

European Yearbook of International Economic Law

Güneş Ünüvar
Joanna Lam
Shai Dothan
Editors

Special Issue:

Permanent Investment Courts

The European Experiment



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Special Issue

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Preface

This special issue explores the Investment Court System (ICS) solutions which the European Union (EU) has adopted in recent economic treaties. It is particularly interested in the transitory and hybrid character of these solutions. As part of this investigation, the special issue also assesses the feasibility of establishing a truly multilateral investment court (MIC) in the present ‘interregnum’ times of Investor-State Dispute Settlement (ISDS). The creation of such a multilateral institution is currently promoted as one of the flagship projects of the EU trade and investment policy, as seen, for example, in the 2017 ‘State of the Union’ address of the then-President of the European Commission Jean Claude Juncker; authorization of the European Commission by the Council on 20 March 2018 to negotiate on behalf of the EU and MIC convention; and the supportive stance for the initiative adopted by the EU Member States before UNCITRAL Working Group III (which since 2017 examines the possibilities of reform of the ISDS system). As the investment court project is currently one of the most pronounced, as well as the most debated projects of the EU trade policy, the proposed special issue is particularly timely.

International investment disputes often concern society as a collective and direct stakeholder, especially in cases prompted by multinational companies conducting essential public services such as sanitation, energy production and distribution, or resource extraction. As disputes with far-reaching and direct implications for the society have amassed, it has been increasingly argued by scholars that the social legitimacy of the international settlement of investment disputes shall be enhanced by, *inter alia*, shifting the ad hoc and arbitral focus of investment dispute resolution to new and more permanent, institutionalized dispute settlement bodies.

Although such suggestions for creating permanent investment courts have been around for decades, it is only now that they may materialize into actual investment courts. In particular, the European Commission has been pushing for a court-like mechanism to resolve investment disputes in several recent trade deals. Such a framework was, for example, included in the Free Trade Agreements (FTAs) and

Investment Protection Agreements (IPAs) that the EU signed with Vietnam and Singapore (EU–Vietnam IPA and EU–Singapore IPA) and Canada (Comprehensive Economic and Trade Agreement (CETA)). The European Commission had also formally proposed a court system during the negotiations for the now-defunct Transatlantic Trade and Investment Partnership (TTIP) agreement with the USA. The adoption of a permanent dispute settlement mechanism has also been accepted in negotiations with Mexico. In addition, and crucially, all agreements mentioned above also include provisions that foresee the establishment of a multilateral investment court (MIC). The ambitions of the EU to create a MIC have been repeatedly expressed on various occasions, including submissions to UNCITRAL, where in 2017 the Working Group III has been entrusted with a broad mandate to conduct work on the possibilities of multilateral reforms of the ISDS system. These reform options are being discussed to this day.

The big question is whether these developments are actually leading to the creation of permanent investment courts. The articles in this special issue examine this question as well as several related inquiries including: How might such courts change the future of international investment law? Will they bring about a real institutional change of adjudicatory mechanisms? Or will they introduce a ‘hybrid’ system, which borrows important characteristics from both arbitration and institutional methods of international adjudication? How will the proposed shift from arbitrators to judges affect the prescribed qualification requirements and rules of appointment of tribunal members? What challenges await stakeholders in the enforcement of decisions rendered by the investment courts, vis-à-vis arbitral tribunals functioning pursuant to the ICSID Convention or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? What lessons can be learned from the North American ISDS practice, and what does a potential MIC mean for the EU legal order as a whole?

The special issue brings together a group of established and emerging scholars who are all investigating the new European model of permanent investment courts. It is based on carefully selected papers from a larger conference at the Centre of Excellence for International Courts (iCourts) at the University of Copenhagen Faculty of Law, which the editors organized on 1–2 February 2018.

