150, 157-9.

³⁶ Lopez-Rodriguez (n 7).

³⁷ Gus Van Harten, "Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law" in Stephan W Schill (eds) International Investment Law and Comparative Public Law, 2010, 631; Galan (n 3) 101-2.

which counsels working with the clients may later become their arbitrators, or vice versa.

It has also been argued that arbitrators are a small, closed group of experts who makes access to the ‘secret club’ very challenging for other arbitrators. In this regard, the parties have a clear tendency to re-appoint experts whose point of views, approaches and beliefs are predictable and familiar to them. Further, appointing experienced and popular arbitrators may potentially have an influential power of convincing the other members of the tribunal.³⁸ For instance, according to the “Corporate Europe Observation Report” Brigitte Stern is distinguished as the state’s most preferred arbitrator. In this respect, she has been challenged in certain cases for her re-appointments which were causing concerns regarding the impartiality principle.³⁹

Moreover, ‘issue conflicts’ can also lead to problems. This type of conflicts may derive from the arbitrator’s connection with the topic in dispute, not the parties, of the case. Such conflicts can emerge where the arbitrator is acted as counsel in another case with the same legal issue; and where the arbitrator has previously declared his/her viewpoint on the points in question.⁴⁰

In *Republic of Ghana v Telekom Malaysia Berhad*⁴¹, Ghana claimed that the arbitrator at stake had an issue conflict because he had been serving two controversial roles at the same time, as a pro-investor position on the interpretation of an issue of expropriation law and as an arbitrator in the case against Ghana. The Dutch court stated that the arbitrator could not play both the role of arbitrator and perform his duty as counsel

³⁸ Echandi (n 19) 40-41.

³⁹ CEAC Holdings Ltd v Montenegro; Highbury International AVV, Compania Minera de Bajo Caroni AVV, and Ramstein Trading Inc v Venezuela, ICSID Case No ARB14/10; Gloria Maria Alvarez, et al, “A Response to the Criticism Against ISDS by EFILA” (2016) 33 (1) Journal of International Arbitration 1, 19.

⁴⁰ Gavan Griffith and Daniel Kalderimis, “‘Pure’ Issue Conflicts in Investment Treaty Arbitration”, in David D. et al (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) chapter 38; Ariel Anderson, “Saving Private ISDS: The Case for Hardening Ethical Guidelines and Systematizing Conflicts Checks” (2018) 49 Geo J Int’l L 1143, 1148.

⁴¹ *Republic of Ghana v Telekom Malaysia Berhad*, HA/RK 2004.667, 18 October 2004, para 3.

in the other case. So, after resigning as counsel, the arbitrator continued his arbitrator role.⁴²

Lack of gender and geography diversity in ISDS also cause impartiality concerns. For example, Western European arbitrators are the most frequently appointed arbitrators all around the world, which signals the absence of diversity can cause to discredit the impartiality of ISDS.⁴³

3. Openness and Transparency

In spite of some progress, the lack of transparency persists to be a serious legitimacy matter that obstructs the efficient public control of arbitrators.⁴⁴

It can be identified that investor-state disputes have distinctive characteristics that may be inexpedient with the confidentiality principle initially created for commercial arbitration. For this reason, investor-state disputes inherently necessitate tailored rules balance preserved trade secrets of foreign investors and state confidential information and the requirement to notify the public.⁴⁵

Transparency's importance in investor-state disputes can be seen more clearly, particularly in environmental, health-related cases that comprise intensively public interest. For instance, in *Vattenfall v Germany*, between the Swedish energy company and the German government, Germany's decision to reject nuclear energy due to the public interest was deliberated.

Similarly, in *Philip Morris v Australia* and *Philip Morris v Uruguay*, Philip Morris challenged the aforesaid states' steps regarding tobacco plain packaging. These cases highlighted the significance of public interest, which plays an effective role in the decision-making process. In investor-state disputes, unlike commercial arbitration, it should be given

⁴² *ibid* para 4-5.

⁴³ Echandi (n 19) 42.

⁴⁴ Dietz et al (n 34) 757; Barnali Choudhury, Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit? (2008) 41 VAND J TRANSNAT'L L 775.

⁴⁵ Joanna Lam and Güneş Ünüvar, "Transparency and Participatory Aspects of Investor-State Dispute Settlement in the EU "new wave" Trade Agreements" (2019) 32 Leiden Journal of International Law 781, 785.

more weight to the principle of transparency than confidentiality to inform the public to make themselves heard for their interest.

