

**CURRENT PROBLEMS AND RECENT DEVELOPMENTS IN INVESTMENT  
ARBITRATION**

**by**

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**A THESIS SUBMITTED IN FULFILLMENT OF THE REQUIREMENTS FOR  
THE DEGREE OF**

**LLM IN TRANSNATIONAL AND EUROPEAN COMMERCIAL LAW AND  
ALTERNATIVE DISPUTE RESOLUTION**

**in**

**THE SCHOOL OF ECONOMICS AND BUSINESS ADMINISTRATION**

**of**

**INTERNATIONAL HELLENIC UNIVERSITY (IHU)**

**(Thessaloniki)**

## ABSTRACT

This thesis addresses the following matter: ‘‘Current Problems and Recent Developments in Investment Arbitration’’. This thesis seeks to explore and analyze the various existing problems, which characterize the investment arbitration, as an alternative dispute resolution mechanism. The following lines, particularly summarize and record the recent developments that have arisen in investment arbitration in parallel with the references to the problems that may still consist controversial issues.

The introduction of this dissertation refers to what internationally has been established as investment arbitration and in what ways, fundamental or not, that kind differs from commercial arbitration. At the same part of the text, it is analyzed whether investment arbitration as a mechanism satisfy the applicants and if yes, why still parties hesitate to betake this alternative dispute resolution mechanism.

Concerning the main issues of this thesis, they contain a number of problems that have arisen throughout the years, since the function of the institution, as well as recent developments, many of which constitute answers in many questions regarding the ISDS mechanism. The matters that are mentioned are the third-party participation (*amicus curiae*) in the investment arbitration procedures, what constitutes an investment (definition of the investment), the litigation before domestic courts and the level that it functions as a precondition for international arbitration. This part also involves the connection between EU law and the investment arbitration, the indirect expropriation in investment arbitration, the provisional measures and the role of previous decisions in investment arbitration procedures. This part ends by a reference to the possibility of an appeals mechanism in investment arbitration, the advantages and the disadvantages of its adoption.

To conclude this thesis, there is a long reference to the various concerns about the whole mechanism and more specifically to the concerns about the legitimacy and transparency of the decisions, the concerns about arbitrator’s independence and impartiality and the concerns regarding the costs and time-intensity of arbitrations. At this part, there are mentioned a few proposals for the improvement of the ISDS mechanism and in the end are demonstrated the concluding remarks.

The purpose of this thesis is to inform the readers about the necessity of the improvement of the function of the investment arbitration mechanism by analyzing the current problems and the recent developments of this kind of arbitration.

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## ACKNOWLEDGEMENTS

From the beginning of my Llm studies at the School of Economics and Business Administration of International Hellenic University (IHU), Professor Dr. Athanasios Kaissis, my supervisor, created an atmosphere that ensured that the whole studies and also the fulfillment of my dissertation would be a great experience. That's why I would like to thank him very much for his support, his guidance, his advice and his help during the preparation and the writing of this thesis. I am also grateful to Dr. iur. Friedrich Rosenfeld, the co-supervisor of my thesis, who really helped me with his guidance and his assistance during the last 6 months to finish this paper. I express gratitude to both of them.

The love, support and the encouragement of my family has been amazing and I would like to thank them for this. I owe the greatest thanks to my mother, who encouraged me from the first moment, provided motivation during the writing of my thesis and ensured me that I would achieve my goal reminding me always the value of education. Thank you all very much.

## **Current Problems and Recent Developments in Investment Arbitration**

The present thesis is about ‘‘current problems and recent developments in investment arbitration’’. It begins with a definition of investment arbitration (see **A**). In a second step, the differences between investment arbitration and commercial arbitration will be explored (see **B**.) and thereafter as part of the main issues of the present thesis there will be analyzed various matters.

### **Introduction**

**A. What has been established internationally as investment arbitration and in what ways, fundamental or not, that kind differs from commercial arbitration.**

- **Definition of investment arbitration**

In the next lines, in order the definition of investment arbitration to be clear, it will be given that this mechanism is a form of resolving disputes arising out of an investment, where the participants are investors on the one hand and host States on the other. The substantive legal basis for function of the mechanism can be found in treaties like CAFTA, NAFTA and ECT and the main protections are clauses like FET and MFN. Apart from treaty disputes, investment arbitrations may also concern mere contractual disputes. In conclusion, it will be mentioned that the procedural framework includes institutional and ad hoc arbitration, where the main institutions are ICSID, ICC etc and the ad hoc rules lead to the UNCITRAL ones. All these matters will be analyzed in the next lines.

Arbitration as a method of alternative dispute resolution is constantly evolving and updated getting in line with the developments and the international market needs.