In their contribution, Shai Dothan and Joanna Lam explore the transitory and hybrid character of the newly proposed investment courts, which contrasts with the public discourse of revolutionary change in investor-state dispute resolution. They ask whether the shift from arbitration to court-like mechanisms is likely to happen, and how deep the change is going to be. The advantages and disadvantages of replacing ad hoc arbitrators with court-like mechanisms are examined. The authors argue that courts are more centralized than arbitration, which is a factor bolstering adjudicatory coherence and adoption of a long-term perspective. However, centralization may imply a greater risk of capture by special interests and could lead to more radical legal developments than the system based on arbitration. Furthermore, compromise solutions that create numerous competing court-like mechanisms

instead of a universal court may potentially escalate the fragmentation of international law.

Eleftheria Neframi scrutinizes the effects of permanent investment courts on the EU legal order. Her contribution deals with the concept of ‘mixity’ of future EU investment treaties, whereby both the EU and its Member States are to become parties to these future treaties. The paper emphasizes substantial issues such as the allocation of international responsibility between the EU and the Member States, the balance between efficiency and ‘the respect of the EU legal order’s fundamental principles’.

Armand de Mestral and Lukas Vanhonnaecker approach the question of permanent investment courts from the North American perspective. They ask whether the parties of NAFTA and the new USMCA, namely the USA, Canada and Mexico, might be more willing to adopt a court-like structure to handle future investment disputes in light of their unique ISDS experience. They juxtapose this question with the inquiry of whether investor-state arbitration is a source of ‘discomfort’ for the countries they classify as developed democracies. To answer these questions, they delve deep into the NAFTA Chapter 11 practice, the North American Model BITs and their development, as well as their apparent stance on the institutionalization of ISA mechanisms.

Marc Bungenberg and Anna M. Holzer conduct a comprehensive analysis of different possible enforcement mechanisms to be employed in a future MIC. They approach the issue from several distinct yet related angles. They consider whether the existing enforcement mechanisms under international arbitration pursuant to the New York Convention or the ICSID Convention, as well as international enforcement of court judgements, shed any light on how an effective enforcement mechanism for the MIC awards could be established. In that vein, they also scrutinize whether the decisions of a MIC would be considered arbitral or judicial in nature. They further discuss the creation of brand-new enforcement mechanisms, including a self-contained ‘MIC treaty’ containing rules on procedure and enforcement, a new New York Convention or ICSID Convention-style treaty on enforcement, among others. They also indicate that the establishment of a ‘fund system’ could be feasible, whereby the MIC members would contribute to a pool intended for compensating the foreign investor, provided that certain conditions are fulfilled and a breach is maintained.

Finally, Güneş Üzüvar and Tim Kreft examine the new EU FTAs and IPAs in order to assess the rules of qualifications and ethics applicable to ISDS adjudicators. They compare the arbitration-based notions of ethics currently applicable to arbitrators, on the one hand, and international judges appointed to international courts, on the other. The fragmented and vague nature of these provisions sometimes makes it difficult to pinpoint how, if at all, arbitrators and international judges differ in the kinds of ethical obligations and duties they assume. The contribution identifies what kinds of core ethical responsibilities international arbitrators and international judges undertake, and how these different adjudicators differ in accordance with the

institutional, permanent and ‘public’ features embedded within each mechanism. Based on these contextual divergences, the paper cautions against the use of ethical rules devised to regulate the judicial and extrajudicial conduct of arbitrators in more judicialized settings where judges adjudicate—such as the prospective ICS proposals and the eventual MIC.

