CHAPTER - 3

REFORMING INVESTOR-STATE ARBITRATION TO HARMONIZE INVESTMENT LAW: ISSUES, CHALLENGES AND DIRECTIONS

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I INTRODUCTION

Is there a global investment law? A negative answer may derive from the ever increasing number of investor-state cases, counting 817 at the time of writing,[1] which stem from the 2951 international investment agreements,[2] indicating that this instrument of dispute resolution is expanding in its reach and that it will affect a growing number of investors, states and people.

The issue of fragmentation is widely recognized in international law, and it may lead to conflicting rules and contradictory arbitral decisions. In particular, multiple are the critiques to investment arbitration, and in particular to the procedures for the arbitrators' appointment, and the lack of transparency throughout the whole arbitration process. Since the procedure is crucial for determining the outcome, a sounder procedure means a fairer result for both parties.

It is in this scenario that various procedural innovations have blossomed: the UNCITRAL Transparency Rules, the proposed Investment Court System, and the Multilateral Investment Court project are valid novelties or proposals aiming to correct the flaws of the current investment arbitration system, and thanks to their applicability to several investment treaties, in one case, and to their potential to affect all the Member States of the European Union, in the other, they lay the foundations

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1 UNCTAD, Investment Dispute Settlement Navigator (Investment Policy Hub, September 2017) <http://investmentpolicyhub.unctad.org/ISDS> accessed 1 October 2017.

2 UNCTAD, International Investment Agreements Navigator (Investment Policy Hub, September 2017) <http://investmentpolicyhub.unctad.org/IIA> accessed 1 October 2017.

for a better structured system of investment arbitration, offering ways out from the impasse of fragmentation of international law.

The present study is composed of five sections. Section 2 retraces the history of international investment law and how it came to be what it is today. Section 3 introduces the Investor-State Dispute Settlement system and its flaws, exemplified in fragmentation, the lack of criteria for arbitrators' appointment, and the general lack of transparency. Section 4, presents the most recent initiatives: the UNCITRAL Transparency Rules and the EU proposals about a Multilateral Investment Court and the Investment Court System, and Section 5 draws the conclusions on how a better regulatory framework can improve the coordination of the overall system of international investment law.

II BRIEF HISTORY OF INTERNATIONAL INVESTMENT LAW

The concept of injury to aliens is the birthplace of international investment law.[3] Under traditional international law sovereign governments are the sole players: this means that claims against sovereign governments could not be brought directly by organisations and individuals, as they did not have the necessary standing,[4] Hence, claims at international courts could not be brought directly by investors.

Investment protection provisions were incorporated in a large number of international agreements concluded in previous years between developed and developing countries, with the purpose of reassuring investors and stimulating foreign investment.Such provisions are meant to ensure businesses regarding the equitable treatment of their investments through the implementation of a mechanism whereby the host state's decisions and actions are independently reviewed.[5]

The dispute settlement mechanism provided for in international agreements aimed at investment protection differs from the state-state dispute settlement mechanism: the goal of the former is precisely to prevent the review of investors' claims being politically interfered with. The substantive provisions constituting the investment protection framework outline the host states obligations according to core principles, such as non-discrimination, fair and equitable treatment, and

3 Joost Pauwelyn "At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How it Emerged and How it Can Be Renamed" (2014) 29 ICSID Rev 372.

4 R Doak Bishop, James Crawford and W Michael Reisman *Foreign Investment Disputes: Cases, Materials And Commentary* (Wolter Kluwer, 2005) 1-2.

5 European Parliament Legal Service, Legal Opinion, SJ-0259/16, 1 June 2016, <https://polcms.secure.europarl.europa.eu/cmsdata/upload/49daf369-5480-40d7-aa8d-df745c4ff98c/SJ-0259-16_legal_opinion.pdf.> accessed 8 April 2017.

expropriation interdiction; the procedural provisions included in this framework specify the mechanisms of dispute resolution between investors and states.[6]

On the basis of the investment disputes resolution procedure known as "Investor-State Dispute Settlement" (ISDS), foreign investors can initiate proceedings against a country before an international tribunal with the purpose of securing compensation for the breach of the substantive provisions of the agreement in question. The purpose of the ISDS mechanism is to open the possibility of arbitration for foreign investors if there is reason to believe not only that basic legal principles have been breached by a host state, but also that the host state courts were not well-equipped (in terms of resources, knowledge, competence, autonomy or impartiality) to address these kinds of cases in an equitable manner.[7]

In 1966 the Convention on the Settlement of Investment Disputes between States and Nationals of Other States entered into force,[8] significantly changing the international investment law landscape. The Convention established the ICSID, the first international arbitration institution expressly intended to serve as a forum for dealing with foreign investment-related disputes between contracting states and foreign investors.[9] By 2016, the ICSID Convention had 161 signatories and was ratified by 153 of them.[10]

The ICSID Convention bans further appeal, as an arbitral award is considered a final ruling of a court in the state in question.[11] The self-contained investor-arbitration system formed by the ICSID Convention stipulates that award-related disputes have to revert to the ICSID and no challenge can be brought against them

6 Ibid.

7 Ibid.

8 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) ICSID *ICSID Convention, Regulations and Rules* (ICSID 2006) <https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf> accessed 25 September 2017.

9 European Parliament Legal Service, Legal Opinion (n 5).

10 ICSID, Database of ICSID Member States <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> accessed 4 April 2017.

11 ICSID Convention, Article 54.

in national courts.[12] The rules set by the World Bank in the ICSID Convention and Additional Facility govern most arbitral tribunals.[13]

III THE ISDS SYSTEM AND ITS FLAWS

The investor-State arbitration system aims at providing a neutral and impartial instrument for the resolution of investment-related disputes. In the wake of the multiplication of high profiles disputes, although it allows parties to choose their arbitrators and provides for a neutral forum for the dispute composition, research has criticized the ISDS system, underlining its numerous flaws: among them there are the fragmentation of investment law, the lack of criteria for arbitrators' appointment, culminating in casting doubts on the latter's impartiality, and the general lack of transparency of the whole arbitral procedure.

3.1 The Fragmentation of Investment Law

Widely recognized is the fact that international law is made by fragments of regulatory and institutional action,[14] referring to the situations where a multitude of international rules co-exist, and some can be of help in interpreting others, or when the application of two norms results in incoherent decisions.[15] This lack of coordination is present in all branches of international law, and international investment law is not immune to it. Because of the bilateral or multilateral approach, typical of the normative schemes of International Investment Agreements, and because of the ad hoc character of arbitral tribunals, one might say that fragmentation defines the nature of investment law. In fact, as stressed by some commentator:

> ISDS involves a plethora of ad hoc, independent tribunals, generally unrestricted by precedent and unsupervised by any superior instance or authority",[16] which "render decisions on the basis of over 3000 similar but rarely identically worded investment instruments containing broad or even vague substantive protection standards.[17]

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12 Lucy Reed, Jan Paulsson and Nigel Blackaby *Guide To ICSID Arbitration* (2nd ed, Kluwer Law International, 2011) 14.

13 European Parliament Legal Service, Legal Opinion (n 5).

14 Margaret Young *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012) 2.

15 International Law Commission of the United Nations (ILC) "Conclusions" Conclusions (2) 7-8.

16 Maninder Malli "Minilateral Treaty-Making in International Investment Law" in Andrea Bjorklund (ed) *Yearbook on International Investment Law and Policy 2013-2014* (Oxford University Press, 2015) 507, 513.

17 Directorate-General for External Policies – Policy Department *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements* vol 2 – Studies (European Parliament Publications Office, 2014) 59-60.

