DOI https://doi.org/10.5817/CZ.MUNI.P210-8639-2021-7

EU and Its New Mechanism for the ISDS in the Protection of FDI – What the Future Holds?

Tereza Ševčíková
Faculty of Law, Masaryk University, Czech Republic

Abstract

The contribution deals with two debates that are taking place within the EU. Internally inside the EU about a possible alternative to ISDS, if any is needed. Specifically, the questions are: *what are the possibilities? And how does the progress in the EU looks like?* Externally, with non-EU countries via bilateral agreements, free trade agreements and globally within UNCITRAL.

Keywords

ISDS; Reform of International Investment Arbitration; EU; BIT; FDI; Achmea; Intra-EU; Extra-EU; FTA; ICS; CETA; UNCITRAL; MIC.

1 Introduction

International investment law is a branch of law that emphasises the protection of foreign investments. International investment law developed from the mixture of general international law, general standards of economic law, and distinct rules peculiar in its domain. The primary purpose of international investment law is to provide foreign investors with the protection of their investments against interference by the host state where the investor operates.[1] The international investment law has become a needful tool over the last century, especially after World War II.[2] From the 1950s, there was an expansion of the international capital market, and the idea is that the flow of capital was supposed to increase

1 DOLZER, R. and C. SCHREUER. *Principles of International Investment Law*. Oxford: Oxford University Press, 2008, pp. 1–3.
2 Ibid.

the economic development of states involved in international investments.[3] The legal sources of the international investment law are mainly bilateral investment treaties ("BITs"), investment chapters of free trade agreements ("FTAs") and regional treaties.[4] Today the BITs are the most common legal source of international investment law. Moreover, since the first BIT was signed between Germany and Pakistan in 1959,[5] BITs have spread widely.[6] In November 2021, United Nations Conference on Trade and Development ("UNCTAD") registered 2258 BITs in force and 324 treaties with investment provisions.[7]

Investment law provides for substantive guarantees.[8] International investment arbitration is the procedural mechanism that guarantees the procedural guarantees.[9] Also, most international investment treaties include a provision enabling investor-state dispute settlement ("ISDS") mechanism for resolving disputes.[10] The ISDS is one of the pivotal elements of international investment arbitration, and has turned the investment

3 AKYÜZ, Y. and A. CORNFORD. Capital flows to developing countries and the reform of the international financial system. *UNCTAD* [online]. November 1999, pp. 1–7 [cit. 25. 5. 2021]. Available at: https://unctad.org/system/files/official-document/dp_143.en.pdf

4 SCHILL, S. Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law. *Oxford Handbooks Online* [online]. February 2018 [cit. 25. 5. 2021]. Available at: https://www.oxfordhandbooks.com/view/10.1093/law/9780198745365.001.0001/law-9780198745365-chapter-51

5 Germany–Pakistan BIT (1959). *Investment Policy Hub* [online]. [cit. 25. 5. 2021]. Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bits/1732/germany---pakistan-bit-1959-

6 SORNARAJAH, M. *The International Law and Foreign Investment*. Cambridge: Cambridge University Press, 2010, pp. 1–7.

7 International Investment Agreements Navigator. *Investment Policy Hub* [online]. [cit. 25. 5. 2021]. Available at: https://investmentpolicy.unctad.org/international-investment-agreements

8 For example, national treatment, most favoured nation and fair and equitable treatment ("FET"), et cetera. DOLZER, R. and C. SCHREUER. *Principles of International Investment Law*. Oxford: Oxford University Press, 2008, pp. 220–222.

9 EUROPEAN COMMISSION. Factsheet on Investor-State Dispute Settlement. *SICE* [online]. 3. 10. 2013, p. 1 [cit. 22. 11. 2021]. Available at: http://www.sice.oas.org/tpd/USA_EU/Studies/tradoc_151791_Investor-State_Dis_e.pdf

10 POHL, J., K. MASHIGO and A. NOHEN. OECD Working Papers on International Investment - Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey. *OECD Publishing* [online]. February 2012, p. 10 [cit. 22. 11. 2021]. Available at: https://www.oecd.org/daf/inv/investment-policy/WP-2012_2.pdf

law into the instrument it is today.[11] Therefore, under these provisions, foreign investors have access to resolve the disputes with the other state via arbitration instead of relying on their home states to pursue their claims through diplomatic protection.[12] However, ISDS system is now being challenged by the states involved because they are not convinced if ISDS fulfils its desired goals. Furthermore, whether the price that states must pay is not unnecessarily high, specifically in the form of the awarded compensation or relinquishing certain privileges and the states' rights. Here are some of the examples of the current and emerging issues about ISDS from the states' perspective: who precisely is the investor under the treaty,[13] the costs of ISDS cases,[14] remedies for foreign investors under investment treaties and their possible impact on a level playing field for domestic and foreign investors,[15] the enforcement and execution of ISDS awards,[16] third party financing of ISDS,[17] the characteristics, selection and regulation of arbitrators in ISDS,[18] forum shopping and treaty shopping by investors, the question of the consistency of decision-making in ISDS,[19] the transparency (or better non-transparency) of the ISDS cases[20] and

11 UNCTAD. Reform of Investor-State Dispute Settlement: In Search of a Roadmap. *UNCTAD* [online]. 23. 6. 2013, p. 2 [cit. 22. 11. 2021]. Available at: https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf; Investor-State Dispute Settlement (ISDS). *Thomson Reuters Practical Law* [online]. [cit. 22. 11. 2021]. Available at: https://uk.practicallaw.thomsonreuters.com/0-624-6147?transitionType=Default&contextData=(sc.Default)&firstPage=true

12 DOLZER, R. and C. SCHREUER. *Principles of International Investment Law*. Oxford: Oxford University Press, 2008, pp. 220–222.