Copenhagen, Denmark
Copenhagen, Denmark
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May 2020

Güneş Ünüvar
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A Paradigm Shift? Arbitration and Court-Like Mechanisms in Investors' Disputes



Shai Dothan and Joanna Lam

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Abstract Recently, several court-like mechanisms have been considered as a substitute for investor-state arbitration. Suggestions for creating such mechanisms have been around for a long time, but new trade agreements may make court-like mechanisms for investors' disputes a reality. This paper starts by asking whether the shift from arbitration to court-like mechanism is likely to happen and how deep is

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the change to dispute resolution going to be. The advantages and disadvantages of replacing ad-hoc arbitrators with court-like mechanisms are examined. Courts are more centralized than arbitrators, which gives them the ability to act in a coherent way and consider long-term consequences. However, centralization may imply a greater risk of capture by special interests and could lead to more radical legal developments than the stable system of diverse arbitration. Furthermore, compromise solutions that create numerous competing court-like mechanisms instead of a universal court may escalate the fragmentation of international law.

1 Introduction

The push for transparency in resolution of international economic disputes has increased in recent years along with the proliferation of arbitration-based mechanisms. The growing number of arbitration fora has led to forum shopping and parallel proceedings not only within but also across the field of international economic law, a field traditionally divided between trade law, investment treaty law and arbitration, and international commercial arbitration. Following these developments, a number of proposals were made to introduce a permanent court or an appellate body for arbitral awards in investment disputes. A more radical version imagines this body as controlling not only investment cases, but also commercial cases that involve issues of public interest.

Although long present in the academic discourse, such proposals have not been implemented, until recently, and they have not received much political support. This may soon change. The European Commission has promoted a permanent, court-like mechanism for investment disputes in several recent trade agreements. Such a solution has already been adopted in the Free Trade Agreement (FTA) of the European Union (EU) with Vietnam. When such a mechanism was accepted by the Canadian government in February 2016—in connection with the Comprehensive Economic and Trade Agreement (CETA) with the EU—it was viewed as sensational due to the scale of both economies and the volume of their trade. In 2015, the European Commission has also officially forwarded and publicized such a proposal in the negotiations of the mega-regional Transatlantic Trade and Investment Partnership (TTIP) agreement with the United States. These developments were followed by reopening of the—already concluded—negotiations of the EU-Singapore FTA. The process resulted in adoption of the permanent investor-state dispute resolution mechanism in the 2018 EU-Singapore Investment Protection Agreement. ICS provisions have also been included in the 2018 revision of the EU-Mexico Global Agreement, making it the fourth EU treaty which incorporates the discussed mechanism.

It should also be noted that all the EU agreements which provide for such a permanent mechanism also include provisions supporting the creation of a single, multilateral adjudicatory body for investor-state disputes. The intention to pursue

this goal was firmly expressed by the European Commission in 2017. President of the European Commission Jean-Claude Juncker affirmed it in the annual “State of the Union” address and brochure of 13 September 2017.¹ On the same day, the Commission issued a Recommendation for a Council Decision authorizing the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes.²

Possibilities of multilateral reforms of the current Investor-State Dispute Settlement (ISDS) system have also recently been explored by the United Nations Commission on International Trade Law (UNCITRAL). Since 2017, the UNCITRAL Working Group III (WG III) has been entrusted with a broad mandate to conduct work on this topic.³ This designation follows the UNCITRAL Secretariat’s studies, pursued jointly with interested organizations, including the Centre for International Dispute Settlement, Geneva (CIDS). In particular, the options of establishing a stand-alone appellate body within ISDS, and of setting up an international investment court have been explicitly introduced for discussion by the Secretariat.⁴ It is also worth noticing that in the Note by the Secretariat “Settlement of Commercial Disputes, Investor-State Dispute Settlement Framework, Compilation of Comments”,⁵ submitted for the fiftieth session of UNCITRAL in July 2017, the responses from several European states express a favorable view of the potential reforms. The comments offered by the EU highlight the efforts already undertaken by the EU and its Member States in this regard, and emphasize the need for “*further discussions about the main goals and priorities of the overall reform project*”.⁶

The proceedings of UNCITRAL WG III (since its thirty-fourth to thirty-seventh sessions) have led to identification of matters, on which the postulated reform would be desirable. They included reshaping of the dispute resolution mechanism in regard

¹ Available at: https://ec.europa.eu/commission/sites/beta-political/files/state-union-2017-brochure_en.pdf at 30 and 47 (last visited on January 25, 2020).