Furthermore, arbitral proceedings are governed by different procedural norms, among which there are ICSID or UNCITRAL arbitration rules.[18] Consequently, it can be inferred that investment arbitrations are most often governed by different sets of norms, regarding both the applicable law and the procedural rules.[19]

In such a regulatory environment, it is appropriate to speak of fragmentation, which leads to inconsistency and unpredictability even in awards deciding on claims which arose from one and the same governmental measure. [20] Sometimes inconsistencies have emerged, even in the case of awards issued under the same investment agreement, because there are no mechanisms to correct legal and factual errors.

In fact, the ISDS system has been widely criticized in the past years, and a number of different fora with investment policy specialisation, such as UNCTAD, the OECD and the World Bank, have concurred that a comprehensive reform of the ISDS system is necessary.The flaws of the ISDS system affect various categories of stakeholders: among them, investors, states, and societies as a whole.The wide range of investment agreements presently in existence has an impact on investors and States, engendering lack of procedure uniformity with regard to investment dispute settlement. Case-law unpredictability and the costs incurred by system use have an impact on them as well.

Since among the wide public there is no complete trust in the fairness and objectivity of the awards issued under the present ISDS system, bringing or winning a case could even be detrimental to the reputation of a company.Moreover, to the extent that host states may be unduly forced to provide compensation to investors because of the impossibility of appeal, the current situation may have adverse implications also for the entire society. In effect, the most evident indicators of fragmentations are the following:

(1) the lack of a comprehensive registry of investor-state cases,
(2) the fact that arbitral panels created ad hoc are not compelled to follow the rule of precedent, and
(3) the fact that there is a limited possibility to review awards, and no possibility of appeal.[21]

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18 Ibid.

19 Ibid.

20 Ibid.

21 Susan D Franck "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 Fordham L Rev 1521; International

3.1.1 Comprehensive Registry of Investor-State Cases

While every main institution administering investor-state arbitration has its own registry for the cases filed before it,[22] the absence of a comprehensive registry of Investor-State cases is due to the number of ad hoc tribunals and institutions providing for investment arbitration dispute resolution.[23] Indeed Sir Robert Y. Jennings stressed that:[24]

> A glance at many recent volumes of the International Law Reports strikingly demonstrates the contemporary phenomenon of the proliferation of such international tribunals applying international law, but there are many that do not appear in the International Law Reports. There are all the administrative tribunals, human right courts … the very large number of ad hoc tribunals… and very many others. But how many others? And what do they all do? Where do they all sit? It is not easy to find out. There is no kind of structured relationship between most of them. There is not even the semblance of any kind of hierarchy or system. They have appeared as a need or desire or ambitious promoted by one another. In this particular respect, contemporary international law is just a disorderly medley. Suffice it to say that it is very difficult to try to make a sort of pattern, much less a structured relationship, of this mass of tribunals, whether important or petty. It is sometimes too difficult to find out what is going on, much less to study it.

Law Commission, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission (2006) UN Doc A/CN.4/L.682 <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> accessed 31 March 2017; Maninder Malli "Minilateral Treaty-Making in International Investment Law" in Andrea K Biorklund *Yearbook on International Investment Law & Policy, 2013-2014* (Oxford University Press, 2015) 507, 513.

22 Frédéric Gilles Sourgens *A Nascent Common Law: The Process of Decision-making in International Legal Disputes between States and Foreign Investors* (Brill Nijhoff, 2014) 6.

23 Daniel Behn "Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art" (2015) 46 Georgetown Journal of International Law 363-415, 413.

24 Robert Y Jennings "The Judiciary, International and National, and the Development of International Law" (1996) 45 International and Comparative Law Quarterly 5(1).

3.1.2 The Rule of Precedent

The issue whether precedents in awards should be considered as binding has been discussed by many researchers,[25] taking into consideration Art 53 of the International Centre for Settlement of Investment Disputes (hereinafter: ICSID) Convention, which provides: "The award shall be binding on the parties". Stressing the words "on the parties", some scholars interpreted this article as "excluding the applicability of the principle of binding precedent to successive ICSID cases."[26]

The same issue has been taken into consideration by some tribunals: in the decision on the application for annulment of the *Amco Asia* award, the ad hoc committee convened for the annulment discussed the role of prior decisions or awards, and noted that no decision was binding on an ad hoc committee;[27] in the same vein, in the *El Paso* case, the tribunal stated that ICSID arbitral tribunals are established ad hoc, from case to case, and that there is "no provision, either in the Washington Convention or in the [relevant Bilateral Investment Treaty] (…), establishing an obligation of stare decisis".[28]

The tribunal in *Liberian Eastern Timber Corp. v Republic of Liberia* stressed that "the Tribunal is not bound by the precedents established by other ICSID Tribunals",[29] and similarly did the tribunal in the *Bayindi*r case, stating "The Tribunal agrees that it is not bound by earlier decisions (para 76),[30] and the tribunal in *Jan de Nul*,

25 See, eg William W Burke-White & Andreas von Stade "Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations" (2010) 35 Yale Journal of International Law 283, 299; Christoph Schreuer & Matthew Weiniger "Conversations Across Cases – Is There a Doctrine of Precedent in Investment Arbitration?" (2008) 5 Transnational Dispute Management 8-18; Benedict Kingsbury and Stephen Schill "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law" in Albert Jan van den Berg (ed) *50 Years of the New York Convention: ICAA International Arbitration Conference* (Kluwer Law International, 2009) 5, 8 n 7.

26 Christoph H Schreuer *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) 1082.

27 *Amco v Republic of Indonesia* ICSID Case No. ARB/81/1, Decision on Jurisdiction, September 25, 1983, 1 ICSID Rep 389, 401 (1993).

28 *El Paso Energy International Co v Argentine Republic* ICSID Case No ARB/03/15, Decision on Jurisdiction, April 27, 2006, para 39.

29 *Liberian Eastern Timber Corp v Government of the Republic of Liberia* ICSID Case No ARB/83/2, 31 March 1986, 2 ICSID Rep 343, 352 (1994).

30 *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan* ICSID Case No ARB/03/29.

observing that "The Tribunal considers that it is not bound by earlier decisions" (decision on jurisdiction, para 64).[31]

3.1.3 Review or Appeal

As regards the possibility to review awards or to appeal, it is well known that the possibility of review of awards has narrow grounds for annulment. For instance, according to Article 52 of ICSID Convention, annulment of an award can be requested only if:[32]

(a) the Tribunal was not properly constituted;
(b) the Tribunal has manifestly exceeded its powers;
(c) there was corruption on the part of a member of the Tribunal;
(d) there has been a serious departure from a fundamental rule of procedure; or
(e) the award has failed to state the reasons on which it is based.

The UNCITRAL Model Law 1985, which has been implemented in more than sixty States, establishes at Article 34(2) the following grounds for setting aside an award:[33]

(a) Validity of arbitration agreement. This category includes: consent; written form; content of agreement; scope.
(b) Due process. This category includes: equal treatment and the ability of a party to present its case.
(c) Excess of authority regarding relief sought. This category includes an award in excess of or different from what is claimed.
(d) Irregular constitution of the arbitral tribunal. This category includes: a constitution of the tribunal in violation of the applicable arbitration rules and, possibly, arbitration law; lack of impartiality and independence of the arbitrator.
(e) Irregular procedure. This category includes a violation of the applicable arbitration rules and, possibly, arbitration law.
(f) Arbitrability, that is the dispute is not capable of settlement by arbitration. This category comprises arbitrability *ratione materiae* and *ratione personae*.

Similar grounds are provided in the domestic legislation of most countries, which gives the possibility to national courts to vacate decisions of arbitrators who ignored

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31 *Jan de Nul NV Dredging International NV v Arab Republic of Egypt* ICSID Case No ARB/04/13.