More specifically, investment arbitration, the seeds of which kind of arbitration were planted many years ago, presents continuous rise. Taking also into account that the world’s first BIT was signed on November 25, 1959 between Pakistan and Germany, after has been tested as a reliable pillar of arbitration, someone can imagine the evolution of the mechanism up to nowadays. Before proceeding to specific details, it’s

necessary to clarify the definition of investment arbitration and its differences from commercial arbitration.

Investment arbitration occurs in the event of an investment dispute, which dispute can arise between a private company or an individual when they invest in a foreign country and the host State or a State owned company, where it matters whether the conduct is attributable to the State. As international commerce and foreign investment have proliferated, so too have disputes between private entities and sovereign governments, their regional or local authorities, or State-owned companies. Resolving these disputes, whether arising under contracts or from administrative or regulatory action by the foreign State, can be particularly complex.<sup>1</sup> According to many State contracts there is reference to litigation of investment disputes in the national courts of the host State and of course this could raise serious concerns about the neutrality and fairness of local court proceedings. These concerns are growing as even if the award is in the investor's favor, local courts can sometimes prevent enforcement against overseas assets by granting annulment under local law.

Summarizing, it can be observed that the disputing parties of an investment arbitration can be, on the one hand individuals or private companies investing their money in a foreign country, the host state, and on the other hand the host State or a State owned company, both claiming their rights.

When investment arbitration is mentioned, both arbitrations under treaties and arbitration under contracts are included, in both cases, agreements that provide companies and individuals with special rights and legal protections when they invest in a foreign country.

Foreign investors can sometimes avoid these risks by throwing on bilateral or multilateral treaties rather than contract, as the consent to arbitrate may be contained in various sources, like in (a) an investment bilateral treaty (BIT), (b) according to the host State's national investment law or (c) in an investment agreement. BITs are created to promote investments in a country, by protecting on equal terms the investors, companies and individuals, when they invest in a foreign country, the host State, and by providing special rights and legal protections to them.

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<sup>1</sup> Jean Kalicki, 'Arbitration with Sovereigns and State-Owned Entities'.

A bilateral investment treaty can provide protection to the investor in a foreign State if there is such a BIT between the two States. Typically, BITs provide for the following standards of protection of an investor: a) most favored nation treatment (*MFN treatment*), according to which the beneficiary State will be granted all the competitive advantages that any other nation also receives, namely the beneficiary foreign investor will be treated no worse than any other foreign investor, b) according to the *national treatment*, foreign investors and the nationals enjoy the same competitive opportunities and there is no negative differentiation between them, c) FET treatment, the most frequently invoked standard in investment disputes, imposes host States to maintain stable and predictable the legal environment for the foreign investors. Additionally, standards such as *protection from expropriation*<sup>2</sup>, *freedom to transfer means and funds* and *full protection and security*, indicate that there is a plethora of protective clauses.

It would be useful to mention the Institutions under which the investment disputes are usually settled and the different kind of rules that could apply in order these disputes to be resolved. Therefore, concerning the settlement of investment disputes, there is the International Centre for Settlement of Investment Disputes (ICSID), an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States with over one hundred and forty member States<sup>3</sup>, as well as the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), which is one of the most important and frequently used arbitration institutions worldwide, after ICSID which is the most important for investment arbitrations.

Apart from these institutions, the UNCITRAL arbitration Rules are widely used in ad hoc arbitrations as well as administered arbitrations and cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award. The original UNCITRAL Arbitration Rules were adopted in 1976 and have been used for

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<sup>2</sup> Professor Ole Kristian Fauchald and Kjersti Schiotz Thorud, ‘‘Protection of investors against expropriation- Norway’s obligations under investment treaties’’ Luis Paradell, ‘‘ Law and Practice of Investment Treaties: Standards of Treatment’’, Kluwer Law International 2009, p. 376

<sup>3</sup><https://icsid.worldbank.org/ICSID/Index.jsp>



the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions.<sup>4</sup>

Obviously, in addition to these the International Chamber of Commerce (ICC) ‘’offers a forum for businesses and other organizations to examine and better comprehend the nature and significance of the major shifts taking place in the world economy by providing investment arbitration services, the consensual process for resolving business disputes in a binding, enforceable manner.’’<sup>5</sup>

As treaty-based investment arbitration is becoming increasingly important in international commerce, the Energy Charter Treaty occupies a singular position, providing a unique multilateral investment protection regime for the energy sector. The North American Free Trade Agreement (NAFTA) and the Central America Free Trade Agreement (CAFTA) have also been prepared for this purpose, namely the settlement of investment disputes and therefore, chapter eleven of the NAFTA and chapter ten of the CAFTA contain provisions designed to protect cross-border investors and facilitate the settlement of investment disputes.