The concept of transparency has expanded to cover the ‘friend of the court’ *amicus curiae* participation by non-disputing parties, which is a person not directly engaged in a case but advises the court.⁴⁶ *Amici curiae* participation can be provided by signing BITs and Free Trade Agreements (FTAs) or adopting model BITs that already include this participation. International Centre for Settlement of Investment Disputes (ICSID) amended its Arbitration Rules to recognise *amici curiae* to file submissions. However, the applications are not often successful, or participation is very limited in scope.⁴⁷ It is also admitted that investment treaty tribunals have the power to allow the participation of *amici curiae*.⁴⁸

Participation of *amici curiae* improves procedural openness and prevents the understanding of the arbitral proceeding as obscure.⁴⁹ *Amici curiae* participation is also helpful to focus on points the parties are incapable or reluctant to mention and produce the tribunals more thorough legal arguments to reach deeper conclusions of a decision.⁵⁰ Since investor-state disputes may potentially involve an alteration in the law of the state party and affect public law issues, the public will need broader

⁴⁶ Collins Dictionary, <https://www.collinsdictionary.com/dictionary/english/amicus-curiae>, (accessed 20.05.2021). For the third-party participation “*amicus curiae*” and its plural form “*amici*” latin words will be used as terminology throughout this essay.

⁴⁷ Lucas Bastin, “The *Amicus Curiae* in Investor-State Arbitration” (2012) 1 (3) CJICL 208, 212; *Apotex Holdings and Apotex Inc v United States of America*, UNCITRAL, Procedural Order No 2 on the Participation of a Non-Disputing Party, 2011; *Eli Lilly and Company v The Government of Canada*, UNCITRAL, ICSID Case No UNCT/14/2, Procedural Order 4, 2016; Bjorklund (n 28) 248.

⁴⁸ C Knahr, “Transparency, Third Party Participation and Access to Documents in International Investment Arbitration” (2007) 23 *Arbitration International* 327.

⁴⁹ Eugenia Levine, “*Amicus Curiae* in International Investment Arbitration: The Implications of an Increase in Third-Party Participation” (2011) 29 (1) *Berkeley Journal of International Law* Volume 207, 217; J VanDuzer, “Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and *Amicus Curiae* Participation” (2007) 52 *McGill LJ* 681; Bastin (n 47) 223; Gus Van Harten, “The European Commission and UNCTAD Reform Agendas” 128, 139-140, in Steffen Hindeleang, Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016).

⁵⁰ T Ishikawa, “Third Party Participation in Investment Treaty Arbitration, (2010) 59 *ICLQ* 373, 402-403.

transparency than private commercial arbitration. Moreover, ISDS provides investors to skirt domestic jurisdiction and question democratically legislated laws via a private proceeding. So, the admission of amici curiae helps to gather required key information and foster matters regarding public interest that are necessary to render a decision properly. Furthermore, it gives amicus, as the representatives of the public, a democratic chance to observe and control the judicial decision-making process of the tribunal and thereby perform a 'symbolic validation' duty.⁵¹

However, it is also a true concern that amicus curiae participation can cause a rise in cost and delay. Another concern is non-parties' interference on the consensual and autonomous character of arbitration, which can be seen as undermining party autonomy.⁵² Amicus curiae may also harm confidentiality and privacy principles.⁵³ Besides, third-parties that are not independent of the parties may try to manipulate the process by serving as amici curiae and may possibly act malevolently.⁵⁴

Despite the argued disadvantages, it is clear that amici curiae are valuable players in investor-state arbitrations. They play a significant role to balance public interest with investors' benefits by contributing to prevent criticisms concerning 'redundant' confidentiality. The desired transparency of the investor-state arbitration system requires the 'active' involvement of amici curiae. In this regard, it is the tribunals who have the discretion to strike a balance between refraining from the complications causing undue cost/delays and impartiality concerns and the contribution of the amici submissions in the case by being voice of the public.

4. Cost and Duration

Transplantation of an inherently private mechanism, international commercial arbitration, into a public law framework has been causing undesirable disparities.⁵⁵

⁵¹ A Newcombe, A Lemaire, "Should Amici Curiae Participate in Investment Treaty Arbitrations?" (2001) 5 *Vindobona Journal of International Commercial Law and Arbitration* 22, 30; Bastin (n 47) 224; Galan (n 3) 101.

⁵² Newcombe (n 51) 32; Bastin (n 47) 225.

⁵³ Levine (n 49) 220; A Boralessa, "The Limitations of Party Autonomy in ICSID" (2004) 15 *American Review of International Arbitration* 253.

⁵⁴ Bastin (n 47) 226.