32 ICSID (n 8).

33 UNCITRAL Model Law on International Commercial Arbitration 1985 <www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf> accessed 31 March 2017.

basic procedural fairness, or who have attempted to resolve matters never properly submitted to their jurisdiction. An example thereof is Article 829 of the Italian Code of Civil Procedure, stating the grounds for nullity of an arbitral award:[34]

> A recourse for nullity may be filed in the following cases:
>
> (1) if the arbitration agreement is null and void;
>
> (2) if the arbitrators have not been appointed according to the provisions laid down in Chapters I and II of this Title, provided that this ground for setting aside has been raised in the arbitration proceedings;
>
> (3) if the award has been rendered by a person who could not be appointed as arbitrator according to Article 812;
>
> (4) if the award exceeds the limits of the submission to arbitration or fails to decide one or more items in the submission to arbitration or contains contradictory provisions, subject to the provisions of Article 817;
>
> (5) if the award does not comply with the requirements of Article 823, paragraph 2, numbers (3), (4), (5) and (6), subject to the provisions in the third paragraph of said article;
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> (6) if the award has been rendered after the expiry of the time-limit indicated in Article 820, subject to the provisions of Article 821;
>
> (7) if during the proceedings those formalities laid down under penalty of nullity for the proceedings before the ordinary courts have not been observed, provided the parties had requested their observance according to Article 816 and if the nullity has not been cured;
>
> (8) if the award is contrary to a previous award which is no longer subject to recourse or to a previous judgment having the force of *res judicata* between the parties, provided that this objection has been raised in the arbitration proceedings;
>
> (9) if the due process principle (*principio del contraddittorio*) has not been respected in the arbitration proceedings. A recourse for nullity may also be filed where the arbitrators did not decide according to rules of law, unless the parties have authorized them to decide *ex aequo et bono* or have declared that there may be no recourse against the award.

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34 Italian Code of Civil Procedure Book Four Title VIII Arbitration <www.arbitrations.ru/userfiles/file/Law/Arbitration%20acts/Italian%20Code%20of%20Civil%20Procedure.pdf> accessed 31 March 2017.

Doubtlessly, the absence of the possibility to appeal derives from several considerations. Research highlighted that judicial review weakens the finality of arbitral awards and hinders the integrity of the arbitral process.[35]

Nevertheless, it is also true that it is difficult to understand for a respondent state and its people when identical issues, concerning the same State, are decided differently by different arbitration tribunals, as it occurred in some cases related to Argentina's crisis in 2002. For instance, it occurred that in *Total*[36] the tribunal not only reached a completely different decision as the one reached by the tribunal in *Continental Casualty*,[37] but developed a very diverse legal reasoning, although the same arbitrator was the President of both tribunals. This, according to some commentators, may derive from the fact that in arbitration finality could be given precedence over correctness.[38]

3.2 The Lack of Criteria for Arbitrators' Appointment

Great value in arbitration has the right, accorded to the parties, to appoint the arbitrators who will decide the dispute between them. The parties are usually free in their decisions, and rather few are the rules regulating such procedural step. Criteria for arbitrators' selection usually encompass only who decides on their appointment, an example therefore is the ICSID Convention Rule 37(2)(a) and (b):[39]

> Article 37(2)
>
> (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.
>
> (b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties".

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35 Hans Smit "Contractual Modification of the Scope of Judicial Review of Arbitral Awards" (1997) 8 AM Rev Int'l Arb 147; Kenneth Curtin "An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards" (2000) 15 Ohio St J on Disp Resol 337, 339.

36 *Total SA v The Argentine Republic* ICSID Case No ARB/04/01 <www.italaw.com/cases/1105#sthash.4HLuDDvW.dpuf> accessed 31 March 2017.

37 *Continental Casualty Company v The Argentine Republic* ICSID Case No ARB/03/9 <www.italaw.com/cases/329#sthash.ehcA8b6M.dpuf> accessed 31 March 2017.

38 Christoph H Schreuer *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) 903.

39 ICSID (n 8).

However, these rules fail to establish any specific requisite for the arbitrators' competence and on conflicts of interests. Research stressed that arbitrators are chosen by the litigating parties, and that "[u]nlike judges, these for-profit arbitrators do not have a flat salary, but are paid per case".[40] This may lead arbitrators to make decisions favoring the increase in number of arbitration proceedings. And since arbitration proceedings can be initiated only by investors, it is not out of place to fear that arbitrators may favor investors.[41]

In some cases, it was observed that arbitrators may happen to have real economic interests, aligned with those of one of the parties. An example of this kind of situation was described in the petition to vacate, proposed by Argentina against the award in the case filed by the English company Anglian Water Group, which included the French water-services multinational Suez:[42] basing on Article 57, stating that "A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV",[43] Argentina filed a challenge to arbitrator Professor Gabrielle Kaufmann-Kohler, stressing that she had been one of the arbitrators of the ICSID Tribunal in the case *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*.[44] The defendant argued that the award of the latter case revealed "a prima facie lack of impartiality (…) made evident through the most prominent inconsistencies of the award that result in the total lack of reliability towards Ms Gabrielle Kaufmann-Kohler".[45]

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40 Pia Eberhardt "The Zombie ISDS. Rebranded as ICS, Rights for Corporations to Sue States Refuse to die" (2016) 11 <https://corporateeurope.org/sites/default/files/attachments/the_zombie_isds_0.pdf> accessed 31 March 2017.

41 Pia Eberhardt and Cecilia Olivet *Profiting from in justice. How law firms, arbitrators and financiers are fueling an investment arbitration boom* (Corporate Europe Observatory and Transnational Institute, 2012) <www.tni.org/files/download/profitingfrominjustice.pdf> accessed 31 March 2017.

42 *Suez, Sociedad General de Aguas de Barcelona SA, and Inter Aguas Servicios Integrales del Agua SA v The Argentine Republic* (hereinafter: *Suez v Argentina*) ICSID Case No ARB/03/17, Decision On the Proposal for the Disqualification of a Member of the Arbitral Tribunal <www.italaw.com/sites/default/files/case-documents/ita0824.pdf> accessed 31 March 2017.

43 ICSID (n 8).

44 Respondent's Proposal to Disqualify, para 8, cited in *Suez v Argentina* (n 42) para 12.

45 Ibid.

After this first proposal, which was dismissed by the tribunal stating that the challenge was without merit,[46] Argentina challenged the same arbitrator again: Argentina discovered that in "2006, Professor Kaufmann-Kohler was appointed to the Board of Directors at the Swiss banking establishment, UBS AG."[47]. In regards to this, Argentina pointed out that "it means foremost that anyone aspiring to a position as director in a major international bank should understand the likely extent of such a bank's interests,[48] and the possibility of conflict should be clear in particular to all senior and experienced international arbitrators accepting such a position".[49] The relationship between UBS and the claimants was that UBS held 2.1% of the voting shares of Suez and 2.38% of Vivendi's registered voting stock.[50] Argentina's second challenge "extended to two other ICSID cases (…) in which Professor Kaufmann-Kohler (…) also [served] as an arbitrator: *Electricidad Argentina SA & EDF International SA v Argentine Republic* and *EDF International, SAUR International SA & Leòn Participaciones Argentinas SA v Argentine Republic*".[51] Argentina claimed also that "as a non-executive director of UBS, Professor Kaufmann-Kohler received a portion of her compensation in UBS stock (…) [becoming in this way] a shareholder in UBS, which in turn owns stock in two of the claimants in these cases".[52] Argentina claimed that UBS "held stock of [the claimants] on its own account and as wealth-management custodian for its bank clients; and it had publicly recommended to its clients that they invest in the business sector of which [Suez and Vivendi] are prominent members or specifically in the stock of [the claimants].[53] All this, in the opinion of Argentina, would open the door to a possible abuse of power.

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46 Ibid para 40.

47 *EDF International SA, SAUR International SA, Leòn Participaciones Argentinas SA v Argentine Republic* Challenge decision regarding Professor Gabrielle Kaufmann-Kohler, para 12, <www.italaw.com/sites/default/files/case-documents/ita0262.pdf> accessed 1 April 2017.

48 This applied, in the opinion of Argentina, in the present case, as the bank had direct or indirect portfolio investments or other relationships with one of the parties.