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[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html)

<sup>5</sup><http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/>

- **Investment VS Commercial arbitration:**

In the following, the differences between investment arbitration and commercial arbitration will be explored. It will be submitted that although, both procedures are relevant to the same alternative dispute resolution mechanism, there are standards which dissociate them.

Factors such as the legal culture, the legal framework and the applicable law, the jurisdiction, the predictability and consistency of decisions, as well as the confidentiality in parallel with the transparency lead to the separation of the two kinds of arbitration, as they constitute distinctive features. It would be helpful a brief reference to each of these factors in order the differences to become more understandable with emphasis on the dilemma, confidentiality or transparency.

With relevance to the legal culture and the impact that it has on each of the two kinds of arbitration, it's necessary to say that the different political backgrounds and the divergence in ethical standards of each country have a huge influence on the formation of the legal culture of that country. Although the most obvious differentiation is between *common law* systems and *civil law* systems, still minor culture differences can affect the whole mechanism. According to article 21.2 of the ICC Rules "*The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages*", which trade usages can be different between various regions of the world and so in commercial arbitration, different legal cultures become relevant. On the other hand, in investment arbitration, where the involvement of governments and other State institutions is intense, these culture differences can also affect the procedures, especially when concepts such as democracy or dictatorial systems are perceived differently. However, when we refer to treaty based arbitration, it is indeed obvious that international law plays a greater role.

Another difference between commercial and investment arbitration are the legal frameworks in which they function.

Regarding the *public international law*, in commercial arbitration the only relevant treaty today is the New York Convention, which deals with the recognition and enforcement of foreign arbitral awards, while in investment arbitration there is a

plethora of BITs and also multilateral instruments, like ICSID Convention and the Energy Charter Treaty and also regional instruments, as NAFTA and CAFTA.

Concerning the *national law*, in commercial arbitration, procedurally, the mandatory provisions of national law rule the arbitration at the place of arbitration and usually the tribunal has to apply the national substantive law. On the other hand, in investment arbitration, the mandatory provisions of the national law play a role, if treaties such as ICSID or NAFTA don't apply, namely when rules of institutions such as the ICC or the LCIA are chosen to be applied, which in turn, have to respect the mandatory provisions of the place of arbitration.

In order this difference to be more conceivable, a distinction has to be made between the applicable substantive law and the procedural law. As regards procedural law, ICSID is an autonomous system independent from any domestic arbitration law. ICSID is also one arbitral institution foreseen under NAFTA – in this case there is hence no domestic arbitration law to be considered. However, NAFTA also refers to the UNCITRAL Arbitration Rules. In this case, mandatory provisions at the place of arbitration apply. As regards substantive law, public international law plays a great role and may «trump» domestic law. However, it would be wrong to conclude that domestic law plays no role at all (e.g. for the question whether a property right has come into existence).

Concerning the jurisdictional differences, in investment arbitration are much frequent, because in commercial arbitration ‘they mostly concern the scope of the contractual arbitration clause, particularly whether it covers also non-signatories within a group of companies or behind a general contractor or after an assignment of the contract’.<sup>6</sup> On the other hand, in investment treaty cases, the question of who should bear the burden of proof on the jurisdictional phase of investment arbitration and what is the standard of review of facts and legal allegations presented by a claimant is often arisen. In investment arbitration respondents' usual jurisdictional objections contest the issues of nationality of investor, existence of investment or claims to be outside the subject-matter jurisdiction. For testing claimant's

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<sup>6</sup> Karl-Heinz Boeckstiegel, ‘Commercial and Investment Arbitration: How different are they today?’, The journal of the London Court of International Arbitration, Volume 28 issue 4 2012, p.583.

claims for jurisdictional purposes, investment tribunals have adopted the so-called prima-facie test.<sup>7</sup>

Predictability and consistency of decisions are directly connected to the issue of transparency, so they will be analyzed together.

In commercial arbitration and more generally we would say that, the principle of confidentiality is considered as one of the most fundamental principles of arbitration and usually is the most important and decisive reason for the parties to choose the arbitral proceedings as the alternative mechanism for the resolution of their dispute.<sup>8</sup> A former Secretary General of the ICC has said that confidentiality was regularly cited by parties as the most attractive feature of arbitration as compared with litigation and other alternative dispute resolution mechanisms.

Theoretically, the privacy and the confidentiality that characterize the arbitral mechanism lead business secrets and personal confidences of the parties, as well as the proceedings themselves, the associated documents and the final arbitral award to be kept confidential. However, because of the lack of a uniform legislation, the legislative regime differs from jurisdiction to jurisdiction and the parties should not assume that all jurisdictions would recognize an implied commitment to confidentiality.