⁵⁵ Stephan Wilske, Martin Raible and Lars Markert, "International Investment Treaty arbitration and International Commercial arbitration- Conceptual Difference or Only A 'Status Thing'?" (2008) 1 *Contemp Asia Arb J* 213, 213-34.

The costs of being a party in ISDS may require courage. According to studies, USD 5 million per case on average for each disputing party is needed to compensate legal fees and the costs of the arbitral tribunal.⁵⁶ In the *Yukos* arbitration cases, the respondent state's costs were USD 27 million (and the claimant's costs USD 80 million).⁵⁷ Additionally, in *Libananco v Turkey*⁵⁸, the respondent's costs were roughly USD 36 million (while the claimant's were USD 24 million).⁵⁹

It is also a significant concern that ISDS is not fast enough. In the last three decades, the briefest arbitral process has been one year, whilst the long-continued has been nearly ten years and a typical time for most of the ISDS proceeding is almost four years.⁶⁰

On the other hand, the political costs of ISDS can be more troublesome, both for States and investors. Many governments have concerns about the possible influence of acting as a defendant in ISDS cases which may harm their prestige through future investment projects. For this reason, in most cases, ISDS serve as pressure or threat to compel parties to negotiate and settle in order to prevent the costly running battle of ISDS process.⁶¹

5. Third-Party Funding (TPF)

Investment arbitration disputes have been appealing to funders because the amount of compensation achieved from these cases is frequently higher than in commercial arbitration. Also, investor-state disputes have no counterclaim likelihood for respondent states which turns such

⁵⁶ Matthew Hodgson, "Costs in Investment Treaty Arbitration: The Case for Reform" in Jean E Kalicki and Anna Joubin-Bret (eds) *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2014) 748, 756.

⁵⁷ *Veteran Petroleum v Russia* (2005), *Yukos Universal v Russia* (2005), *Hulley Enterprises v Russia* (2005).

⁵⁸ *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8).

⁵⁹ Lise Johnson, Lisa Sachs, Brooke Güven and Jesse Coleman, "Costs and Benefits of Investment Treaties, Practical Consideration for States" (March 1 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3277965 (accessed 20.05.2021).

⁶⁰ Echandi (n 19) 55.

⁶¹ Jonathan Klett, "National Interest v Foreign Investment- Protecting Parties Through ISDS" (2016) 25 *Tul J Int'l & Comp L* 213, 225.

disputes into a very profitable market for funders.⁶² For example, in *Teinver v Argentina* case,⁶³ Burford Capital obtained a 736% profit on its investment.

It should also be noted that TPF is also possible for respondent states. In *RSM v Grenada* case,⁶⁴ Global Petroleum Group funded Grenada's defence. However, there were assertions that Global Petroleum had been ensured the oil exploration rights after withdrawn from RSM.⁶⁵ This case example shows that even though in principle, TPF is also available to respondent states, TPF is originally designed for claimants in ISDS and inclined in favour of the investors.⁶⁶ In this respect, the process is not transparent enough to control, and so is open to legitimacy and fairness concerns.

Another reason why funders support such disputes is to acquire control and economic power over the case. In this way, they can affect the management and result of the case. Moreover, the anticipation of generating an advantageous precedent that would support their future disputes is also a motivational purpose.⁶⁷ In *Quasar de Valores SICAV S.A. et al. v The Russian Federation*,⁶⁸ the funder was a former majority shareholder in the Russian oil company Yukos, rather than an independent third-party funding company. By funding the *Quasar de Valores* case, the funder was hoping to establish an expedient precedent in the expectation that would be beneficial for his future case. The case at stake was a major dispute against Russia linked with the substantial Yukos case un-

⁶² Catherine A Rogers, "Gamblers, Loan Sharks & Third-Party Funders" in *Ethics in International Arbitration* (2014) 177, 178-9; Rachel Denae Thrasher, "Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform" (2018) 59 BC L Rev 2935, 2936.

⁶³ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1; Frank J Garcia, "Third-Party Funding as Exploitation of the Investment Treaty System" (2018) 59 BC L Rev 2911, 2916.

⁶⁴ *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14.

⁶⁵ Thrasher (n 62) 2941.

⁶⁶ Frank J Garcia, Leo Gargne, Eric De Brabandere, Rachel D. Thrasher and William Park, "Reforming International Investment Law: Opportunities, Challenges, Paradigms" (2018) 59 BC L Rev 2899, 2900.

⁶⁷ *ibid* 2901.