49 *Compañia de Aguas del Aconquija SA et al v Argentine Republic* ICSID Case No ARB/97/3, Annulment Proceedings, Decision on the Argentine Republic's Request for Annulment of the Ward, August 10, 2010, para 220.

50 *Suez v Argentina* Decision on a second proposal for the disqualification of a member of the arbitral tribunal (12 May 2008), para 12.

51 Ibid para 9.

52 Ibid para 12.

53 Petition to vacate arbitration award, United States District Court for the District of Columbia, Case 1:15-cv-01057-BAH, para 31.

Notwithstanding the presence of all of these elements, the said petition was concluded with the decision that the connection between Professor Kaufmann-Kohler directorship role of UBS and the claimant AWG Group Limited was "not enough to establish «a circumstance» giving rise to justifiable doubts as to [her] independence and impartiality".[54]

Independently from the case under discussion, the lack of clear norms to avoid conflict of interest, as well as the manner itself in which arbitrator challenges are decided, raise serious questions. In the ICSID Convention, Article 58 establishes:[55]

> The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision.

In the UNCITRAL Arbitration Rules, Article 13.4 establishes:[56]

> If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.

Research pointed out that "having arbitrators decide on challenges to colleague arbitrators seems highly problematic given the fact that the deciding arbitrators themselves might likely be in the situation of being challenged in the future, and possibly even by the arbitrator challenged in the first place. This constellation makes it difficult not to conclude that an arbitrator might be influenced by his or her personal considerations when deciding the challenge."[57]

In fact, some researchers have examined a number of investment arbitrations, and have found that there in several occasions the disputing parties attempted to disqualify arbitrators for different reasons and under different arbitral rules. However, with regards to the ICSID, only three arbitrators have been successfully

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54 *Suez v Argentina* Decision on a second proposal for the disqualification of a member of the arbitral tribunal n 50 para 24.

55 ICSID (n 8).

56 UNCITRAL Arbitration Rules 2013 <www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf> accessed 3 April 2017.

57 Nathalie Bernasconi-Osterwalder and Diana Rosert "Investment Treaty Arbitration: Opportunities to reform arbitral rules and processes" (*IISD Report* January 2014) <www.iisd.org/pdf/2014/investment_treaty_arbitration.pdf> accessed 3 April 2017.

challenged.[58] In any case, in the light of the abovementioned, this datum can be interpreted in different ways.

3.3 The General Lack of Transparency

Transparency in investment arbitration is one of the most discussed topics in recent literature, and is the subject of the most passionate debates among scholars.[59] Correspondingly, transparency is present, recognized and implemented in international, regional and national regimes within and beyond national borders, and the way this is carried out is associated not only with the structuring of the various regulatory agencies, but also to the manner of activity implementation by those agencies.[60]

Nevertheless, the definition of transparency is not easy to draw, as it holds different features based on the law sector it is applied to.[61]

In the meaning of investment law, transparency can be described as the following: "The adequacy, accuracy, availability, and accessibility of knowledge and information about the policies and activities of (the international investment law regime and its participants), and of the central organizations (functioning within) it on matters relevant to compliance and effectiveness, and about the operation of norms, rules, and procedures (underlying the regime)".[62]

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58 Ibid.

59 Christina Knahr and August Reinisch "Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauss Compromise" (2007) 6 The Law and Practice of International Courts and Tribunals 97-118, 97.

60 Dario Bevilacqua and Francesca Spagnuolo "Transparency and Participation in the Global Polity: Lessons Learned from Food and Water Governance" (2015) Glocalism: Journals of Culture, Politics and Innovation 1-35 <www.glocalismjournal.net/ImagePub.aspx?id=239786> accessed 4 November 2016.

61 Carl-Sebastian Zoellner "Transparency an Analysis of an Evolving Fundamental Principal in International Economic Law" (2006) 7 *Mich J Int'l L* 579-628, 580-581.

62 Julie A Maupin "Transparency in International investment Law: The Good, the Bad and the Murky" in Andrea Bianchi and Anne Peters (eds) *Transparency in International Law* (Cambridge University Press, 2013) 142-171, 147.

Moreover, a different approach allows adjusting the notion of transparency in single-treaty systems[63] to the field of investment disputes, as suggested by Julie Maupin, who wrote:[64]

> [T]ransparency means 'the adequacy, accuracy, availability, and accessibility of knowledge and information about the policies and activities of [the international investment law regimes and its participants], and of the central organizations [functioning within] it on matters relevant to compliance and effectiveness, and about the operation of the norms rules, and procedures [underlying the regime].

Transparency can play a crucial role in enhancing public administration, rendering it more accessible to society, incentivizing people's participation, guaranteeing its plurality and accountability.[65] Several aspects of transparency can be identified: among them are the possibility to have access to parties' submissions, the accessibility to hearings and related communication, the publication of the arbitral award,[66] and third parties' participation.[67]

A systematic approach was adopted already in 2010 by the United Nations Commission on International Trade Law (UNCITRAL) Working Group II on Arbitration and Conciliation, with the statement: "[T]he substantive issues to be considered in respect of the possible content of a legal standard on transparency would be as follows: publicity regarding the initiation of arbitral proceedings; documents to be published (such as pleadings, procedural orders, supporting evidence); submission by third parties ("amicus curiae") in proceedings; public

63 Abram Chayes, Antonia Handler Chayes and Ronald Mitchell "Managing Compliance: A Comparative Perspective" in Edith Brown and Harold Jacobson (eds) *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press, 1998) 39-62, 43.

64 Maupin (n 62) 149. The brackets include Maupin's adaptations of the definition given by Chayes, et al (n 63) 41.

65 Bevilacqua and Spagnuolo (n 60) 3.

66 Thore Neumann and Bruno Simma "Transparency in International Adjudication', in Andrea Bianchi and Anne Peters (eds) *Transparency in International* Law (Cambridge University Press, 2013) 436-476, 437.

67 Florentino P Feliciano "The 'Ordre Public' Dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance Requirements in International Investment and Trade Arbitration" in Junji Nakagawa (ed) *Transparency in International Trade and Investment Dispute Settlement* (Routledge, 2013)15-29, 19.

hearings; publication of arbitral awards; possible exceptions to the transparency rules; and repository of published information ("registry")."[68]

Based on this definition, the concept of transparency in international law was differentiated by a number of scholars into three dimensions: institutional transparency, legislative transparency, and procedural transparency. Whereas daily international organizations activities are the focus of institutional transparency,[69] the international law legislative process is addressed by legislative transparency.[70]

Reflecting on the nexus between transparency, international fairness and legitimacy, Franck stated that "a deeply held popular belief [affirms] that for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted and applied."[71] There are, in his view, four elements that can be considered as objective factors indicating that rules are legitimate: clear message articulation (determinacy), conveyance of authority via ritual or standardised practice (symbolic validation), consistency and agreement with other rules (coherence), and vertical nexus to a pyramidal structure of secondary rules (adherence to a normative hierarchy). If rules show these characteristics, they induce states (and, in my opinion, also private subjects) to abide by their commands. On the contrary, if these elements are scarcely or not present, it is easier to avoid to conform to them.[72]

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68 UNCITRAL *Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration* Report of the Working Group II (Arbitration and Conciliation) of the work of its fifty-third session (Vienna, 4–8 October 2010) A/CN9/712, 20 October 2010, para 31 <https://daccess-ods.un.org/TMP/4176788.33007813.html> accessed 23 June 2016.

69 Some programs, promoting accountability through transparency, have been launched by major international organizations; see, among others, the United Nations *Strengthening Accountability* <www.un.org/en/strengtheningtheun/accountability.shtml> accessed 23 June 2016, and the European Commission's *Transparency Portal* <http://ec.europa.eu/transparency/index_en.htm> accessed 23 June 2016.