Constantly arise concerns above the principle of confidentiality, taking into account that while on the one hand, according to the freedom of contract, parties shouldn't be restricted by disclosure rules in negotiating, performing or terminating agreements, on the other hand, sometimes there are reasons that necessitate the disclosure of some information. Apart from this, there is always the need for transparent decision-making, but also the need business secrets or issues on States interests to be kept confidential.

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<sup>7</sup> Josef Ostřanský, "The burden of proof and the prima facie threshold at the jurisdictional stage in investment treaty arbitration", Academic Year 2011-2012, Tutorial Group C

<sup>8</sup> Anjanette H. Raymond, "Confidentiality in a forum of last resort: is the use of confidential arbitration a good idea for business and society?", Lexis Nexis

Of particular importance is the decision of the High Court of Australia in *Esso v. Plowman* case<sup>9</sup>, because according to this decision, ‘‘ Confidentiality is not an essential attribute of private arbitration, whether on the grounds of long-standing arbitral custom and practice, or in order to give efficacy to the private nature of arbitral proceedings’’, and also ‘‘if there were a duty of confidentiality, it could be curtailed in the public interest’’.

On the other hand, concerning the arbitration for the settlement of investment disputes, the concerns multiply, as such proceedings usually deal with public interests and the consideration of confidentiality as a discretionary right and not as an obligation, magnifies the doubt whether investor-state arbitral proceedings have to be treated as confidential or not.

In recent investment arbitrations, transparency has gained much importance. Transparency can be achieved through disclosure of decisions and pleadings to the public, as well as by granting certain participatory rights to non-disputing parties. Investment arbitration proceedings usually concern sensitive questions of public interest, examining for example the lawfulness of regulatory and administrative actions of a State and in general matters that could have major economic and political consequences· that’s why in investment arbitration, the principles of confidentiality and necessary transparency collide.

In contrast with the traditional commercial arbitration, where the confidentiality of the process and the contractual relationship, and a tailor-made solution play an important role, in investment arbitration there is a strong desire for transparency and disclosure, although the recent UNCITRAL Transparency Rules foresee exceptions from transparency.<sup>10</sup> Because of the involvement of States, it is supported that it would be helpful even the anonymous publication of arbitral awards on investment disputes in order a uniform development of case law to be achieved in this area. It would be useful to be mentioned article 29§§2,4 of the 2012 US Model BIT by the title of ‘‘Transparency of Arbitral Proceedings’’ according to which:

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<sup>9</sup> [http://www.arbitration-icca.org/media/0/12223892932650/confidentiality\\_chapter\\_for\\_leading\\_arbs\\_guide.pdf](http://www.arbitration-icca.org/media/0/12223892932650/confidentiality_chapter_for_leading_arbs_guide.pdf), p. 420-427

<sup>10</sup> <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf>, article 7

## Article 29§2

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

## Article 29§4

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;

(c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and

(d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that

first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

Other examples can be found in the 2003 Canadian Model FIPA and the 2004 U.S. Model BIT, which address transparency expressly and in detail.<sup>11</sup> A similar trend can be observed in the DSU negotiations at the WTO where various transparency provisions have been advanced by State Parties.<sup>12</sup>

It is still suggested an adaptation of the general principle of confidentiality in investment arbitration, because of the particularities of investor-state disputes and in order to be reflected the unique needs of international investment arbitration, although confidentiality is by no longer the default rule, according to UNCITRAL Transparency Rules or the ICSID Rules. The adjudication of State actions in these kind of disputes and the further economic and political importance that could this adjudication have, impose the need for the development of case law in this area making the transparency unavoidable. Only through the public availability of decisions will lawyers and arbitrators be able to produce fair results and promote consistent development of the law.

Furthermore, an arbitral award concerning hypothetically the lawfulness of the actions of a State and the legal protection it might can offer to its investors has not only unilateral and specific impacts on these notably interested parties, but it could also affect other foreign investors who might be interested in investing on the ground of this state. And this fact also impels to a more transparent system. Apart from this, there are also other reasons which create the necessity for a more transparent system. Public interests are usually involved in investment arbitration, the awards may lead to substantial liability of States for which the taxpayers have to come up and also States may have human rights obligations to promote transparency.