⁶⁸ SCC Arbitration No. 24/2007, Award of 20 July 2012, para. 223.

der the Energy Charter Treaty (ECT). Moreover, the tribunal declined the funded party's application to recover costs since the funder was solely attempting to produce an advantageous precedent and could not obtain repayment from the funded party, even if the funded party won the case.⁶⁹

TPF impairs access to justice for developing respondent states by unbalancing the system and affecting the disadvantaged states' power to control regulatory change.⁷⁰ It is reasonably argued that funders are deliberately aiming at the BIT/ISDS as an investment means due to its peculiar structural characteristics: the awards are unappealable, legally binding, and the majority of ISDS arbitral awards are published, which helps to foresee whether a case will succeed or not.

In other words, in an already imbalanced system, funders confer increased superiority on investors against states with limited substantive rights and no appellate rights.⁷¹

TPF could harm the core structure of ISDS system, which is in connection with public interest more than private commercial interests. It should not be ignored that respondent states in investor-state disputes are in a unique position in which investors are complaining of the states' measures of general public interest, environmental law, labour protections and other social-economic rights.⁷² TPF clearly seems to be non-convenient for ISDS, designed for private-private disputes settled in commercial arbitration and should be banned. If this cannot be done, then stronger regulations requiring mandatory and expansive disclosure would be definitely a must to balance the delicate equilibrium and provide the transparency needed in investor-state disputes.⁷³ This mandatory disclosure should involve not only the existence and identity of third-party funders but also the general structure of these funding agreements⁷⁴ to prevent any legitimacy concerns.

⁶⁹ Victoria Shannon Sahani, *Revealing Not-for-Profit Third-Party Funders in Investment Arbitration*, <https://oxia.oupplaw.com/page/565> (accessed 20.05.2021).

⁷⁰ Garcia (n 63) 2925.

⁷¹ *ibid* 2921; Thrasher (n 62) 2937.

⁷² Thrasher (n 62) 2948.

⁷³ *ibid* 2935.

⁷⁴ *ibid* 2946.

II. The Main Issues that may prove to be an obstacle in settlement of “Energy Disputes”

Settlement of Energy disputes has common issues with the general ISDS regime, however on several points such as “right to regulate” and recent *Achmea* case’s impacts on the future of Energy dispute settlement mechanism, “compatibility with the EU law”, “third-party participation” and “environmental protection” are some of the salient topics that should be examined separately. Of course, there are other important issues regarding the Energy sector as well. Nevertheless, to limit the essay, only these obstacles are analysed.

A. Right to Regulate and Compatibility with the EU Law

Energy Charter Treaty (ECT) is a multilateral international agreement that outlines the legal foundation to advance long-term collaboration in the energy sector between signatory countries. The ECT was signed by all EU member states separately and the EU. In recent years, particularly two cases which were settled under the ECT- *Charanne v Spain* (2016); *Eiser Infrastructure Ltd et al v Kingdom of Spain* (2017) were discussed regarding mainly the difference between the state’s right to regulate and protections for the investor.

Slovak Republic v Achmea BV (2018) has significance because its compatibility with the EU law and its impacts on the energy sector have been considered.

1. Right to Regulate

Since around the mid-2000s, ISDS decisions have begun to acknowledge that legitimacy should not be considered in one-sided terms protecting just the foreign investor unequally. The system permits investors to enjoy both substantive and procedural rights, but the communities affected by such investments to have neither.⁷⁵ The lack of access to justice for local communities that are affected by such investments is seen unjustifiable.⁷⁶ This imbalanced system causes a structural confrontation

⁷⁵ See Alessandra Arcuri and Francesco Montanaro, “Justice for All? Protecting the Public Interest in Investment Treaties” (2018) 59 B C L Rev 2791, 2793; Mattias Kumm, “An Empire of Capital?: Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege” (2015) 4 ESIL Reflections 1, 5.

⁷⁶ Arcuri and Montanaro (n 75) 2799.

between ISDS and the rule of law. States have also limited ability to raise counterclaims and citizens have limited participatory rights such as via amicus briefs. The states have to strike a balance between public interest and the protection of investment.⁷⁷ Such an unequal and asymmetric situation raised questions about the even-handedness of ISDS.

In *El Paso Energy Int'l Co v Argentine Republic*,⁷⁸ it is highlighted that tribunal's development of the principle of a state's right to regulate considering public interest objectives indicates an evident concern of fairness on striking a balance between investors and state's right to regulate.⁷⁹ In this respect, the state has to be capable to realise the reasonable modifications and cannot be deemed to have confirmed a 'freeze' on the development of its legal regime.⁸⁰ In such cases, the tribunals will determine the economic or socio-political circumstances' in the host states to be "exceptional" with ascertaining that the state's measures to focus on relevant conditions were in the "public interest of the host state".⁸¹

Considering fairness only with regard to foreign investors could indeed create an unbalanced and unfair mechanism. Such an approach may provoke states to quit ISDS in the long term, as it can be seen in practice.