70 The online public consultation on investment protection and investor-State dispute settlement (ISDS) in the *Transatlantic Trade and Investment Partnership* (TTIP) agreement has been launched by the European Commission on 27.03.2014. This initiative shows that international and regional organizations acknowledge the importance of including all stakeholders interested in the negotiation of multilateral treaties. See, the dedicated website of the European Commission, *Trade: Consultations: Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, concluded 13 July 2014 <http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179> accessed 23.06.2016.

71 Thomas M Franck *Fairness in International Law and Institutions* (Clarendon Press, 1995) 7–8.

72 Thomas M Franck "Legitimacy in the International System" (1988) 82 (4) The American Journal of International Law 705-759, 712.

The implementation of law by international courts is the concern of procedural transparency.[73]

However, regulatory transparency and procedural transparency have been distinguished further by certain commentators. In their view, regulatory transparency draws attention to the regulatory and administrative systems and is applicable in the interpretation of fair and equitable treatment standards, while procedural transparency takes into account the entire design of investment treaties and the incorporated clauses relating to investment disputes and their resolution.It refers particularly to the following key point: to what degree are "transparency and accountability (…) beginning to outweigh privacy and confidentiality in importance" in investment arbitration?[74]

As stated in the report of the Trade and Development Board at the United Nations Conference on Trade and Development (UNCTAD): "[transparency] was also seen as an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such. Those challenges were said to include, among others: an increasing number of treaty-based investor-State arbitrations, including an increasing number of frivolous claims; increasing amounts of awarded damages; increasing inconsistency of awards and concerns about lack of predictability and legal stability; and uncertainties regarding how the investor-State dispute settlement system interacted with important public policy considerations. It was said that legal standards on increased transparency would enhance the public understanding of the process and its overall credibility."[75]

In any case, notwithstanding an ample consensus on a certain degree of transparency, up to 2014 neither ICSID nor the Permanent Court of Arbitration (PCA), nor the Stockholm Chamber of Commerce (SCC) or other commercial arbitration institutions had promoted transparency in a decisive manner, and also

73 Joachim Delaney Daniel Barstow Magraw Jr "Procedural Transparency" in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 721-788, 722.

74 Campbell McLachlan, Laurence Shore and Matthew Weiniger *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007) 57.

75 UNCITRAL "Report of the Working Group on Arbitration and Conciliation on the work of its fifty-third session (Vienna, 4-8 October 2010)" (A/CN.9/712) in Yearbook Volume XLII: 2011 (United Nations 2014) 181.

some researchers doubted that, despite the importance conferred to transparency, its practical impact on investment arbitration could really be substantial.[76]

IV LATEST INNOVATIONS

The recent initiatives of two different, although complementary, institutions, namely UNCITRAL and the European Union (hereinafter: EU), have provided an answer to some of these issues: the UNCITRAL *Rules on Transparency in Treaty-based Investor-State Arbitration* (hereinafter: UNCITRAL Transparency Rules), which are effective since 1 April 2014, and two proposals by European Commission.

4.1 The UNCITRAL Transparency Rules

The procedural rules provided for in the UNCITRAL Transparency Rules afford transparency and public accessibility of investment arbitration. Research has favourably welcomed the Transparency Rules, affirming that they "provide for public access to documents generated during treaty-based investor-state arbitrations (…) brought under the UNCITRAL Arbitration Rules, as well as public access to hearings of such disputes and the ability for third parties to make submissions, subject to certain exceptions",[77] and stressing that "the introduction of the UNCITRAL Transparency Rules could materially change the nature of the dispute resolution process under BITs or other investment treaties which provide for UNCITRAL arbitration, making it more open to public participation and scrutiny."[78]

Also other scholars pointed out that "in what seems to be a great struggle to achieve full transparency for investor–State treaty-based arbitration, the UNCITRAL Transparency Rules represent a huge and important contribution, by making openness a rule rather than an exception and shifting the presumption of confidentiality, much more suitable for commercial arbitration, towards transparency."[79] However, some researchers called attention to the fact that "in terms of the applicability of the Rules, it should be noted that even though they apply

76 Ronald B Mitchell "Sources of Transparency: Information Systems in International Regimes" (1998) 42 International Studies Quarterly 109-130, 111.

77 Deborah Wilkie "UNCTRAL Unveils New Transparency Rules – Blazing a Trail Towards Transparency in Investor-State Arbitration?" (2013) <http://kluwerarbitrationblog.com/2013/07/25/uncitral-unveils-new-transparency-rules-blazing-a-trail-towards-transparency-in-investor-state-arbitration/> accessed 1 April 2017.

78 Ibid.

79 Marta Requejo "The UNCITRAL Rules on Transparency in Investor-State Treaty-based Arbitration" (28 February 2014) <http://conflictoflaws.net/2014/the-uncitral-rules-on-transparency-in-investor-state-treaty-based-arbitration/> accessed 1 April 2017.

automatically to claims brought under a treaty concluded after 1st April 2014, parties will still have the possibility to opt out from transparency provisions."[80]

On one side, it is true that, by providing a detailed list of documents subject to disclosure, the Transparency Rules undoubtedly leave less room for the abuse of proceedings. On the other side, it is also correct that the Rules still leave open the likelihood for such discussion in relation to specific issues, such as expert reports, witness statements, and exhibits, which are not to be automatically disclosed. Indeed, Article 3 of the UNCITRAL Rules on Transparency states that:[81]

> 1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.
>
> 2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.
>
> 3. Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified site.

On turn, Article 7 of the Rules on Transparency provides that confidential or protected information shall not be made available to the public, and specifies that:[82]

> 2. Confidential or protected information consists of: (a) Confidential business information; (b) Information that is protected against being made available to the public under the treaty; (c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of

80 Ibid.

81 UNCTRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014 <www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> accessed 1 April 2017.

82 Ibid.

the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or (d) Information the disclosure of which would impede law enforcement.

Therefore, although some scholars affirm that "confidentiality as a virtue in all sorts of arbitral proceedings and as a general justification for international arbitration is thus an outdated concept",[83] others warn that "when there is discretionary power of tribunals to restrict disclosure in order to protect confidential or protected documents and the integrity of the arbitral process the potential abuse of such powers is often an issue."[84]

4.2 The EU's Proposals

4.2.1 The Investment Court System

Some scholars point out that the fragmented investment treaty regime can give rise to "a substantive rather than deliberative multilateralism (…) on the basis of bilateral treaties" by means of the development of "increasingly uniform standards of investment protection."[85]

In any case, other scholars affirm, "potential remains for a much greater level of harmonisation, to be achieved through the completion of major treaty negotiations":[86] among them, there is the proposal for an Investment Court System (hereinafter: ICS) within the framework of the Trans-Atlantic Trade and Investment Partnership (hereinafter: TTIP).

The ICS is outlined in Sub-Section 4 of the EU Commission draft text: it thrives towards a harmonization of investment law, through the creation of a system

83 Won L Kidane *The Culture of International Arbitration* (Oxford University Press, 2017) 107.

84 Marta Requejo "The UNCITRAL Rules on Transparency in Investor-State Treaty-based Arbitration" (2014) <http://conflictoflaws.net/2014/the-uncitral-rules-on-transparency-in-investor-state-treaty-based-arbitration/> accessed 1 April 2017.

85 Stephan W Schill "Multilateralizing Investment Treaties through Most-Favored-Nation Clauses" (2009) 27 Berkeley J Int'l L 496, 500.