13 GAUKRODGER, D. and K. GORDON. OECD Working Papers on International Investment - Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community. *OECD Publishing* [online]. March 2012, p. 17 [cit. 22. 11. 2021]. Available at: https://www.oecd.org/investment/investment-policy/WP-2012_3.pdf

14 Ibid., p. 19.

15 Ibid., p. 24.

16 Ibid., p. 30.

17 Ibid., p. 36.

18 Ibid., p. 43.

19 Ibid., p. 51.

20 ROBERTS, A. and Z. BOURAOUI. UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims. *EJIL:Talk!* [online]. 6. 6. 2018 [cit. 22. 11. 2021]. Available at: https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/

an effect on the states' ability to govern issues inside their country without a possibility that some foreign investors would not like the new legislative.[21]

The discussion about the need and form of international investment arbitration reform echoes between states and other important international actors.[22] Especially in the United Nations Commission on International Trade Law ("UNCITRAL") and within the European Union ("EU"). It can be easily estimated that the EU is one of the main actors and promoters in this global debate.[23]

There are currently two wholly separate but parallel debates, one outside the EU and the other inside the organisation itself. In both, the EU plays a significant role. However, the debates are different. Therefore, there needs to be a distinction between them, and they need to be analyzed separately. The intra-EU debate considers a need to develop a new mechanism inside the EU, a unique international organisation that created its own legal subsystem. In addition, by acceding to the EU, Member States grant the EU part of their sovereignty necessary to fulfil the common goals. The Court of Justice of the European Union ("CJEU"), in the Achmea judgment, stated that the arbitration clauses are incompatible with the EU law. Therefore, it is necessary to revise inside the EU the need to invent an alternative intra-EU mechanism. On the other hand, the extra-EU debate concerns

21 See, e.g., Final Award of PCA of 2 May 2018, *Antaris Solar GmbH and Dr. Michael Göde vs. Czech Republic*, Case No. 2014-01; Final Award of PCA of 15 May 2019, *WA Investments Europa Nova Ltd. vs. Czech Republic*, Case No. 2014-19; Final Award of PCA of 15 May 2019, *I.C.W. Europe Investments Limited vs. Czech Republic*, Case No. 2014-22; Final Award of ICSID of 21 October 2019, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) vs. Kingdom of Spain*, Case No. ARB/13/31.

22 SKOVGAARD PAULSEN, L. and G. GERTZ. Reforming the investment treaty regime: A 'backward-looking' approach. *Brookings* [online]. 17. 3. 2021 [cit. 25. 5. 2021]. Available at: https://www.brookings.edu/research/reforming-the-investment-treaty-regime/

23 The EU moves forward efforts at UN on multilateral reform of ISDS. *European Commission* [online]. 18. 1. 2019 [cit. 25. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=1972; HALLAK, I. Multilateral Investment Court: Overview of the reform proposals and prospects. *European Parliament* [online]. January 2020 [cit. 25. 5. 2021]. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf; MEIJER, G., K. SCHWEDT and X. TATON. State of Play of EU Investment Protection: Investor-State Arbitration Laws and Regulation. *ICLG* [online]. 16. 11. 2020 [cit. 25. 5. 2021]. Available at: https://iclg.com/practice-areas/investor-state-arbitration-laws-and-regulations/4-state-of-play-of-eu-investment-protection

the global discussion caused by dissatisfaction in the global field. However, it does not aim to unify the objectives within a legal subsystem which would not be possible at the global level, but to address global concerns and create a compromise between states, as the individual delegations in the UNCITRAL negotiations are trying to do.

This piece aims to outline the possible forms of both intra-EU and extra-EU reforms. The second chapter appraises the readers of the background, which led to the current situation, and highlights the intra-EU possible forms in the ISDS. The third chapter deliberates upon the mechanisms developed in the FTAs solely for the disputes with countries outside the EU and the process of the establishment of the Multilateral Investment Court ("MIC").

2 Intra-EU Debate

2.1 Background of the Debate

Some Member States and the Commission used to discuss whether intra-EU BITs are compatible with EU law.[24] One of the expressed concerns was that the provisions in the intra-EU BIT might lead to the more favourable treatment of investors who are nationals of Member States party to the BIT by excluding the same protection to investors from the other Member States. That conduct could lead to discrimination based on the nationality of the foreign investor.[25] Conversely, another discussed matter was whether if the EU law unable the possibility of intra-EU ISDS, it would be the end of efficient and protection of foreign direct investment ("FDI"). The turning point of this debate was the Achmea judgment,[26] wherein the CJEU held that the arbitration clauses in intra-EU BITs are incompatible with the EU law.[27]

24 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 5.

25 KRAUSE, C. von. The European Commission's Opposition to Intra-EU BITs and Its Impact on Investment Arbitration. *Kluwer Arbitration Blog* [online]. 28. 10. 2010 [cit. 22. 11. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2010/09/28/the-european-commissions-opposition-to-intra-eu-bits-and-its-impact-on-investment-arbitration/

26 Judgment of the CJEU of 6 March 2018, Case C-284/16.

27 HINDELANG, S. The Limited Immediate Effects of CJEU's Achmea Judgement. *Verfassungsblog* [online]. 9. 3. 2018 [cit. 25. 5. 2021]. Available at: https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/

Specifically, in this judgment, the CJEU ruled that the ISDS clause included in the Netherlands–Czechoslovakia BIT was incompatible with EU law.[28] The crucial reason for this reasoning was that according to the CJEU, arbitral tribunals operate "outside" the domestic legal system of the Member States; hence they cannot request preliminary rulings from the CJEU whenever the interpretation of the EU law is at stake.[29] The CJEU specifically stated: *"In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by the Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the precise nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above."*[30] In other words, investment arbitral tribunals operate outside the scope of the CJEU, and they might jeopardise the uniformity, consistency and harmonized interpretation of EU law. Moreover, it could undermine the authority of the CJEU as a conclusive interpretative body of the EU law.

In January 2019, three political Declarations were adopted. Each clarifies the possible implications of the results of the Achmea judgment[31] and the agreed approach of the Member States on the future of the intra-EU ISDS.[32]

In May 2020, some Member States signed the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European

28 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 5.

29 Judgment of the CJEU of 6 March 2018, Case C-284/16, para 42.

30 Ibid., para 58.

31 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 5.

32 BRAY, D. and S. KAPOOR. Agreement on the Termination of Intra-EU BITs: Sunset in Stone? *Kluwer Arbitration Blog* [online]. 4. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/04/agreement-on-the-termination-of-intra-eu-bits-sunset-in-stone/

Union ("Termination Agreement"),[33] which, after the ratification of the signing member states, terminates the intra-EU BITs.[34] However, some states have not signed it – the UK (for obvious reasons based on Brexit and the Withdrawal Agreement), Ireland (already terminated its BITs), Finland, Austria and Sweden (have committed to terminating their BITs bilaterally).[35] Furthermore, the Commission has issued formal infringement notices to Finland as well as to the UK.[36] The Termination Agreement entered into force on 29 August 2020, after Denmark (on 6 May 2020) and Hungary (on 30 July 2020), the first two EU Member States were out of the 23 signatories to ratify the Termination Agreement.[37] With the ratification of the Termination Agreement, the intra-EU ISDS cease to exist.