Charanne v Spain, was a case concerning Spain's regulatory changes about national systems based on photovoltaic solar electricity, in which the claim was dismissed. The tribunal emphasized that breach of investor assumption must depend on an objective test or evaluation, and the claimants could have anticipated potential adjustments to the regulatory framework.⁸²

Similarly, the tribunal in *Eiser Infrastructure Ltd et al v Kingdom of Spain*, stated that an agreement to maintain steadiness in the core as-

⁷⁷ Puig and Shaffer (n 1) 370.

⁷⁸ ICSID Case No ARB/03/15, Decision on Jurisdiction, para 70 (April 27, 2006).

⁷⁹ Nikesh Patel, "An Emerging Trend in International Trade: A Shift to Safeguard Against ISDS Abuses and Protect Host-State Sovereignty" (2017) 26 Minn J Int'l L 273.

⁸⁰ Award (31 October 2011) para. 365.

⁸¹ Yulia Levashova, The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment, International Arbitration Law Library, Volume 50 (Kluwer Law International 2019), 152-3.

⁸² *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, para 505.

pects of the legal regime trusted by investors in embarking on long-term investments does not promise that regulatory rules cannot change.⁸³

2. Compatibility with the EU Law

Emphasis must be placed particularly to the European Court of Justice (CJEU) case, *Slovakia Republic v Achmea B. V.*,⁸⁴ which evaluates the investor-state arbitration clauses in BITs and the significance of this decision on the energy sector. In the *Achmea* case,⁸⁵ the CJEU has decided that investor-state arbitration is not constituent of the EU's legal regime, so intra-EU BITs are not admissible. The ruling is critical; nevertheless, this award's full effect is unpredictable yet. It only examines a particular BIT in question and does not conclude general application. Also, it is clear that the ruling will negatively affect the enforcement of prospective investment arbitration awards and make the mechanism undesirable in cases concerning intra-EU investment issue.⁸⁶ Respondent EU member states potentially will depend on the decision of CJEU in ongoing and future arbitrations to challenge the jurisdiction of tribunals and prevent the enforcement; or question the validity of awards. Further, the judgment of the CJEU will impose on EU member states to cancel intra-EU bilateral investment treaties and, in general support the EC in the pending infringement proceedings against member states denying terminating their intra-EU BITs. In this regard, according to EC, national courts are obliged to annul any arbitral award concluded under intra-EU BITs.⁸⁷

Moreover, it is not clear whether this decision can also affect ECT.⁸⁸ Implementing the *Achmea* decision to the ECT has been rejected

⁸³ para 371.

⁸⁴ Case C-284/16 *Slovakia Republic v Achmea B. V.* [2018] ECLI:EU:C:2018:158.

⁸⁵ *ibid* para 60.

⁸⁶ Marta Abula, "Investor State Arbitration as Part of EU's Judicial System" (2018) 2 ECLIC 687, 696-697.

⁸⁷ EU Commission, Communication from the Commission to the European Parliament and the Council Protection of Intra-EU Investment, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&rid=8> (accessed 20.05.2021).

⁸⁸ Marc Bungenberg, "The Multilateral Investment Court- Royal Road or Dead End for the EU Legal Order?" (2019) 5 IBLJ 471, 475.

for now.⁸⁹ In these cases, the tribunals stated that the *Achmea* case correlates just only to all intra-EU BITs. On the other hand, in its statement of 15 January 2019, 22 EU Member States informed that they acknowledge intra-EU BIT and ECT claims to be non-arbitrable and urged the investor society not to commence new intra-EU investment arbitrations.⁹⁰ This declaration provoked a more complicated and unpredictable situation for the future of intra-EU BITs.

B. ISDS and Environmental Protection

Transparency and efficiency have been a growing concern in international investment arbitration in relation to environment or public health cases.

Even though the outcomes are sometimes in favour of states as in *Pac Rim v El Salvador* and also *Aven and Others v Costa Rica*,⁹¹ and sometimes in favour of the investors,⁹² it is a fact that the right to regulate may be resisted through ISDS, even it is for an environmental protection goal. One of the main concerns of arbitration's "regulatory chill effect" is that governments may refrain from altering legitimate regulation or legislation that aims to shield the environment; from the potentially catastrophic burden of costs.⁹³ In other words, the chilling effect may cause go-

⁸⁹ Masdar Solar and Wind Cooperatief UA v Kingdom of Spain, Award of 16 May 2018, ICSID Case No ARB/14/1 at [678 et seq]; Vattenfall v Germany (II), Decision of the Achmea Issue of 31 August 2018, ICSID Case No ARB/12/12 at [161 et seq]. Also in the same direction, Foresight Luxembourg Solar 1 Sarl, Foresight Luxembourg Solar 2 Sarl, Greentech Energy System A/S, GWM Renewable Energy I SPA and GWM Renewable Energy II SPA v The Kingdom of Spain, SCC Arbitration V (2015/150), award of 14 November 2018.