86 Mark Feldman, Rodrigo Monardes Vignolo and Cristián Rodríguez Chiffelle "The Role of Pacific Rim FTAs in the Harmonisation of International Investment Law: Towards a Free Trade Area of the Asia-Pacific" (2016) 2 <http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Feldman-Monardes-Rodriguez-Chiffelle-Final.pdf> accessed 1 April 2017.

provided with a First Chamber and an Appellate Court, as provided for under Article 9.1:[87]

> A Tribunal of First Instance ('Tribunal') is hereby established to hear claims submitted pursuant to Article 6.

and Article 10.1:[88]

> A permanent Appeal Tribunal is hereby established to hear appeals from the awards issued by the Tribunal.

and the application of the UNCITRAL Transparency Rules, as provided for under Article 18:[89]

> 1. The "UNCITRAL Transparency Rules" shall apply to disputes under this Section, with the following additional obligations.
>
> 2. The request for consultations under Article 4, the request for a determination and the notice of determination under Article 5, the agreement to mediate under Article 3, the notice of challenge and the decision on challenge under Article 11 the request for consolidation under Article 27 and all document submitted to and issued by the Appeal Tribunal shall be included in the list of documents referred to in Article 3(1) of the UNCITRAL Transparency Rules.
>
> 3. Exhibits shall be included in the list of documents mentioned in Article 3(2) of the UNCITRAL Transparency Rules.

Concerning arbitrators that will operate within the ICS, the EU proposal offers procedural norms for the arbitrators' designation, under Article 9.4 and 9.5:[90]

> 9.4 The Judges shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.

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87 EU Commission draft text "Transatlantic Trade and Investment Partnership: Trade In Services, Investment and E-Commerce Chapter II – Investment" <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 1 April 2017.

88 Ibid.

89 Ibid.

90 Ibid.

> 9.5 The Judges appointed pursuant to this Section shall be appointed for a six-year term, renewable once. However, the terms of seven of the fifteen persons appointed immediately after the entry into force of the Agreement, to be determined by lot, shall extend to nine years. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

Moreover, the Commission proposals offers, under Article 11.1, an ethical code the decision-makers (who are termed "Judges"[91] and "Members of the Appeal Tribunal",[92] while the bodies where they will operate will be called Tribunal[93] and Appeal Tribunal[94]) will have to abide by:[95]

> 11.1 The Judges of the Tribunal and the Members of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt. They shall not be affiliated with any government. They shall not take instructions from any government or organisation with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. In so doing they shall comply with Annex II (Code of Conduct). In addition, upon appointment, they shall refrain from acting as counsel in any pending or new investment protection dispute under this or any other agreement or domestic law.

According to some scholars, the proposal, which intends to resolve an often stressed potential lack of independence and impartiality of arbitrators, seems capable to remove the most part of the concerns in this regard.[96] Doubtlessly, the Commission's commitment to outline the rules governing the role, the appointment procedures and the ethical conduct of arbitrators is meaningful. However, in the opinion of other legal experts, a number of articles of the proposal made by the European Commission have worrisome implications.

Let us focus on the definition of investment reported in Chapter II:

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91 EU Commission draft text (n 87) art 9 and art 11.

92 Ibid art 10 and art 11.

93 Ibid art 9.

94 Ibid art 10.

95 Ibid.

96 Mirjam van de Hel-Koedoot, 'The Proposed New Investment Court System for TTIP: The Right Way Forward?' <https://efilablog.org/2015/10/14/the-proposed-new-investment-court-system-for-ttip-the-right-way-forward/> accessed 1 April 2017.

Definitions specific to investment protection

For purposes of this Title:

"Investment" means every kind of asset which has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:[97]

a) an enterprise;

b) shares, stocks and other forms of equity participation in an enterprise;

c) bonds, debentures and other debt instruments of an enterprise;

d) a loan to an enterprise;

e) any other kinds of interest in an enterprise;

f) an interest arising from:

   i) a concession conferred pursuant to domestic law or under a contract, including to search for, cultivate, extract or exploit natural resources,

   ii) a turnkey, construction, production, or revenue-sharing contract, or

   iii) other similar contracts;

g) intellectual property rights;

h) any other moveable property, tangible or intangible, or immovable property and related rights;

i) claims to money or claims to performance under a contract;

For greater certainty, "claims to money" does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party, domestic financing of such contracts, or any related order, judgment, or arbitral award.

97 European Commission *Transatlantic Trade and Investment Partnership Trade In Services, Investment And E-Commerce*, Commission draft text TTIP – investment, Chapter II – Investment, Definitions <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 1 April 2017.

> Returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their qualification as investments.

Given how widely defined investment is, more than one field of law is applicable: civil law, general administrative law and social and tax legislation.

As a consequence, from civil law, the legal investment protection spreads to general administrative law and social and tax legislation, most likely serving as a regulatory and legislative chill. Concerning the norms proposed for the decision-makers' designation, article 9.4 states that:[98]

> The Judges shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence.

Similarly, article 10.7 establishes:[99]

> The Members of the Appeal Tribunal shall possess the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognised competence.

Some researchers critique this wording from several points of view. First, according to them it would have been more suitable to ask future decision-makers both to hold the qualifications required in their respective countries for appointment to judicial office, and to be jurists of recognized competence.

Second, in the opinion of these critics, the articles under discussion do not specify how a jurist's "recognized competence" is univocally assessed.[100]

It is true, on the one hand, that Article 9.4 and Article 10.7 stress that the future decision-makers in the ICS will have to hold some relevant qualifications:[101]

> Article 9.4
>
> They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade

98 Ibid.

99 Ibid.

100 Louise Woods "Fit for purpose? The EU's Investment Court System" (2016) <http://kluwerarbitrationblog.com/2016/03/23/to-be-decided/> accessed 3 April 2017.

101 TTIP "Trade In Services, Investment And E-Commerce Chapter II – Investment, Definitions" <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 1 April 2017.

law and the resolution of disputes arising under international investment or international trade agreements.

Article 10.7

They shall have demonstrated expertise in public international law. It is desirable that they have expertise in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.[102]

Therefore, according to the cited Articles, the decision-makers shall have demonstrated expertise in public international law, and desirably in international investment law and international trade law. On the other hand, it is not required even as an optional qualification, any competence on the more general civil law and administrative law, nor on specific sectors of social and tax legislation, sectors on which it is highly likely that they will have to make decisions, due to the broad definition of investment provided for in the Definitions. Moreover, in the opinion of some experts, the difference in role between prospective judges of the Tribunal of First Instance, and prospective Members of the Appeal Tribunal, should have been addressed: requiring a different professional profile, and/or establishing a different process for the selection of these two categories of decision-makers.[103]

Regarding the ethical norms included in Article 11.1, at the surface they seem to cover all potential cases of conflict of interests, providing for the independence of Judges and Members of the Appeal Tribunal in a comprehensive way.

In effect, Article 11.1 establishes:[104]

The Judges of the Tribunal and the Members of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt. They shall not be affiliated with any government. They shall not take instructions from any government or organisation with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. In so doing they shall comply with Annex II (Code of Conduct). In addition, upon appointment, they shall refrain from acting as counsel in any pending or new investment protection dispute under this or any other agreement or domestic law.

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102 Ibid.

103 Louise Woods "Fit for purpose? The EU's Investment Court System" (2016) <http://kluwerarbitrationblog.com/2016/03/23/to-be-decided/> accessed 3 April 2017.