The Termination Agreement reproduces the outcomes of the Achmea judgment and the principal values of the Declarations mentioned above.[38] Thus, all intra-EU BITs and disputes based on them are declared incompatible with EU law. New intra-EU BIT arbitrations should not be initiated,[39] as Art. 5 of Termination Agreement states that arbitration clauses in intra-EU BITs *"shall not serve as the legal basis for New Arbitration Proceedings."*[40] The Termination Agreement requires that the Member

33 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (Termination Agreement). *EUR-Lex* [online]. 29. 5. 2020 [cit. 25. 5. 2021]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22020A0529%2801%29

34 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 5.

35 Termination of intra-EU bilateral investment treaties: the UK – the last safe haven? *Dentons* [online]. 9. 11. 2020 [cit. 25. 5. 2021]. Available at: https://www.dentons.com/en/insights/articles/2020/november/9/termination-of-intra-eu-bilateral-investment-treaties; LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 5.

36 Termination of intra-EU bilateral investment treaties: the UK – the last safe haven? *Dentons* [online]. 9. 11. 2020 [cit. 25. 5. 2021]. Available at: https://www.dentons.com/en/insights/articles/2020/november/9/termination-of-intra-eu-bilateral-investment-treaties

37 Agreement for the termination of intra-EU BITs enters into force. *Lexology* [online]. 8. 9. 2020 [cit. 25. 5. 2021]. Available at: https://www.lexology.com/library/detail.aspx?g=bdf7412c-5cd3-4e18-997b-a387fc25b044

38 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 5.

39 NEMESCSÓI, A., M. DESPLATS and S. DELI. The end of Intra-EU BITs. Now what? *DLAPIPER* [online]. 4. 8. 2020 [cit. 26. 5. 2021]. Available at: https://www.dlapiper.com/en/us/insights/publications/2020/08/the-end-of-intra-eu-bits-now-what/

40 Art. 5 Termination Agreement.

States inform arbitral tribunals about new or pending arbitrations that the arbitration clause contained within the relevant intra-EU BIT cannot serve as a legal basis for those proceedings.[41]

As it was already said, the Termination Agreement has precluded the possibility of investor-state arbitration within the EU and the BITs in total. However, not all the Member States have signed a Termination Agreement, and the fate of these intra-EU BITs is ambiguous.

2.2 What Now?

According to the author, following the Termination Agreement, a new mechanism had become an exigency to fill the rip legal vacuum in investment protection for intra-EU investors. According to the European Commission ("EC"), there is no gap to full after Achmea because the EU is operating on the principle of mutual trust; therefore, the EU law and Member States' national law covers the required protection of the foreign investors and investors' access to justice; hence the intra-EU BITs are no longer requirable. However, the EC suggested in its 2018 Communication[42] to *"provide guidance on existing EU rules for the treatment of cross-border EU investments."*[43]

However, providing just guidance seems insufficient based on the structure of the EU. According to the author, the EU pretends to be clear on the issue, although no statement that would clarify the matter has been issued. Although the EC has issued a consultation, it has not yet commented on how it would imagine the system would, could or should appear. It is somewhat strange that even though the EC seems to believe that it is sufficient to bring disputes arising from the FDI protection before national courts, why did it launch a consultation if it is a closed topic? Moreover, in the ongoing consultation, the EU clarifies the occasional incompetence of the courts. Hence, according to the author, just some guidance is not enough because silence disturbs

41 Termination of intra-EU bilateral investment treaties: the UK – the last safe haven? *Dentons* [online]. 9. 11. 2020 [cit. 25. 5. 2021]. Available at: https://www.dentons.com/en/insights/articles/2020/november/9/termination-of-intra-eu-bilateral-investment-treaties

42 Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment. *EUR-Lex* [online]. 19. 7. 2018 [cit. 25. 5. 2021]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&from=en

43 Ibid, p. 1.

the harmony inside the EU. Furthermore, Luxembourg and Portugal noted that similarly. Luxembourg called upon the EC and the Member States *"to start a process to ensure complete, strong and effective protection of investments within the EU and adequate instruments in this regard."*[44] Furthermore, Portugal *"called to assess the establishment of new or better tools under European Union law and to carry out an assessment of the current dispute settlement mechanisms which are essential to ensure legal certainty and the protection of interests of investors."*[45]

The issues are now to consider if the new mechanism should be even developed or not. And if yes, how it should be constructed for the beneficence of all involved parties. The EU has to consider the significant factor that investment disputes usually require specific sector skills and have significant interests at stake. Furthermore, the judicial systems of EU Member States often lack the efficiency and effectiveness required to render a timely and well-reasoned decision by competent adjudicators.[46] For future references, there are ***these possible approaches:***

1. Due to the implementation of the Termination Agreement, the legal protection will be based solely on EU or national protection, and claims will be brought before domestic courts.
2. EU will desire to invent an alternative mechanism to ISDS that will have to reflect the issues raised in Achmea judgment.

The EC issued a public consultation that should help solve the dilemma of the need of inventing a new mechanism.[47] However, the outcomes have

44 INGWERSEN, H. and K. SCHWEDT. Treaty to terminate intra-EU BITs enters into force. *Linklaters* [online]. 10. 9. 2020 [cit. 25. 5. 2021]. Available at: https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/september/treaty-to-terminate-intra-eu-bits-enters-into-force

45 Ibid.

46 LEIKIN, E., B. KASOLOWSKY and I. BORGDORF. The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field. *Kluwer Arbitration Blog* [online]. 7. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

47 Public Consultation Document an Intra-EU Investment Protection and Facilitation Initiative. *European Commission* [online]. [cit. 25. 5. 2021]. Available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2020-investment-protection-consultation-document_en.pdf; EC launches consultation on facilitating intra-EU investment. *IISD* [online]. 14. 7. 2020 [cit. 25. 5. 2021]. Available at: https://www.iisd.org/itn/2020/07/14/ec-launches-consultation-on-facilitating-intra-eu-investment/

not been presented yet. All citizens concerned organisations and actors were welcomed to participate.[48] Therefore, the consultation should provide much valuable and helpful information. Ideally, this consolation will help the EC develop the most efficient mechanism for intra-EU dispute resolution and show how these actors view the FDI protection under EU law.

However, as mentioned, this was just the brief intel into the issue of the substantive law, and the author thenceforward discusses only the procedural part.