⁹⁰ Declaration of the representatives of the governments of the member states, of 15 January 2019 on the legal consequences of the judgment of the court of justice in Achmea and on investment protection in the European Union, https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf (accessed 20.05.2021).

⁹¹ Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12; David R. Aven and Others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3; Glamis v. US [2009] NAFTA, ICSID 48 ILM 1039 Award (8 June 2009).

⁹² Metalclad v. Mexico, ICSID Case No. ARB(AF)/97/1 Award (30 August 2000).

⁹³ Duy Vu, "Reasons not to Exit? A Survey of the Effectiveness and Spillover Effects of International Investment Arbitration" (2019) 47 European Journal of Law and Economics 291, 305-7.

vernments to prevent from applying their sovereignty rights in serious public interest subjects, such as the environment. In this respect, governments overthink potential disputes before they begin to draft the regulation and/or, following a lost arbitration process on a corresponding sort of regulation, to hinder a similar damaging decision that has a domino effect.⁹⁴

In *Aven and Others v Costa Rica* case, the tribunal emphasized that investors' rights are subsidiary to the government's right to guarantee that the investments are performed "in a manner sensitive to environmental concerns".⁹⁵ However, it was held that this subordination was not infinite and that the state must realise its environmental laws "in a fair, non-discriminatory fashion, applying said laws to protect the environment, following principles of due process, not only for its adoption but also for its enforcement".⁹⁶ In this case, even the tribunal awarded in favour of the state regarding the environmental policies, it did not accept Costa Rica's counterclaim regarding the environmental damage.

C. Reluctance to Amicus Curiae (Friend of the Court) Submissions by the Tribunals

Amicus curiae participation has significant importance for energy disputes since these disputes have severe implications on a State's public policy, such as environment and health.

In *AES v Hungary*⁹⁷ and *Electrabel v Hungary*⁹⁸ cases brought before ICSID pursuant to the ECT, the claimants asserted that Hungary had violated the ECT with measures against power purchase agreements. The European Commission (EC) submitted to be an "amicus" in the arbitral process as it considered that relevant agreements were illegitimate under European Community law. Both of the tribunals consented to the amicus to file written submissions. Even though EC had this permission from the tribunals, it received no other allowances as amicus curiae making this participation very limited and ineffective.

⁹⁴ ibid 307.

⁹⁵ para 412.

⁹⁶ para 413.

⁹⁷ AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary, ICSID Case No ARB/07/22, award 23 September 2010.

⁹⁸ Electrabel SA v Republic of Hungary, ICSID Case No ARB/7/19.

In *Piero Foresti v South Africa*⁹⁹ case, South African legislation, which was vesting mineral rights, was challenged. So, previous rights owners are informed to request to switch their earlier rights into new order rights. Five NGO's submitted for amici curiae to file written submissions, access to key documents, permission to attend and make oral submissions at the hearing. The tribunal permitted only to file written submissions and let the amici curiae access to documents. However, the tribunal did not allow the amici curiae to attend the hearings. Permitting key case documents is a contributive step. Nevertheless, in such a case involving the public interest, a grant to present at the hearings and providing the amicus to be the general public's voice would make the process more democratic and transparent.

*Methanex Corporation v United States of America*¹⁰⁰ was a case concerning a prohibition of a specific "gasoline additive" that the claimant was a producer of this ingredient. NGOs submitted to make written submissions, receive the parties' pleadings, present at the hearing and make oral submissions at the hearing. The tribunal granted permission to file written submissions according to UNCITRAL Arbitration Rules. However, the tribunal rejected all other requests noting that hearings would be in camera and that the parties had previously agreed that the arbitration would be confidential. In this decision, even though the tribunal clarified that third-party participation does not necessarily aggrieve the ideology of the investor-state arbitration,¹⁰¹ it was given more weight to the confidentiality and party autonomy principle that are mainly designed for commercial disputes, not for the disputes involving public interest, such as the environment.