104 European Commission (n 97).

However, some researchers have found that some general cases of conflict of interests present in the ISDS system remain unaddressed also in the ICS. Bernasconi-Osterwalder and Rosert emphasize that "arbitrators sitting on treaty-based investor-state tribunals can simultaneously serve as counsel or expert in other such disputes (the "dual-role" or "multiple hat" issue).[105]

Yackee points out that these professionals "comprise a highly networked «knowledge elite» who possess «professional training, prestige, and reputation for expertise in an area highly valued by society or elite decision makers» and upon whom national political leaders rely for advice and to whom those leaders delegate policymaking responsibility. (…) They also exhibit a fluid mobility between intra-agency roles, shifting relatively easily between public and private service, between advocacy and adjudication and scholarship, and they self-police each other's commitment to the common cause (…) Elite private lawyers are also deeply involved in the generation of international investment law (IIL) rules not just by virtue of their role in authoring partisan briefs in discrete IIL disputes, but also through their regular involvement in the academic and professional conference circuit, their service as arbitrators, and their production of IIL scholarship published in specialized journals".[106] Moreover, some potential conflicts of interests could characterize the ICS in particular and in fact some scholars underlined that:

(1) judges and members of the appeal tribunal could continue to practice law as private lawyers (though not as counsel in other investment claims);
(2) there is no prohibition, for judges and members of the appeal tribunal, to act as arbitrators in other cases
(3) there is no cooling-off period before or after their appointment

In this way, these decision-makers can remain part of the small group of investment arbitrators who have so far encouraged claims and decided the majority of investor disputes.[107]

105 Nathalie Bernasconi-Osterwalder, Diana Rosert "Investment Treaty Arbitration: Opportunities to reform arbitral rules and processes" (*IISD Report*, January 2014) <www.iisd.org/pdf/2014/investment_treaty_arbitration.pdf> accessed 3 April 2017, at 13.

106 Jason Webb Yackee "Controlling the International Investment Law Agency" (2012) 53 Harv Int'l LJ 391, 402 and 405.

107 Pia Eberhardt "The zombie ISDS. Rebranded as ICS, rights for corporations to sue states refuse to die" (2016) 11 <https://corporateeurope.org/sites/default/files/attachments/the_zombie_isds_0.pdf> accessed 31 March 2017.

4.2.2 Multilateral Investment Court

The second proposal of the European Commission aims to establish a multilateral court on investment, which, as well, thrives towards a harmonization of investment law. In *Establishment of a Multilateral Investment Court for investment dispute resolution* the European Commission correctly identified the main flaws of the ISDS system and proposed the establishment of a Multilateral Investment Court ("MIC") with the aim to remedy such flaws.[108] However, although the proposed MIC may solve some of the issues, others persist and additional ones arise. Among the unresolved issues is, apart from the issue of judges' conflict of interest, the fact that when conflicts between the International Investment Law and the Member States' or the EU's right to regulate arise, the latter are not fully protected.

Some recent cases have focused on similar conflicts: *Vattenfall v Germany I* and *Micula v Romania*. In April 2009 the German government was brought to international arbitration by the energy utility company Vattenfall.[109] The arbitration called into question environmental limitations applied to a €2.6 billion coal-based power plant being built in Moorburg, on the banks of the Elbe River.

The coal-based power plant had been controversial from several different aspects, ever since the announcement of its construction was made by the company in 2004. In 2007 a petition opposing the power plant construction was signed by about 12,000 citizens. Even though the public was opposed to the project, in 2007 the City of Hamburg agreed a provisional contract allowing the plant to be built on the condition of compliance with environmental restrictions regarding the plant's impact on waters in the Elbe River.

In any case, the final permit dictated the contract terms. The preliminary permit for construction provided by Hamburg's Urban Development and Environment Authority (BSU) in November 2007 enabled Vattenfall to begin with some parts of the construction. The project eventually received a final permit, which specified further restrictions regarding the effect of the power plant on the volume, temperature and oxygen content of the water. The dispute centred primarily on these further restrictions associated with the quality of water.

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108 European Commission "Establishment of a Multilateral Investment Court for investment dispute resolution" (1 August 2016) <http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf> accessed 8 April 2017.

109 *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany* (ICSID Case No ARB/09/6).

In the view of the City of Hamburg, the conditions outlined in the water permit had to be upheld to satisfy the EU's Water Framework Directive,[110] which imposed on all EU Member States the requirement to guarantee a particular quality of water in rivers, lakes, estuaries, coastal waters and groundwater by 2015. Moreover, according to the City of Hamburg, the conditions were on the same line as the restrictions imposed on all industries along the Elbe River.

Vattenfall argued that the practicality and economic feasibility of the plant would be affected by the water regulations, and considered that the latter exceeded the terms of the contract signed in 2007. Vattenfall claimed that the multilateral Energy Charter Treaty, ratified by Germany in 1997, was breached by the imposition of stricter regulations in the final permit. *Vattenfall v Germany I* was settled in 2011: the local court ruled in favour of Vattenfall, who was granted a new water permit that greatly relaxed the initial environmental restrictions imposed on the power plant, increasing the volume of water that could be taken from the river and attenuating fish protective measures.

The ruling prompted the European Commission to bring a claim against Germany before the European Court of Justice, on the grounds that the permit granted for the Moorburg plant construction breached EU environmental law because insufficient measures were taken to ensure the protection of fish species (eg salmon) swimming near the plant.[111] The Swedish company owned by the Micula brothers had made investments in Romania prior to the country becoming an EU member state. The Romanian government offered business incentives that the company accepted, but stopped offering incentives when Romania became an EU member state, in keeping with EU state aid rules.[112]

As a consequence, the company brought an arbitration against Romania under the Romania-Sweden bilateral investment treaty (BIT) and won compensation amounting to USD $250 million on grounds that the country had transgressed its obligations under the investment agreement. In 2014, a provisional injunction was served by DG Competition to Romania forbidding it to pay the compensation, as that

110 Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0060> accessed 8 April 2017.

111 Claire Provost and Matt Kennard "The obscure legal system that lets corporations sue countries" <www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid> accessed 8 April 2017.

112 Monique Goyens "The Micula case: When ISDS messes with EU law, BEUC" <www.beuc.eu/blog/the-micula-case-when-isds-messes-with-eu-law/> accessed 4 April 2017.

would be classified as illegal state aid.[113] A final decision has so far not been pronounced in this case. However, the case shows that the ISDS systems allows a company to take successful legal action against a Member State for the reason that the latter ensures that its legislation and policies comply with EU legislation.

Since MIC should apply mainly international law, these cases might arise with more and more frequency, and national measures part of policies aimed at protecting public interest might be challenged, as in public health or sustainable energy measures. Moreover, other scenarios can be envisaged: would it be possible for a company to proceed against a Member State introducing a future EU Directive requesting standardised food packaging information on grounds of intellectual property right violation? Could the company invoke the same grounds to take legal action against every Member State in which it has a subsidiary?

Among the problems that are originated are the following:

(1) the costs and the impact of establishing a MIC should be previously evaluated. Indeed, there is uncertainty regarding the overall costs incurred by the formation of such a MIC[114]
(2) moreover, an arbitration allowing appeal with an Appellate Tribunal that has the power to review laws as well as facts will likely increase or even duplicate the costs for the parties.[115]

Even more importantly, the compatibility of the MIC with EU treaties should be verified.

The CJEU acknowledged in its *Van Gend en Loos* that the EU "constitutes a new legal order of international law,"[116] dissimilar from "pure" public international law. There are both external and internal aspects to this principle. The latter specifies that national authorities cannot undermine the powers of the EU institutions and national legal systems cannot outlaw EU norms, whereas the former guarantees that EU

113 Ibid.

114 EFILA "Submission of the European Federation for Investment Law and Arbitration (EFILA) to the public consultation organized by the European Commission on a multilateral reform of investment dispute resolution" <http://efila.org/wp-content/uploads/2014/02/EFILAs-submission-for-public-consultation-on-MIC-DEF-15-3-2017.pdf> accessed 8 April 2017.

115 EFILA "Task Force Paper regarding the proposed International Court System (ICS)" <http://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf> accessed 25 September 2017.

116 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse Administratie der Belastingen* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61962CJ0026&from=IT> accessed 8 April 2017.

powers are not challenged by international courts functioning and that EU law is not overridden by international law in those courts.[117]

There are worries especially that the EU legal order autonomy may be challenged regarding the relationship between the EU law and the MIC proposal. The joint implementation of Article 19(1) of the TEU and Article 344 of the TFEU is the source of the concerns about the effect of investor-State adjudication on the EU legal order autonomy: they specify that the European Court of Justice has exclusive jurisdiction over how EU law is interpreted and applied, as highlighted by this Court in several decisions.