2.2.1 How the Procedure Regarding Investor-State Disputes Should Look Like?

The only thing that is clear for now is that the intra-EU ISDS, as was known, is dead. Furthermore, a kind of vacuum has been created, so what now?

Some may say that the debate is over for the EU and the Member States and that intra-EU state-investor disputes will be resolved before national courts where the investor operates. That approach is entirely in line with the Achmea judgment and the CJEU argumentation. On the other hand, the EU is aware that some member states' domestic court systems can be unpredictable, time-consuming and ineffective.[49] Also, the EC is aware that the domestic courts (of at least some particular the Member States) have shown themselves unwilling or unable to hold national governments to account and apply the law in a truly neutral and impartial manner.[50] In addition, the CJEU ruled that, for example, the Polish courts are not sufficient and impartial.[51] Therefore, if the CJEU stated that in its ruling, the EU must consider that not all domestic courts can provide an efficient system; hence, creating an alternative system would be a suitable solution.

48 Cross-border investment within the EU – clarifying and supplementing EU rules – Public consultation. *European Commission* [online]. [cit. 25. 5. 2021]. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Investment-protection-and-facilitation-framework/public-consultation

49 LEIKIN, E., B. KASOLOWSKY and I. BORGDORF. The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field. *Kluwer Arbitration Blog* [online]. 7. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

50 Ibid.

51 Judgment of the CJEU of 16 November 2021, Joined Cases C-748/19 and C-754/19.

Moreover, as mentioned earlier, investment disputes usually require specific sector skills and significant interests. And the judicial systems of EU Member States often lack the efficiency and effectiveness required to render a timely and well-reasoned decision by competent adjudicators. Finally, foreign investors often face a language barrier when litigating disputes before domestic courts in the host State's language.[52] Furthermore, investors do not see this option as an optimal solution based on the public consultation outcomes (at least what was published so far).[53]

Another possible option can be a new procedural mechanism altogether. This possibility has many alternatives, which the author outlines further in this article. The EU must consider that an effective procedural mechanism must provide for certain critical elements: 1) *expert and experienced adjudicators*; 2) *a reliable and impartial forum*; 3) *a neutral procedural language*; and 4) *the straightforward enforcement of decisions.*[54]

One option is establishing an arbitral forum administrated by the Permanent Court of Arbitration ("PCA") or creating the 'Unified Investment Court'.[55] The 'Unified Investment Court' would be an independent adjudication body

52 LEIKIN, E., B. KASOLOWSKY and I. BORGDORF. The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field. *Kluwer Arbitration Blog* [online]. 7. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

53 E.g., Position Paper of the German Insurance Association (GDV) on the Public consultation on an intra-EU investment protection and facilitation initiative. *European Commission* [online]. [cit. 25. 5. 2021]. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Investment-protection-and-facilitation-framework/public-consultation_en

54 LEIKIN, E., B. KASOLOWSKY and I. BORGDORF. The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field. *Kluwer Arbitration Blog* [online]. 7. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

55 HINDELANG, S. The Limited Immediate Effects of CJEU's Achmea Judgement. *Verfassungsblog* [online]. 9. 3. 2018 [cit. 25. 5. 2021]. Available at: https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/

similar to the Iran-United States Claims Tribunals.[56] And both of these possible approaches would need to be integrated into the EU legal system[57] to be compatible with the outcomes of the Achmea judgment.

Another approach is to create the 'EU Multilateral Investment Court'.[58] That would be a new international court with jurisdiction on intra-EU investment disputes.[59] Nevertheless, according to some experts, it would seem challenging to harmonise it with the EU's fundamental principles, particularly with the conditions set by the CJEU in Achmea.[60]

Both of the approaches mentioned in the last two paragraphs raise the question of the compatibility with the EU law and fundamental principles, as was discussed in the Achmea judgment. Furthermore, as was, for example, raised in the times of the EU's accession to the European Convention on Human Rights. The relevant solution would be strictly up to the EU and its perspective on this issue. However, according to the author, the solution could be that the EU would enable this adjudicatory body to start a preliminary ruling and raise questions.

---

56 ANDERSEN, T. and S. HINDELANG. The Day after: Alternatives to intra-EU BITs. *Journal of World Investment & Trade*, 2016, Vol. 17, no. 6, pp. 984–1014; HINDELANG, S. The Limited Immediate Effects of CJEU's Achmea Judgement. *Verfassungsblog* [online]. 9. 3. 2018 [cit. 25. 5. 2021]. Available at: https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/; LEIKIN, E., B. KASOLOWSKY and I. BORGDORF. The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field. *Kluwer Arbitration Blog* [online]. 7. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

57 HINDELANG, S. The Limited Immediate Effects of CJEU's Achmea Judgement. *Verfassungsblog* [online]. 9. 3. 2018 [cit. 25. 5. 2021]. Available at: https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/

58 ORECKI, M. Foreign Investments in Poland in Light of the Achmea Case and "Reform" of Polish Judicial System – Catch 22 Situation? *Kluwer Arbitration Blog* [online]. 22. 4. 2018 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2018/04/22/foreign-investments-poland-light-achmea-case-reform-polish-judicial-system-catch-22-situation/?doing_wp_cron=1598448710.7851428985595703125000; Multilateral investment court: Council gives mandate to the Commission to open negotiations – press release. *consilium.europa.eu* [online]. 20. 3. 2018 [cit. 25. 5. 2021]. Available at: https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/

59 Ibid.

60 Judgment of the CJEU of 6 March 2018, Case C-284/16.

The alternative approach in the form of the "European Investment Court"[61] is also discussed between experts. It would be a hybrid system comprised of *ad hoc* adjudicatory bodies. It would allow the delivery of timely decisions and the appointment of adjudicators with specific sector skills while providing for an appeal mechanism for manifest errors of law to a permanent body embedded within the EU judicial system. It could be created either as a specialized chamber of the EU's General Court in Luxembourg or as a joint court to all Member States. The court would maintain a preselected roster of arbitrators authorized to hear the investment dispute. Furthermore, operating as an appellate court for setting-aside decisions.[62] This option might establish the necessary link to the judicial system of the Member States and of the EU, which the CJEU said in the Achmea decision that was crucially missing for current arbitral tribunals.[63] Therefore based on the above-mentioned, the author views this approach as the probably most efficient one. But just in theory. The problem is that only the practice can show how this solution would work as a result of the matter.