² Available at: <http://eur-lex.europa.eu/legal-content/EN/TEXT/?uri=COM:2017:493:FIN> (last visited on January 25, 2020).

³ Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017) available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-34th-session/930_for_the_website.pdf (last visited on January 25, 2020) According to the Report, “[t]he Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.” p. 3.

⁴ United Nations Commission on International Trade Law Fiftieth session Vienna, 3–21 July 2017. Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS). Note by the Secretariat. available at: http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html (last visited on January 25, 2020) p. 6 and ff.

⁵ United Nations Commission on International Trade Law Fiftieth session Vienna, 3–21 July 2017. Settlement of Commercial Disputes, Investor-State Dispute Settlement Framework. Compilation of Comments. Note by the Secretariat available at: http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html (last visited on January 25, 2020) p. 12.

⁶ Ibid.

to (1) stand-alone review or appellate mechanism; (2) standing multilateral investment court; and (3) selection and appointment of arbitrators and adjudicators (A/CN.9/1004, paras. 25 and 27). These issues were the object of discussion of the thirty-eighth session of UNCITRAL WG III, held on 14–18 October, 2019 and on 20–24 January, 2020, where polarized stances of the WG III Members on the prospects of the reform in this regard were expressed.⁷

All those developments form a significant trend which might signal a paradigm shift in the resolution of investment disputes.

Is the recent trend in favor of permanent tribunals really a paradigm shift? Is it a revolution or is it simply a natural evolution of processes that were already discernible in arbitration? Scholars have noted that even the current system of investment arbitration takes into account interests besides those of the parties to the dispute. Investment arbitration can promote the values of transparency,⁸ legal stability, and fairness. In other words, even separate arbitrators can form some sort of global governance.⁹ Yet as long as there is a possibility of choosing between individual arbitrators, the goal of global governance suffers from several major challenges.

A court-like mechanism of dispute resolution may ensure transparency and participation and include mechanisms of review that secure its normative legitimacy. It may be able to consider long-term goals and build its social legitimacy over time. It may also improve regional consolidation and facilitate the consideration of all relevant interests better than ad-hoc arbitration.

A shift from arbitrators to courts will be compatible with trends that are already materializing in arbitration of investment disputes. This institutional change may solve some problems that the current system is still struggling with. At the same time, the shift to court-like mechanisms may introduce a new set of problems into the system. The prospects of a truly universal economic court are not high at the moment. More feasible compromise solutions—in the form of a multitude of multilateral or regional institutions—may prove to be a dangerous cure. Such solutions add new institutions instead of unifying old ones and may compound the problems associated with fragmentation. Specifically, the new institutions may give powerful countries an even greater advantage in choosing the forum that suits their interests.¹⁰

The article examines these issues in the context of recent, as well as historical developments. Section 2 reviews the policy proposals and the proposals made by academics to construct court-like mechanisms to address investment disputes. Section 3 presents current legal developments in the creation of courts of this kind. Section 4 asks if arbitrators are not solving most of the problems of forum

⁷Possible reform of investor-State dispute settlement (ISDS) Appellate and multilateral court mechanisms. Note by the Secretariat available at <https://undocs.org/en/A/CN.9/WG.III/WP.185> (last visited on January 25, 2020), p. 2.

⁸Jemielniak (2016), p. 262.

⁹Schill and Kingsbury (2010), pp. 5–68.

¹⁰Benvenisti and Downs (2007), p. 595.

shopping themselves without any need for a true revolution in the field. Section 5 reviews the potential harmful effects of creating court-like mechanisms, particularly their tendency to increase the fragmentation of international governance. Section 6 presents some advantages of shifting to court-like mechanisms for resolving investment disputes. Section 7 concludes.