All the above cases show that even the rules give the right for the third-party participations and the tribunal has the discretion to do so; in practice, the tribunals are too reluctant to apply the amicus curiae participation. This process has a considerable potential to be a solution for the

⁹⁹ *Foresti & Others v Republic of South Africa* ICSID Case No ARB (AF) /7/01.

¹⁰⁰ *Methanex v United States of America*, Ad Hoc, UNCITRAL (NAFTA), Decision of the tribunal on petitions from third persons to intervene as amici curiae, 15 January 2001, 23.

¹⁰¹ *Methanex v United States of America* para 30. Also, *Suez, Sociedad general de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB 03/19 (19 May 2005).

transparency and legitimacy concerns and, the tribunals should use their discretion more widely in this regard. Whilst using its discretion, the tribunal will have a crucial responsibility of balancing relevant procedural principles and the impact of amicus curiae participation to the case. The tribunal realises this task by considering whether amicus participation produces important material facts which are not in the parties' submissions, prevents redundant procedural burdens for the parties, harms procedural effectiveness.¹⁰²

III. Recommendations for Reform

Now, the very first question should be whether ISDS is excessively problematic that destroying the system is a must or, the structure of the system still strong and effective but needs reforms to ease the issues without removing it radically. More importantly, before deciding this profound question, it should be considered that approximately 3,367 BITs are the pillars of the system. They are long-term in nature, and "even when they are terminated, they have long tails, covering existing investments for years after termination".¹⁰³

Many proposals have been suggested for the concerns raised. For example, the proposition of a Multilateral Investment Court (MIC) system, which involves a tribunal of the first instance and an appellate body, with the fixed-term judges with a regular salary and selected on a random basis designated by states, was introduced in 2016 by the EC. However, there would be a potential risk of 'vote trading'¹⁰⁴ where states' political power will play an important role to control the court. In other words, the judges appointed might be biased in favor of the states that have the power to appoint or to veto them. Moreover, enforcement of MIC awards via the ICSID Convention is considered impossible¹⁰⁵. Any attempt to

¹⁰² *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 3 (29 September 2006).

¹⁰³ Kahale (n 10) 47.

¹⁰⁴ Jose Manuel Alvarez Zarate, "Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?" (2018) 59 *Boston College Law Review* 2765, 2787.

¹⁰⁵ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States [ICSID], 575 UNTS 159; N Jansen Calamita, "The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime" (2017) 18 *Journal of World Investment & Trade* 604 et seq.

harmonize an appellate mechanism with arbitration under the ICSID Convention would be contradictory with the ICSID Convention, which explicitly eliminates it.¹⁰⁶ In this regard, the New York Convention of 1958's application is also problematic and uncertain.¹⁰⁷ For these reasons, the MIC should provide for a separate new enforcement system which means the modification of the whole system would be expensive and challenging. Even MIC would use the infrastructure of other bodies, courts or organizations, the difficulty of the adaptability and redesigning process would be inevitable. It is also uncertain whether a new court would be convenient for a very fragmented system.¹⁰⁸ The proposed co-court system would definitely provide improvements for ISDS; however, it would bring more criticisms and issues if it is not well-designed in the long term.¹⁰⁹

Due to the reasons mentioned above, the existing system's essential elements would be maintained, and countries could make bespoke updates to the ISDS system in their prospect IIAs. This would be a model or a preparation process for future transformation. Within this period, transparency should be increased. In this regard, third-party participation as *amicus curia* should be accepted more widely in practice, especially by authorizing access to arbitration documents and hearings. TPF should be banned. If it is not possible, then more expansive disclosure rules should be brought. The biggest change would be adopting an appeal mechanism that will provide a decentralized and consistent system. In this suggested system, arbitral adjudication would be sustained and stepping back to court proceedings should not be considered. The appeal mechanism will

¹⁰⁶ Art 53 of ICSID Convention.

¹⁰⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNS 3; Umair Ghori, "Investment Court System or Regional Dispute Settlement: The Uncertain Future of Investor-State Dispute Settlement" (2018) 30 *Bond L Rev* 83, 97 seq.

¹⁰⁸ Policy Notes, "Reform of Investor-State Dispute Settlement in Search of a Roadmap" UNCTAD Secretariat, 23 (1) *Transnational Corporations*, 65-6.