The last-mentioned option in this chapter is the creation of new specialized courts within the existing judicial system of the Member States.[64] The model for this option could be the mechanism of the investment disputes resolution of Singapore International Commercial Court,[65] the Astana International Financial Centre Court,[66] or the Dubai International Financial Centre Courts.[67] The advantages of this approach are competent,

61 It was proposed by Paschalis Paschalidis. The pressing need for a European investment court. *GAR* [online]. 10. 2. 2020 [cit. 25. 5. 2021]. Available at: https://globalarbitrationreview.com/the-pressing-need-european-investment-court

62 Ibid.

63 Judgment of the CJEU of 6 March 2018, Case C-284/16.

64 LEIKIN, E., B. KASOLOWSKY and I. BORGDORF. The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field. *Kluwer Arbitration Blog* [online]. 7. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

65 Overview of the SICC. *SICC* [online]. [cit. 25. 5. 2021]. Available at: https://www.sicc.gov.sg/about-the-sicc/overview-of-the-sicc

66 The Astana International Financial Centre (AIFC) Court. *SIFOCC* [online]. [cit. 25. 5. 2021]. Available at: https://sifocc.org/countries/kazakhstan/

67 Dubai International Financial Centre. *DIFC* [online]. [cit. 25. 5. 2021]. Available at: https://www.difc.ae/

internationally experienced judges, time-efficient case management, flexible procedural rules and English-language proceedings.[68] However, similarly to other mentioned approaches, there could be a problem harmonising this approach with the EU law and the Achmea ruling because this approach desires to create the extra-territorial body.

All of the above-mentioned approaches are just suggestions; however, the EU has not proposed any possibility other than resolving the disputes before domestic courts. As the author stated in a few paragraphs above, that is not the most efficient solution. According to the author, the best resolution would be the creation of the European Investment Court, but the EU would need to secure that this approach would be properly implemented into the EU law and reflect the issues raised in Achmea. Nonetheless, it seems that the EU does not perceive the resolution before the national courts as an issue; hence the question of whether the EU would create an alternative remains unanswered.

3 Extra-EU Debate

Alongside the intra-EU debate, the other parallel discussion is being negotiated. Many states are not satisfied with the current system; hence they try to invent a reform of the current ISDS. There are many discussed issues, but just to give an example, the States are not satisfied with the level of transparency (or better to say non-transparency) of the proceedings, with the system of appointment of arbitrators, and even some of them would like to have a possibility of the appeal. Also, some states view the ISDS as an intervention into its sovereignty since an extra adjudicatory body decides the disputes involving the states.

The extra-EU debate is built on different issues that the intra-EU, some countries are not satisfied with the current system and try to reform it. From the EU's point of view, there are two levels of extra-EU debate, one taking

68 LEIKIN, E., B. KASOLOWSKY and I. BORGDORF. The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field. *Kluwer Arbitration Blog* [online]. 7. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

place at the bilateral level between the EU and third countries, the other taking place in the field of UNCITRAL. And why this distinction between these two levels? The advocate for the reform on the bilateral level between the EU and third countries is more accessible to accomplish through trade policy. Howbeit, that is not that easy within UNCITRAL, since there are many delegations with even slightly different opinions on the matter.

3.1 EU and Extra-EU Debate Taking Place on the Bilateral Level

The EU has determined the possibility of the ISDS between the Member States. Since the Lisbon Treaty entered into force, the EU has exclusive competence to negotiate investment protection agreements with third countries.[69] And since 2011, when the negotiations on Transatlantic Trade and Investment Partnership ("TTIP") were taking place, the EU has faced many controversies that these negotiations have brought. Especially from non-governmental organisations and the Member States, who have debated whether ISDS is the right solution to disputes in this area. The negotiations about the ISDS mechanism 'shipwrecked'; but the EU decided to propose establishing the Investment Court System ("ICS").[70] According to the EC, the ICS will provide clear rules applied by impartial judges through a transparent and neutral process in the interest of States and investors. The ICS should provide a neutral venue for the settlement of investment disputes. In contrast to ISDS, ICS is supposed to be a more cost-effective and faster investment dispute resolution system.[71]

The first discussed agreement is the TTIP between the EU and the USA, which has never been finalized. One of the disagreements between

69 Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishes a framework for screening foreign direct investments into the Union transitional arrangements for bilateral investment agreements between the Member States and third countries.

70 HALLAK, I. Multilateral Investment Court: Overview of the reform proposals and prospects. *European Parliament* [online]. January 2020 [cit. 25. 5. 2021]. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf

71 EUROPEAN COMMISSION – Memo. Why the new EU proposal for an Investment Court System in TTIP is beneficial to both States and investors. *European Commission* [online]. 12. 11. 2015 [cit. 28. 5. 2021]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_6060

the parties was about the investment chapter. The EU wanted the ICS system, a new approach as a pre-step towards the reform on the global level. The USA preferred the current ISDS system. In 2019 the negotiations were put on hold. Furthermore, the near future will show if President Biden will continue with the negotiations after President Trump, who was not a big fan of this agreement. The author sees the situation over the TTIP as an excellent example when the actors have a different point of view on the reform. As one of the leading promoters of global reform, the EU wants to start the reform with its partners. The US is quite satisfied with the current system and not very fond of the possible changes.[72]

The WTO Dispute Settlement System inspires the ICS, and it is a semi-permanent, two-tier, court-like system that is significantly distant from arbitration. The ICS would consist of a first instance tribunal with fifteen members and an appellate tribunal of six members. The investor would not have any power over selecting the tribunal members. The Contracting Parties would appoint all members by joint agreement.[73] The EC has announced a tender for the candidates for dispute settlement activities under EU trade and investment agreements with third countries.[74] In December 2020, the EC issued a decision to create a panel of independent experts who would assist the EC in selecting candidates that would be applied to exercise the roles of trade law arbitrators, experts and investment adjudicators in dispute settlement mechanisms under EU agreements.[75] The EU has successfully negotiated ICS implementation into the FTAs with Canada,

72 TIP draft to be prepared by July; ISDS being built based on both EU and U.S. proposals. *IISD* [online]. 16. 5. 2016 [cit. 28. 5. 2021]. Available at: https://www.iisd.org/itn/en/2016/05/16/ttip-draft-to-be-prepared-by-july-isds-being-built-based-on-both-eu-and-u-s-proposals/; The Transatlantic Trade and Investment Partnership (TTIP). *European Commission* [online]. [cit. 28. 5. 2021]. Available at: https://ec.europa.eu/trade/policy/in-focus/ttip/

73 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 6.