2 Proposals for Court-Like Mechanisms

2.1 *Historical Development and Problems with the Current System*

Early attempts at multilateralization of the investment regime were undertaken already in the 1940s and 1950s upon the initiative of capital-exporting states and organizations representing investors, such as the International Chamber of Commerce.¹¹ One of these initiatives was the proposal for establishment of the Arbitral Tribunal for Foreign Investment and of the Foreign Investment Court, the statute of which was drafted under the auspices of the International Law Association in 1948.¹²

These efforts did not lead to the creation of the proposed institutions, due to the reluctance of host states, which were influenced by recent decolonization processes.¹³ Nevertheless, this initiative was considered successful as it marked a notable conceptual and semantic shift from the traditional focus on the protection of aliens and their property towards protection of investment ‘with the object of promoting economic development’.¹⁴ This approach, which emphasizes the long-term effects of investment and not just investors’ rights, was further adopted in subsequent instruments.

The concept of a uniform investment court has thus been formulated already in the beginning of contemporary investment relations. Because the capital-exporting states were unable to secure protection for investments by multilateral means of a judicial system, they turned instead to bilateral negotiations, entering into multiple bilateral investment treaties, with arbitration as a main mechanism for addressing disputes.

Scholars have raised several arguments against the use of arbitration to resolve investment disputes. Some commentators focus on the lack of transparency and social legitimacy of arbitration.¹⁵ Others focus on the problems of forum shopping

¹¹Miles (2013), p. 85.

¹²International Law Association, Draft Statute of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Court (reprinted in UNCTAD, International Code 1948).

¹³See Miles (2013), p. 85.

¹⁴See Newcombe and Paradell (2009).

¹⁵See the discussion on Sect. 6 below.

and parallel proceedings that plague disputes that are resolved by arbitration.¹⁶ For others, the key problem is the lack of coherence in adjudication by arbitration, which is especially damaging for lack of an appellate body or judicial control to supervise arbitration.¹⁷ Finally, some authors are concerned that arbitrators are biased in favor of investors and do not sufficiently consider the public interest.¹⁸

2.2 *Proposals for Change*

Some of these concerns may have been addressed by recent developments in the field of investment arbitration.¹⁹ Nevertheless, some proposals were raised to remedy the problems with investor arbitration by introducing court-like mechanisms. This sub-Part discusses several such proposals. As discussed in detail below, some of them call for introducing a court-like mechanism to resolve investment disputes. Others suggest keeping the system of arbitration, but adding on to it a permanent appellate body which shall review investment awards. Finally, some envision a system of permanent bodies for investment disputes that would include both first instance courts and an appellate body.

The proposals for reforming the investment dispute settlement system must address two types of questions regarding jurisdiction. First, they must determine the personal jurisdiction of the court-like bodies, namely, which parties will fall under their jurisdiction. Second, they must circumscribe the subject-matter jurisdiction of the envisioned bodies. Addressing these questions involves difficult choices. Separate courts with narrow personal jurisdictions in general increase the risk of further fragmentation of international law (although evidence as to the harmonizing effect of activity of investment arbitral tribunals has also been presented).²⁰ As discussed below, some commentators have argued that the subject-matter jurisdiction should also be expansive and should include trade disputes between states and commercial disputes between private parties in addition to investment treaty disputes.

Some scholars argued that the continuous will of state actors to retain arbitration as the default mechanism in their investment agreements demonstrates that ‘at least in the eyes of the users of the system, arbitration is not a fundamentally flawed

¹⁶See Tereposky and Nielsen (2016).

¹⁷See Harten (2007); Schill (2017), pp. 5–6.

¹⁸See *id* at 172–173. Cf. Park (2009), p. 629 at 658–661 (suggesting that arbitrators cannot be systematically biased toward investors because they care about their reputation and because host states also take part in appointing arbitrators); Christoph (2013), p. 296 at 314 (arguing that available data doesn’t support accusations of pro-investor bias).

¹⁹See below Sect. 5.

²⁰Cf. Ünüvar (2016).