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<sup>11</sup> US Model Bilateral Investment Treaty, November 2004, arts. 28-37 available at [http://www.ustr.gov/assets/Trade\\_Sectors/Investment/Model\\_BIT/asset\\_upload\\_file847\\_6897.pdf](http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf); See also, Canada's Foreign Investment Protection and Promotion Agreement Model, 2003, arts. 20-47 available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf>

<sup>12</sup> Meg Kinnear, General Counsel, Trade Law Bureau, Departments of Justice & International Trade Canada, ‘‘ Transparency and Third Party Participation in Investor-State Dispute Settlement’’, Symposium Co-organised by ICSID, OECD and UNCTAD, p.2

**B.Does investment arbitration, as a mechanism, satisfy the applicants and if yes, why still parties hesitate to betake this alternative dispute resolution mechanism?**

Although it is doubtless that investment arbitration during the last years gains much support as an institution, is also true that, constantly appear in the limelight various unpromising reasons for the whole procedure.

Two events of the last years, relevant to the withdrawal from ICSID Convention are remarkable, that of Ecuador's in 2009<sup>13</sup> following Bolivia, which withdrew from ICSID in 2007 and that of Venezuela's in 2012. Undoubtedly, the basic reason for this move is the perception in many Latin America countries that international investment arbitration is biased towards investors and this results to the lack of confidence in the institution because of the legal uncertainty. The loss of faith in the system raises questions about the Convention's achievement of its purpose. However, political reasons and political interests are not excluded.

More specifically, concerning Ecuador's tactic, President Rafael Correa had expressed a totally negative and aggressive position towards foreign companies operating in certain business sectors in Ecuador, including oil and mining firms. Subsequently, in March 2008, President Correa announced that Ecuador would withdraw from a number of bilateral investment treaties (BITs) that it had entered into with other developing states, including El Salvador and Paraguay. More recently, he threatened to expel from Ecuador any foreign companies that initiated arbitration proceedings against the state. In addition to this, Ecuador has supported the formation of an alternative forum of investment arbitration, to be based in South America.<sup>14</sup>

On the other hand and concerning the Venezuela's regime, there is also a political background, which however affects the investment arbitration of the country.

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<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20>

<sup>14</sup> Joshua M. Robbins, "Ecuador withdraws from ICSID Convention", p.1, [uk.practicallaw.com](http://uk.practicallaw.com)



According to the Foreign Ministry's 2012 press-release, the country acceded to the Convention in 1993 by ‘‘ a decision of a provisional and weak government, devoid of popular legitimacy and under the pressure of transnational economic sectors involved in the dismantling of Venezuela's national sovereignty’’.<sup>15</sup> The denouncement of the Convention reveals the government's political message that there is no trust to the system, that the country disavows it and refuses to cooperate with it in the future regaining the role of the State in the economy and its State sovereignty.

However, whatever the real reasons for these withdrawals are, the point is that the investment arbitration, as an alternative mechanism has not gained the necessary trust of the parties, especially in these Latin America countries, which hesitate to choose it, because of the legal uncertainty they receive. Taking into consideration, the political and economic interests that characterize such investments and therefore how these can be influenced by an arbitration mechanism and also the fact that Brazil, one of the world's largest industrial powers, is not party to any bilateral investment treaties and hasn't ratified the ICSID Convention, real doubts and questionings above the investment arbitration seem obvious.

Unfortunately, not only in Latin America, but also throughout Europe there are a lot of concerns above the success or not of the investment arbitration function, where disputes arise. Since the entry into force of the Lisbon Treaty in December 2009, the exclusive competence on foreign direct investment has shifted from Member States to the European level. Since then, have arisen many practical and legal issues in the investment treaty field. Doubts concerning the protection of the investors as well as the existing and the restructured investments, concerning the applicable law, both in terms of selection of a legal system as well as the characterization of the question itself, and doubts relevant to the transparency of proceedings in particular with respect to the substance and the procedure are some of the reasons of parties' hesitance towards the investment arbitration.

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<sup>15</sup> “Gobierno Bolivariano denuncia convenio con Ciadi”, 25 January 2012, <http://www.mre.gov.ve/>

In contrast with what was referred above, in Europe the nature of problems seems different, although the result is the same. According to recent trends<sup>16</sup>, the differences in recognition and enforcement regimes under ICSID and non-ICSID arbitrations as well as the ineffectiveness<sup>17</sup> of the annulment of the awards provisions and the recommended appeal mechanism in conjunction with was mentioned before, lead to the depreciation of the mechanism even in the European area.

### **Main issues**

Taking all the above as a starting point, the following section will explore in greater detail the procedural and substantive challenges that the system of international investment protection is currently facing. A focus will be set on various initiatives to enhance the level of transparency, e.g. by third party participation.