74 Candidates for dispute settlement activities under EU trade and investment agreements. *European Commission* [online]. 18. 12. 2020 [cit. 25. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=2224

75 Selection panel. *European Commission* [online]. 18. 12. 2020 [cit. 25. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159205.pdf

Vietnam, Singapore, and Mexico to accept the ICS system in the new FTAs,[76] which will be discussed in this subsection.

The EU negotiated or is negotiating quite an amount of the FTAs with countries all around the world.[77] Some are already in force (e.g., EU-Canada FTA, EU-Mexico FTA, EU-Japan FTA, EU-South Korea FTA, or EU-Vietnam FTA).[78] However, some of them have been adopted not ratified yet (e.g., EU-China Comprehensive Agreement on Investment, EU-Vietnam Investment Protection Agreement).[79] Some of them are being negotiated (e.g., EU-Australia FTA or EU-New Zealand FTA).[80] And with some countries, the EU has never reached an agreement, or the negotiations were put on hold (e.g., FTA with the USA called TTIP).[81] As mentioned earlier, the EU is trying to implement into these agreements the ICS mechanism. In the following paragraphs, the author briefly outlines CETA[82] and TTIP[83] as two counterparts of the debate.

The EU negotiated the Canada-EU Trade Agreement with the northern neighbour of the USA, and both of the parties agreed on the use of the ICS system. CETA provisionally came into force in 2017.[84] And even though the ICS is implemented in CETA, it has not been used in practice yet as the EU issued a tender for the appointment of the panel of arbiters. Even though the CJEU rendered its Opinion 1/17 in 2017, which stated that ICS, as contained in CETA, is compatible with EU law.[85] The CETA agreement will show in practice if the reform could be successful; however, any result could not be seen since the ICS has not yet been field-tested. It is pretty strange

76 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 6.

77 EU trade agreements 2021. *European Commission* [online]. [cit. 28. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159174.pdf

78 Ibid.

79 Ibid.

80 Ibid.

81 Ibid.

82 CETA – EU – Canada Comprehensive Economic and Trade Agreement.

83 TTIP – Transatlantic Trade and Investment Partnership between EU and USA.

84 EU-Canada trade agreement (CETA) enters into force. *EUR-Lex* [online]. [cit. 28. 5. 2021]. Available at: https://eur-lex.europa.eu/content/news/eu_canada_trade_agreement-ceta.html

85 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 6.

that even though the EU had the consensus since 2017, the creation is still not completed. Also, the EU and Canada are both promoters of the MIC, and it seems that the establishment of ICS is a pre-step of the formation of MIC.[86]

The future of ISDS, based on the agreements currently being concluded by the EU, seems to have a relatively straightforward goal, namely that the EU is trying to overthrow a reformed system in the form of ICS, which could gradually lead to the emergence of a MIC.[87] However, not all countries identify with this system, so it is questionable how the EU will advocate this type of reform.

3.2 The Creation of MIC

The creation of the MIC is one of the possible reforms of ISDS on the global level.[88] Furthermore, as mentioned many times above, the EU is one of the leading promoters of establishing MIC in the UNCITRAL Working Group III.[89] In 2017 the EU, Canada and Mauritius proposed in UNCITRAL the creation of a working group, which should identify and examine the current ISDS system's issues and come up with possible solutions.

The prime proposal is to set up a two-tier international investment court composed of a first instance court and an appeal body. MIC would adjudicate claims brought under investment treaties that member states of UNCITRAL have assigned to its authority. Both of its bodies would be staffed by tenured adjudicators chosen and remunerated permanently by the member states and assisted by a secretariat.[90] In October 2020, the draft statute of MIC was presented, and so far, it seems that the MIC will be composed of "The Plenary Body", "Judges of the MIC", "The Advisory

86 HALLAK, I. Multilateral Investment Court: Overview of the reform proposals and prospects. *European Parliament* [online]. January 2020 [cit. 25. 5. 2021]. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf

87 Ibid.

88 Ibid.

89 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, pp. 6–7.

90 CROISANT, G. Multilateral Investment Court. *JUS MUNDI* [online]. 17. 2. 2021 [cit. 28. 5. 2021]. Available at: https://jusmundi.com/en/document/wiki/en-multilateral-investment-court

Centre", and "The Secretariat."[91] However, the precise structure is still being negotiated, and the result will be based on the outcome of ongoing international negotiations.[92]

Even the EU, Canada and many other countries are convinced that the formation of MIC is the right choice; many states are not convinced at all. For example, the USA and UK are some of them.[93] On the other hand, it seems that the EU desires to succeed in the creation of MIC. That may seem obvious from the FTAs' negotiations between the EU and third countries, where the EU tries to implement the ICS. According to the EU, the ICS provision in the FTA should smooth the ICS transition towards MIC.[94]

Even though the EU seems quite sure about the establishment of MIC, the reality may be different, and there is no guarantee if the MIC will be created and, if yes, then when. Why? It may take years or even decades to pursue such a reform; however, it heads towards the right direction. Furthermore, the negotiations are now taking place; for example, the 41st session of the UNCITRAL Working Group III takes place on 15 November 2021.

4 Conclusion

As it is recognisable from the article, it is necessary to distinguish between the intra-EU and extra-EU debates. Although both debates are linked by EU involvement, they are built on slightly different goals and different proposals.

91 BUNGENBERG, M. and A. REINISCH. Draft Statute of the Multilateral Investment Court. *UNCITRAL* [online]. November 2020 [cit. 28. 5. 2021]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/bungenberg_reinisch_draft_statute_of_the_mic.pdf; See Art. 3 Draft statute of MIC.