According to Article 19(1) of the TEU, it is solely the Court that has to "ensure that in the interpretation and application of the Treaties the law is observed", whilst according to Article 344 of the TFEU "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." These provisions make it clear that investor-State tribunals compliance with EUL, according to CJEU's, rather than tribunals', interpretation and implementation must be guaranteed by any FTA between the EU and third countries.[118]

This has been affirmed by the Court in several rulings and opinions, which have maintained that the EU law interpretations drawn by the institutions of an international dispute settlement system were non-binding, despite acknowledging that the formation of an international dispute settlement system with institutions empowered to implement rulings binding on the EU and also the CJEU was included in the treaty-making prerogative of the EU.[119]

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117 Bruno de Witte "A Selfish Court?: The Court of Justice and the Design of International Dispute Settlement Beyond the European Union" in Marise Cremona & Anne Thies (eds) *The European Court Of Justice And External Relations Law. Constitutional Challenges* (Hart Publishing, 2014) 33-46 (providing the interpretation of the Court of Justice of the EU on other international dispute settlement mechanisms).

118 Angelos Dimopoulos "The Compatibility of Future EU Investment Agreements with EU Law" (2012) 39 Legal Issues Econ. Integration 447, 470; Julie A Maupin "Where Should Europe's Investment Path Lead? Reflections on August Reinisch, 'Quo Vadis Europe?'" (2014) 12 Santa Clara J Int'l L 183, 219 (noting that it is the Court, and not the arbitrators on their own, that have made this determination).

119 Opinion 1/75, Understanding on a Local Cost Standard, (1975) ECR 1355; Opinion C-2/13, Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2013) (acknowledging that the Treaties of the EU provided for the creation of a dispute settlement system whose decisions are binding upon the EU Institutions); Opinion 1/09, Draft agreement – Creation of a unified patent litigation system, (2011) ECR I-1137; Opinion 1/00, Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area, (2002) ECR I-3498; Opinion 2/92, Competence of the Community or one of its institutions to participate in the

In the *Mox Plant* decision, the Court emphasised that the distribution of duties outlined in the Treaties fell outside the scope of an international agreement, and as a consequence, it cannot affect "the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 of the EC"[120] (now Art. 19 of the TEU). From the perspective of the Court, its exclusive Court jurisdiction is validated by Article 344 of the TFEU, pursuant to which "Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein."[121]

By all probability, we can apply to the MIC what the German Magistrates Association maintains regarding the ICS. This Association argues that this kind of institution has no legal grounds and questions the ability of the EU to create an investment court. If an investment court were created, the European Union and the Member States would be obligated, immediately after the finalisation of an agreement, to submit it to the investment court jurisdiction, and to implement the complainant-selected international procedures.

Aside from restricting the legislative powers of the Union and the Member States, such an investment court would bring changes to the established court system within the Member States and the European Union as well.[122] Evidence that this is not a remote possibility can be found in the recent issue regarding the proposed Patent Court. In its Opinion 1/09 of 8 March 2011 on the establishment of a European Patent Court, the EUCJ stated that the Union maintains "a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions (para 70)". Like the proposed Patent Court that was then being assessed,

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Third Revised Decision of the OECD on national treatment, (1995) ECR 521; Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property (1994) ECR 5267; Opinion 1/91, Draft Agreement Between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, (1991) ECR 6079; Opinion 1/78, International Agreement on Natural Rubber, (1979) ECR 2871.

120 *Commission v Ireland* Judgment of the Court (Grand Chamber) 30 May 2006, Case C-459/03, para. 123 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62003CJ0459&from=EN> accessed 25 September 2017.

121 Consolidated Version of the Treaty on the Functioning of the European Union 2012, arts 216-19, O J C 326/47, art 344, at para. 123.

122 Opinion on the establishment of an investment tribunal in TTIP - the proposal from the European Commission on 16.09.2015 and 11.12.2015 <www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf> accessed 8 April 2017.

the MIC would be a court which would be "outside the institutional and judicial framework of the Union" (para 71).

The MIC would be "an organisation with a distinct legal personality under international law", as in the case of the suggested Patent Court that was under evaluation at the time. Obviously, if a decision of the MIC violated the European Union law, "Infringement proceedings" could not be applicable to it and it could not engender "any financial liability on the part of one or more Member States" (para 88). Therefore, also a MIC could "deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law" (para 89).[123]

Furthermore, although these proposals are aimed to the harmonization of investment law, other fundamental problems affecting International Investment Law, and especially the ISDS system are not addressed by the MIC project nor by the ICS proposal. And these are precisely the problems causing the greater disapproval of the ISDS system. Among them, there are:

- the difference in treatment between foreign investors compared to host States, domestic investors, trade unions, local communities;
- the politically unacceptable, and ethically questionable, choice that too often obliges Respondent States either not to implement laws which are necessary for the country or to pay to foreign investors amounts of sums far higher that what the latter concretely invested.

V CONCLUSIONS AND THE WAY FORWARD

The present study has examined the system in place for the resolution of investor-state disputes. Although significant advantages arise out of the use of a neutral arbitration forum, the current structure of ISDS contributes to the fragmentation of international law: the rules that govern the procedure differ in each case, and they may lead to diverging arbitral awards. In particular, the present research focused on the issues of lack of rule of precedent, lack of criteria for arbitrators' appointment, and general lack of transparency during the arbitral procedure.

123 ECJ, Opinion of 8. 3. 2011 – Case C-1/09 Opinion 1/09 of the Court (Full Court) 8 March 2011 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CV0001&from=EN> accessed 8 April 2017.

In order to create the conditions for a more predictable outcome and harmonize international investment law, International Organizations such as the United Nations, and Supranational Organizations such as the European Union, have developed initiatives with the aim of improving the current normative framework: the UNCITRAL Transparency Rules, the MIC project and the ICS are tools, applicable to multiple IIAs, to regulate the procedure of investment arbitration.

This approach moulds the procedural rules and deems the treaties as unchangeable. However, a different tactic is to amend the same treaties: in fact, the UNCTAD in its World Investment Report 2017 lays down ten actions to reform investment treaties and render them more sustainable development oriented. The planned actions are as follows: (1) jointly interpreting treaty provisions; (2) amending treaty provisions; (3) replacing "outdated" treaties; (4) consolidating the IIA network; (5) managing relationships between coexisting treaties; (6) referencing global standards; (7) engaging multilaterally; (8) abandoning unratified old treaties; (9) terminating existing old treaties; and (10) withdrawing from multilateral treaties. They insist on rethinking the validity, interpretation, amendment, and coordinated action with other treaties. Some of these actions have already been applied in practice; examples thereof are the following. The NAFTA Free Trade Commission clarified the meaning of certain clauses in the "Notes of Interpretation of Certain Chapter 11 Provisions";[124] the EU member states from Eastern Europe used protocols to make amendments to their IIAs to bring their international obligations in line with their obligations under EU law;[125] the Canada-EU CETA will replace eight prior BITs between Canada and EU member States; the United Nations Convention on Transparency in Treaty-based Investor-States Arbitration (the Mauritius Convention) fosters greater application of the UNCITRAL Transparency Rules to IIAs concluded prior to 1 April 2014; the United States publicly stated its intention not to become a party to the TPP.[126]

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124 NAFTA Free Trade Commission "Notes of Interpretation of Certain Chapter 11 Provisions" (31 July 2001) <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng&_ga=2.26851961.513523544.1506862306-106947727.1506862306> accessed 1 October 2017.

125 One example thereof is the *Protocole Additionnel entre Ia Republique Tcheque et Ie Royaume du Maroc relatif a l'amendement de l' Accord entre Ia Republique Tcheque et Ie Royaume du Maroc pour Ia Promotion et Ia Protection Reciproques des Investissements, signe a Rabat, Ie 11 juin 2001* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/967> accessed 1 October 2017.

126 United States, The White House "Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement" (23 January 2017).