**A. Because of all these concerns about the investment arbitration mechanism, it has been suggested a modification of the institution in general concerning both the procedural section and the merit issues. More specifically, there have been many discussions about the nature of third-party participation in investment arbitration, namely about the *amicus curiae*.**

Up to date, and taking into account the implications, positive and negative, of recent trends in *amicus curiae* participation, arbitrators show greater willingness to provide third parties with a limited mandate to participate in the arbitral proceedings. Non-disputing parties have sought to participate in investment proceedings in various ways: a) by submitting written amicus briefs on the merits, b) by seeking access to the records of the proceedings and c) by taking part in oral proceedings or attending hearings as observers.

The participation of non-disputing parties appeared in the NAFTA context<sup>18</sup>, under the *Methanex* case, where at the end the *Methanex* tribunal found it had the authority

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<sup>16</sup> Recent Developments in Investor-State Dispute Settlement, IIA Issues note, UNCTAD 28-29 May 2013, p.10

<sup>17</sup> Lise Johnson, “ Annulment of ICSID Awards: Recent developments”, IV Annual Forum for Developing Country Investment Negotiators Background Papers New Delhi, October 27-29, 2010, p.1.

<sup>18</sup> NAFTA Chapter 11, article 1120(1)(c).

to accept *amicus curiae* submissions under the discretion granted by article 15 of UNCITRAL Rules<sup>19</sup>, according to which: ‘‘Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case’’.

Many cases followed, such as the *UPS v Canada*<sup>20</sup>, again under the NAFTA arbitration tribunal, the *Tunari v Bolivia* case<sup>21</sup>, in ICSID arbitration proceedings, the *Vivendi v Argentina* case<sup>22</sup>, where the tribunal was faced with a number of relevant petitions.

In April 2006, the ICSID Rules were amended and now in article 37(2) is provided the concept under which the non-disputing parties are allowed to file written submissions· discussions also took place on the occasion of the revision of UNCITRAL Arbitration Rules concerning the *amicus curiae* participation through the draft article 15(5), although at the end this proposal was not incorporated into the new version of the UNCITRAL Rules as pre-released on 12 June 2010.

In summary, there is now a solid foundation for the acceptance of *amici curiae* submissions under specific circumstances in NAFTA/UNCITRAL and ICSID arbitrations and can participate as *amici curiae* workers unions, nongovernmental organizations and business federations, and after the amendment of the ICSID Rules and the FTC Statement, the stabilization of such participation is more possible.<sup>23</sup>

In general, *amicus curiae* intervention has been permitted in investment treaty arbitrations on the basis that: a) such arbitration proceedings have concerned issues of public interest, b) such intervention can assist the tribunal with special expertise and

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<sup>19</sup> Methanex, decision of the Tribunal on petitions from third persons to intervene as *amici curiae* of 15 January 2001, paras 47 and 53.

<sup>20</sup> UPS, Decision on petitions for intervention and participation as *amici curiae* of 17 October 2001.

<sup>21</sup> *Aguas del Tunari SA v. Republic of Bolivia, (Tunari)*, ICSID Case no ARB/02/3.

<sup>22</sup> *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic, (Vivendi)*, ICSID Case no ARB/03/19.

<sup>23</sup> [http://www.ustr.gov/archive/Trade\\_Agreements/Regional/NAFTA/NAFTA\\_Commission/Section\\_Index.html](http://www.ustr.gov/archive/Trade_Agreements/Regional/NAFTA/NAFTA_Commission/Section_Index.html)

c) the tribunal process could benefit from being perceived as more open or transparent.<sup>24</sup>

The amicus involvement has been supported as a positive innovation of the investment arbitration procedure, as it is meant to contribute to the procedural legitimacy of the arbitral process as well as to the substantive quality of the awards. Such participation can contribute to the procedural openness and can ensure that the broader public doesn't keep the arbitration process secretive. The legal quality of the award can be improved and the international investment law as a whole can be developed systemically. Apart from this, representatives of supranational regimes, such as the Commission, could prevent the fragmentation of international law.

However, taking into account the possible practical burdens on the disputing parties, like costs and delays and the fact that confidentiality and privacy can be lost because of the third-party participation and the corollary of potential politicization, the investor confidence in the investment arbitration mechanism can be even less.

A solution would be the development of formalized criteria for third-party participation. Concerning these criteria, ICSID Rules, the FTC Statement and the Canadian Model BIT focus on the potential of the amicus brief to assist the tribunal, in case that it would address a matter within the scope of the dispute and in case that the third party has a 'significant' interest in the proceedings.<sup>25</sup> In addition to this, a clear guideline in the rules utilized in investment arbitration and the allowance of different forms of amicus participation could minor the hesitance towards it.

Up to date, it is obvious that cannot be addressed the interplay between the issues of the need of transparency and openness to non-disputing participants on the one hand and the potential of being less attractive the arbitration to investors if amicus briefs become widespread.