92 CROISANT, G. Multilateral Investment Court. *JUS MUNDI* [online]. 17. 2. 2021 [cit. 28. 5. 2021]. Available at: https://jusmundi.com/en/document/wiki/en-multilateral-investment-court

93 U.S. officials raise concerns over proposed MIC in talks with the United Kingdom, documents say. *IISD* [online]. 17. 12. 2019 [cit. 28. 5. 2021]. Available at: https://www.iisd.org/itn/en/2019/12/17/u-s-officials-raise-concerns-over-proposed-mic-in-talks-with-the-united-kingdom-documents-say/

94 HALLAK, I. Multilateral Investment Court: Overview of the reform proposals and prospects. *European Parliament* [online]. January 2020, p. 2 [cit. 25. 5. 2021]. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf

Concerning the intra-EU debate, the problem is built around the discussion of whether the national courts of the Member States are competent and qualified to resolve the disputes arising from the protection of FDI or whether the new alternative development is required. The domestic courts meet the requirements set in Achmea judgment. On the other hand, according to the author, some of the alternative approaches may seem more efficient, the creation and implementation of such system would be more difficult. From the author's point of view, all the possible alternative solutions mentioned in the article could, under the proper gestation and implementation, serve the desired purpose very well. However, that would depend on how the EU and the Member States handle the creation of the alternative mechanism. In compliance with the author's point of view based on the available information, establishing the European Investment Court or creating new specialized courts within the Member States' existing judicial system seems the two best options. The European Investment Court could provide the "best of both worlds", because it is a hybrid system of *ad hoc* adjudicatory bodies and the court of appeal.

Moreover, it would be created under the EU authority; therefore, it would serve the whole organisation. Another great option is to create new specialized courts within the existing judicial system of the Member States. Nevertheless, as mentioned multiple times in the article, both of the mentioned approaches would need to fulfil the requirements set in the Achmea judgment and Termination Agreement.

There are two levels of discussions in the bilateral level between the EU and the third states in the extra-EU debate. Within this debate, the EU has the authority to negotiate the agreements; hence, the EU can engineer its visionary reforms through these treaties. Specifically, via them, it seeks to enforce ICS, which is a pre-step for creating the MIC. On the global level, the EU can try to pursue its goal; however, the EU needs to consider many other states with other opinions on the matter. The formation of MIC could bring some transparency, effectiveness and sufficiency into the ISDS on the procedural level. However, the creation will be a tardy process.

Also, the possibility of the succession of the results is slightly different. If we look at possible implementation, it is more likely that the intra-EU debate

will be resolved faster than at the global level, specifically in UNCITRAL, where it is often complicated (challenging) for states to agree on something so fundamental. There is no clear answer to the problem. Instead, it raises more and more questions. Furthermore, just time, negotiations, and the EU/worldwide opinion will clear it up.

Literature

Agreement for the termination of intra-EU BITs enters into force. *Lexology* [online]. 8. 9. 2020 [cit. 26. 5. 2021]. Available at: https://www.lexology.com/library/detail.aspx?g=bdf7412c-5cd3-4e18-997b-a387fc25b044

AKYÜZ, Y. and A. CORNFORD. Capital flows to developing countries and the reform of the international financial system. *UNCTAD* [online]. November 1999, 50 p. [cit. 25. 5. 2021]. Available at: https://unctad.org/system/files/official-document/dp_143.en.pdf

ANDERSEN, T. and S. HINDELANG. The Day after: Alternatives to intra-EU BITs. *Journal of World Investment & Trade*, 2016, Vol. 17, no. 6, pp. 984–1014. DOI https://doi.org/10.1163/22119000-12340025

BRAY, D. and S. KAPOOR. Agreement on the Termination of Intra-EU BITs: Sunset in Stone? *Kluwer Arbitration Blog* [online]. 4. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/04/agreement-on-the-termination-of-intra-eu-bits-sunset-in-stone/

BUNGENBERG, M. and A. REINISCH. Draft Statute of the Multilateral Investment Court. *UNCITRAL* [online]. November 2020 [cit. 28. 5. 2021]. DOI https://doi.org/10.5771/9783748924739. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/bungenberg_reinisch_draft_statute_of_the_mic.pdf

Candidates for dispute settlement activities under EU trade and investment agreements. *European Commission* [online]. 18. 12. 2020 [cit. 25. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=2224

Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment. *EUR-Lex* [online]. 19. 7. 2018 [cit. 25. 5. 2021]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&from=en

CROISANT, G. Multilateral Investment Court. *JUS MUNDI* [online]. 17. 2. 2021 [cit. 28. 5. 2021]. Available at: https://jusmundi.com/en/document/wiki/en-multilateral-investment-court

Cross-border investment within the EU – clarifying and supplementing EU rules – Public consultation. *European Commission* [online]. [cit. 25. 5. 2021]. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Investment-protection-and-facilitation-framework/public-consultation_en

DOLZER, R. and C. SCHREUER. *Principles of International Investment Law*. Oxford: Oxford University Press, 2008, 433 p. DOI https://doi.org/10.1093/law:iic/9780199211753.001.1

Dubai International Financial Centre. *DIFC* [online]. [cit. 25. 5. 2021]. Available at: https://www.difc.ae/

EC launches consultation on facilitating intra-EU investment. *IISD* [online]. 14. 7. 2020 [cit. 25. 5. 2021]. Available at: https://www.iisd.org/itn/2020/07/14/ec-launches-consultation-on-facilitating-intra-eu-investment/

EU-Canada trade agreement (CETA) enters into force. *EUR-Lex* [online]. [cit. 28. 5. 2021]. Available at: https://eur-lex.europa.eu/content/news/eu_canada_trade_agreement-ceta.html

EU trade agreements 2021. *European Commission* [online]. [cit. 28. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159174.pdf

EUROPEAN COMMISSION. Factsheet on Investor-State Dispute Settlement. *SICE* [online]. 3. 10. 2013, 6 p. [cit. 22. 11. 2021]. Available at: http://www.sice.oas.org/tpd/USA_EU/Studies/tradoc_151791_Investor-State_Dis_e.pdf

EUROPEAN COMMISSION – Memo. Why the new EU proposal for an Investment Court System in TTIP is beneficial to both States and investors. *European Commission* [online]. 12. 11. 2015 [cit. 28. 5. 2021]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_6060

GAUKRODGER, D. and K. GORDON. OECD Working Papers on International Investment – Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community. *OECD Publishing* [online]. March 2012, 101 p. [cit. 22. 11. 2021], DOI https://doi.org/10.2139/ssrn.2207366. Available at: https://www.oecd.org/investment/investment-policy/WP-2012_3.pdf

HALLAK, I. Multilateral Investment Court: Overview of the reform proposals and prospects. *European Parliament* [online]. January 2020, 8 p. [cit. 25. 5. 2021]. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf

HINDELANG, S. The Limited Immediate Effects of CJEU's Achmea Judgement. *Verfassungsblog* [online]. 9. 3. 2018 [cit. 25. 5. 2021]. Available at: https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/