¹⁰⁹ M R Dahlan and Wolf von Kumberg, "Investor-State Dispute Settlement Reconceptualized: Regulation of Disputes, Standards and Mediation" (2018) 18 *Pepp Disp Resol LJ* 467; Uzelac (n 21) 6; Jonathan Ketcheson, "Investment Arbitration: Learning From Experience" 97, in Steffen Hindelang, Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016).

be established on an institutional basis with a secretariat originated from the WTO Appellate Body. The enforcement of awards of the appeal body for non-ICSID contracting parties with respect to an ICSID award would be in accordance with the New York Convention.¹¹⁰ This is because the presence of an internal appellate mechanism shall not impact the nature of the process. In a two-tiered process, awards issued by the first-tier tribunal may only be enforced under the New York Convention once the limit for the appeal has expired.¹¹¹

Such an appeal system would promote the rule of law in ISDS by harmonizing consisting of precedents and increasing transparency.¹¹² By this way, the decisions of an appellate court would be helpful to create persuasive precedent. In other words, precedents would potentially constrain tribunals to guarantee a high quality of reasoning by leaving their awards open to appeal if they contradict or fail to adequately distinguish precedent established by the appellate court.¹¹³

Also, it should not be underestimated that reinforcing dispute prevention and management policies at the national level would significantly benefit in investor-state disputes.¹¹⁴

¹¹⁰ Gabrielle Kaufmann-Kohler and Michele Potesta, “Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap”, CIDS Research Paper, Geneva Centre for International Dispute Settlement, 3 June 2016, 203-6, https://www.cids.ch/images/Documents/CIDS_First_Report_ISDS_2015.pdf (accessed 20.05.2021); “Standalone Appeal Mechanism” (MIAM) can also be adopted, Bungenberg (n 5)197.

¹¹¹ Kaufmann-Kohler and Potesta (n 110) 163-4.

¹¹² Arseni Matveev, “Investor-State Dispute Settlement: The Evolving Balance Between Investor Protection and State Sovereignty” (2015) 40 UW Austl L Rev 348,384-5; Jaemin Lee, “Introduction of an Appellate Review Mechanism for International Investment Disputes: Expected Benefits and Remaining Tasks” in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System-Journeys for the 21st Century* (Brill, 2015) 474-7.

¹¹³ Matveev (n 112) 385; Eduardo Zuleta, “The Challenges of Creating a Standing International Investment Court” in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System- Journeys for the 21st Century* (Brill, 2015) 403, 416.

¹¹⁴ Policy Notes (n 87) 65-6; United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), Thirty-ninth session, “Possible reform of investor-State dispute settlement (ISDS) -Dispute prevention and

Conclusion

ISDS is a vital tool of the international investment law that directly and significantly affects the public interest. It is under intense criticism by asserting that the regime is based on unidirectional protection of the investors, which ‘indulges’ the interests of foreign investors while not considering sufficiently the interests of the states’ and turning the system into an unbalanced secret club.

With the increase in the number of cases and the range of affected states, the criticisms have also escalated. These criticisms have led to a comprehensive reform movement all around the world. In this direction, an investment court system that would remove the current system and radically rebuild the ISDS has been one of the notable focus points. This proposed model, which also involves an appellate mechanism, has the potential to prevent some deficiencies of the ad hoc arbitration by transforming it into a court system by the appointment of permanent judges and constituting a regular appeal tribunal. On the other hand, this proposed new system may be seen as a ‘regression’. To renounce the advantages and particularly the flexibility of arbitration would substantially negatively affect the prospect investors’ decision to establish future investment projects.

Thus, what the system needs is not to demolish the whole system which can work properly with its shortcomings. In other words, “do not burn your house to fright away the mice”. When the concerns are scrutinized rigorously, in the core of the criticisms, it can be perceived that the insistence to recognise the difference between commercial arbitration which is based on private-private disputes and investor-state dispute settlement, which is a treaty-based adjudication with severe public policy concerns¹¹⁵ creates continuous challenges regarding legitimacy crisis that hinder the reform. Therefore, what is required first is to realize what the system really is and what the system really demands.

It is reasonable to say that it would be unsuitable for searching a radical reform. Instead, considering adjustments to the system without altering its basic structure would be more effective and adequate. It can

mitigation- Means of alternative dispute resolution”, <https://undocs.org/en/A/CN.9/WG.III/WP.190> (accessed 20.05.2021).

¹¹⁵ Nyombi and Mortimer (n 8) 206-7.

be observed from the history that establishing BITs and ISDS is an indication of distrust of domestic law and courts; and lately with the proposal for a MIC system shows the dissatisfaction of ISDS. This vicious circle will be expected in the future too since with the help of concerns and criticisms, an ongoing system can be improved. It is contributing to being in search of a more satisfactory regime; however it is also true that to what extent it is reasonable to look for the perfect mechanism even it does not exist? For these reasons, considering an appeal mechanism and the recommendations mentioned above to increase transparency and consistency would help to embrace the ISDS again.

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