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<sup>24</sup> *Methanex*, Decision of the tribunal o petitions from third persons to intervene as *amici curiae* of 15 January 2001, para 49.

<sup>25</sup> See FTC Statement, supra note 64, ICSID Rules, supra note 17, art. 37(2), Canadian Model BIT, supra note 65, art. 39.

**Although many of the current problems and recent developments in investment arbitration have already been mentioned above, it is necessary to be explored further subjects of interest relevant to the recent trends in international investment law. In the next lines there will be reported new sections and will be analyzed in further details already stated matters.**

## **B. Definition of Investment**

Primarily, it will be given the definition of investment according to the latest decisions. So, concerning the definition of investment, a definition which is necessary to be established jurisdiction under Article 25 of the ICSID Convention, decisions rendered in 2012 seem to focus principally on three factors: contribution, risk and duration. For example, the tribunal in *Electrabel v. Hungary* noted that “while there is incomplete unanimity between tribunals regarding the elements of an investment, there is a general consensus that the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment.” The tribunal also noted that, while the economic development of the host State was one of the objectives of the ICSID Convention (and a desirable consequence of the investment), it was “not necessarily an element of an investment”.<sup>26</sup>

## **C. The litigation before domestic courts as a precondition for international arbitration.**

Thereafter, it will be analyzed the litigation before domestic courts as a precondition for international arbitration. According to recent cases like the *ICS Inspection v. Argentina case* and the *Georgia v. Russia case*, has been clearly favored the strict application of procedural prerequisites, such as the 18-month recourse-to-local-courts requirement provided for in article 8 of the Argentina-UK BIT irrespective of the potential futility or inefficiency of the litigation. Moreover, the tribunal held that “it couldn’t create

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<sup>26</sup> *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.43.

exceptions to treaty rules where these are merely based upon an assessment of the wisdom of the policy in question, having no basis in either the treaty text or in any supplementary interpretive source, however desirable such policy considerations might be seen to be in the abstract.”<sup>27</sup>

Similarly, in *Daimler v. Argentina*, the tribunal based on Article 10 of the Argentina-Germany BIT, held that “since the 18-month domestic courts provision constitutes a treaty-based pre-condition to the Host State’s consent to arbitrate, it cannot be bypassed or otherwise waived by the Tribunal as a mere procedural or admissibility-related matter”.<sup>28</sup>

#### **D. EU law and its’ connection with the institution of investment arbitration.**

As already mentioned above, in Europe there are still doubts about the effectiveness of the arbitration mechanism, with some more specific matters such as the ones that have been stated above.

Characteristic of the problematic function of investment arbitration in EU, although this decision is particularly relevant as concerns the hierarchy between EU law and the ECT, is the case of *Electrabel v. Hungary*, where the tribunal rejected the Commission’s submissions as a non-disputing party. More specifically, although the tribunal recognized the role of EU law as a body of supranational law and the role of the Court of Justice of the EU as the arbiter and gate-keeper of EU law and pointed out its obligation to apply EU law to the dispute, it however stated that it was not required to adjudicate upon the validity of EU law.

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<sup>27</sup>ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina (UNCITRAL, PCA Case No. 2010-9), Award on Jurisdiction, 10 February 2012 , paras. 267-269

<sup>28</sup> *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award, 22 August 2012, para 194. Both the ICS Inspection and the Daimler tribunals were chaired by Professor Pierre Marie Dupuy.

## **E. Indirect Expropriation in Recent Investment Arbitration**

Protection of foreign investors against expropriation is one of the core issues of investment law. The large majority of investment tribunals are confronted with investors claiming that they or their investment had been expropriated by the host government or one of its agencies. Since there is no definition of what constitutes indirect expropriation the scope and meaning of this notion has to be determined through arbitral practice. Tribunals have developed certain criteria which they apply in order to determine whether an expropriation qualifies as indirect at the expense of investors.<sup>29</sup>

### **Amicus Curiae (a short reference)**

-The issue of the third party participation (**amicus curiae**) has already been mentioned above, with reference both to its admission as a positive innovation of the investment arbitration procedure, but also with reference to its conception as an additional practical burden on the disputing parties, concerning the costs and the delays and as a blocking agent of confidentiality and privacy during the arbitral proceedings. For confirmation of the above, are cited the *Von Pezold v. Zimbabwe* and the *Border Timbers v. Zimbabwe* cases, where the tribunal rejected the amicus curiae brief because the criteria under Rule 37(2) ICSID Arbitration Rules were not satisfied. More specifically, the tribunal noted inter alia that (i) the circumstances of the amici's application gave rise to legitimate doubts as to their independence or neutrality<sup>30</sup> (ii) consideration of rights of indigenous people under international law to which the amicus brief referred, was not part of the tribunal's mandate under