INGWERSEN, H. and K. SCHWEDT. Treaty to terminate intra-EU BITs enters into force. *Linklaters* [online]. 10. 9. 2020 [cit. 25. 5. 2021]. Available at: https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/september/treaty-to-terminate-intra-eu-bits-enters-into-force

International Investment Agreements Navigator. *Investment Policy Hub* [online]. [cit. 28. 5. 2021]. Available at: https://investmentpolicy.unctad.org/international-investment-agreements

Investor-State Dispute Settlement (ISDS). *Thomson Reuters Practical Law* [online]. [cit. 22. 11. 2021]. Available at: https://uk.practicallaw.thomsonreuters.com/0-624-6147?transitionType=Default&contextData=(sc.Default)&firstPage=true

KRAUSE, C. von. The European Commission's Opposition to Intra-EU BITs and Its Impact on Investment Arbitration. *Kluwer Arbitration Blog* [online]. 28. 10. 2010 [cit. 22. 11. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2010/09/28/the-european-commissions-opposition-to-intra-eu-bits-and-its-impact-on-investment-arbitration/

LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, pp. 5–8.

LEIKIN, E., B. KASOLOWSKY and I. BORGDORF. The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field. *Kluwer Arbitration Blog* [online]. 7. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

MEIJER, G., K. SCHWEDT and X. TATON. State of Play of EU Investment Protection: Investor-State Arbitration Laws and Regulation. *ICLG* [online]. 16. 11. 2020 [cit. 25. 5. 2021]. Available at: https://iclg.com/practice-areas/investor-state-arbitration-laws-and-regulations/4-state-of-play-of-eu-investment-protection

Multilateral investment court: Council gives mandate to the Commission to open negotiations – press release. *consilium.europa.eu* [online]. 20. 3. 2018 [cit. 25. 5. 2021]. Available at: https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/

NEMESCSÓI, A., M. DESPLATS and S. DELI. The end of Intra-EU BITs. Now what?. *DLAPIPER* [online]. 4. 8. 2020 [cit. 26. 5. 2021]. Available at: https://www.dlapiper.com/en/us/insights/publications/2020/08/the-end-of-intra-eu-bits-now-what/

ORECKI, M. Foreign Investments in Poland in Light of the Achmea Case and "Reform" of Polish Judicial System – Catch 22 Situation? *Kluwer Arbitration Blog* [online]. 22. 4. 2018 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2018/04/22/foreign-investments-poland-light-achmea-case-reform-polish-judicial-system-catch-22-situation/?doing_wp_cron=1598448710.7851428985595703125000

Overview of the SICC. *SICC* [online]. [cit. 25. 5. 2021]. Available at: https://www.sicc.gov.sg/about-the-sicc/overview-of-the-sicc

POHL, J., K. MASHIGO and A. NOHEN. OECD Working Papers on International Investment – Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey. *OECD Publishing* [online]. February 2012, 57 p. [cit. 22. 11. 2021]. DOI https://doi.org/10.2139/ssrn.2187254. Available at: https://www.oecd.org/daf/inv/investment-policy/WP-2012_2.pdf

Position Paper of the German Insurance Association (GDV) on the Public consultation on an intra-EU investment protection and facilitation initiative. *European Commission* [online]. [cit. 25. 5. 2021]. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Investment-protection-and-facilitation-framework/public-consultation_en

Public Consultation Document an Intra-EU Investment Protection and Facilitation Initiative. *European Commission* [online]. [cit. 25. 5. 2021]. Available at: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2020-investment-protection-consultation-document_en.pdf

ROBERTS, A. and Z. BOURAOUI. UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims. *EJIL:Talk!* [online]. 6. 6. 2018 [cit. 22. 11. 2021]. Available at: https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/

Selection panel. *European Commission* [online]. 18. 12. 2020 [cit. 25. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159205.pdf

SCHILL, S. Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law. *Oxford Handbooks Online* [online]. February 2018 [cit. 25. 5. 2021]. Available at: https://www.oxfordhandbooks.com/view/10.1093/law/9780198745365.001.0001/law-9780198745365-chapter-51

SKOVGAARD PAULSEN, L. and G. GERTZ. Reforming the investment treaty regime: A 'backward-looking' approach. *Brookings* [online]. 17. 3. 2021 [cit. 25. 5. 2021]. Available at: https://www.brookings.edu/research/reforming-the-investment-treaty-regime/

SORNARAJAH, M. *The International Law and Foreign Investment.* Cambridge: Cambridge University Press, 2010, 524 p. DOI https://doi.org/10.1017/CBO9780511841439

Termination of intra-EU bilateral investment treaties: the UK – the last safe haven?. *Dentons* [online]. 9. 11. 2020 [cit. 25. 5. 2021]. Available at: https://www.dentons.com/en/insights/articles/2020/november/9/termination-of-intra-eu-bilateral-investment-treaties

The Astana International Financial Centre (AIFC) Court. *SIFOCC* [online]. [cit. 25. 5. 2021]. Available at: https://sifocc.org/countries/kazakhstan/

The EU moves forward efforts at UN on multilateral reform of ISDS. *European Commission* [online]. 18. 1. 2019 [cit. 25. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=1972

The pressing need for a European investment court. *GAR* [online]. 10. 2. 2020 [cit. 25. 5. 2021]. Available at: https://globalarbitrationreview.com/the-pressing-need-european-investment-court

The Transatlantic Trade and Investment Partnership (TTIP). *European Commission* [online]. [cit. 28. 5. 2021]. Available at: https://ec.europa.eu/trade/policy/in-focus/ttip/

TTIP draft to be prepared by July; ISDS being built based on both EU and U.S. proposals. *IISD* [online]. 16. 5. 2016 [cit. 28. 5. 2021]. Available at: https://www.iisd.org/itn/en/2016/05/16/ttip-draft-to-be-prepared-by-july-isds-being-built-based-on-both-eu-and-u-s-proposals/

UNCTAD. Reform of Investor-State Dispute Settlement: In Search of a Roadmap. *UNCTAD* [online]. 23. 6. 2013, 10 p. [cit. 22. 11. 2021]. Available at: https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf

U.S. officials raise concerns over proposed MIC in talks with the United Kingdom, documents say. *IISD* [online]. 17. 12. 2019 [cit. 28. 5. 2021]. Available at: https://www.iisd.org/itn/en/2019/12/17/u-s-officials-raise-concerns-over-proposed-mic-in-talks-with-the-united-kingdom-documents-say/

Contact – e-mail
468258@mail.muni.cz

ORCID
0000-0003-4243-7799