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<sup>29</sup> OECD (2004), "'Indirect Expropriation" and the "Right to Regulate" in International Investment Law", OECD Working Papers on International Investment, 2004/04, OECD Publishing, p.9

<sup>30</sup> Bernhard Von Pezold and others v. Zimbabwe (ICSID Case No. ARB/10/15) and Border Timbers Limited et al v. Zimbabwe (ICSID CASE No. ARB/10/25), Procedural Order No. 2, 26 June 2012, para. 56.

either the ICSID Convention or the applicable BITs<sup>31</sup> and (iii) in light of its mission and expertise, the ECCHR did not have a “significant interest in the proceeding”<sup>32</sup>.

Apart from this innovation, there are some additional issues that it would be useful to be mentioned as they occupied the decisions of the tribunals during the last years and constitute recent developments in investment arbitration.

## **F.Provisional measures in investment arbitration procedures**

One of the issues of great interest and importance in international arbitration in general and in investment arbitration specifically is the issue of provisional measures. The importance of this question lies in the fact that the terminology with respect to interim and partial awards as well as interim awards or measures is confusing and this affects the tribunal’s order or not of the provisional measures.

There is lack of uniformity in the doctrine and practice of international arbitration as regards the criteria for delimitation of the different categories of awards. Moreover, terms such as “partial award” and “interim award” are used as synonymous without attributing to them a particular meaning. Interim measures and even rulings on purely procedural matters are named “awards”.<sup>33</sup>The ICC Commission on International Arbitration attempted to agree on a definition of the different terms, but “... [n]ot only did it find that in practice these terms are used often indiscriminately, but it was unable to reach a consensus with regard to the definition of an award, despite the fact that this is essential for determining which decisions have to be submitted to the ICC Court of Arbitration for scrutiny...”.<sup>34</sup>

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<sup>31</sup> Bernhard Von Pezold and others v. Zimbabwe (ICSID Case No. ARB/10/15) and Border Timbers Limited et al v. Zimbabwe (ICSID CASE No. ARB/10/25), Procedural Order No. 2, 26 June 2012, para. 59.

<sup>32</sup> Bernhard Von Pezold and others v. Zimbabwe (ICSID Case No. ARB/10/15) and Border Timbers Limited et al v. Zimbabwe (ICSID CASE No. ARB/10/25), Procedural Order No. 2, 26 June 2012, para 61.

<sup>33</sup> Eduardo Zuleta Jaramillo, “ The Relationship Between Interim and Final Awards - Res Judicata Concerns”, p. 246, Kluwer database

<sup>34</sup> Jean-Francois POUDRET and Sebastien BESSON, *Comparative Law of International Arbitration*, p. 635. For the discussion on the ICC Commission on terminology, see ICC, “Final Report on Interim and Partial Awards of a Working



*Interim* is defined as: "... for, during, belonging to, or connected with an intervening period of time; temporary, provisional". This definition includes two possibilities, which are used interchangeably but have different meanings. First, *interim* may be read as *belonging to or connected to* the intervening period of the dispute. In this sense, *interim* would be understood in temporal relationship to *final award*. The intervening period may be thought of as anything that occurs between the formation of the tribunal and the end of the proceedings. An interim *award* may be defined as any award disposing of an issue that precedes the final award (or any award putting an end to the dispute). In sum, it is a fully reasoned award that resolves an issue *connected with an intervening period*, as opposed to the end of the dispute. Second, *interim* means temporary or provisional. Under this reading, an interim award may be thought of as a temporary or provisional award.<sup>35</sup>

In line with past practice, the tribunals in recent cases have concluded that provisional measures may be ordered where the situation is urgent and the requested measures are necessary to preserve the asserted right from irreparable harm and a characteristic example is the *Tethyan v. Pakistan* case.<sup>36</sup>

Another relevant example is the *Burlington v. Ecuador* case, where the tribunal rejected the claimant's argument that the non compliance with an order for provisional remedies constituted expropriation of the claimant's right to pursue ICSID arbitration. While the tribunal did not excuse the respondent's failure to abide by the provisional measures, it noted that an order for provisional remedies only created procedural rights during the arbitration and could not be assimilated to a court's decision to annul a final award (such as it was in the case of *Saipem v. Bangladesh*).<sup>37</sup>

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Party of the ICC's Commission on International Arbitration", 2 ICC International Court of Arbitration Bulletin (1990) pp. 26-30.

<sup>35</sup> Eduardo Zuleta Jaramillo, "The Relationship Between Interim and Final Awards - Res Judicata Concerns", p. 247

<sup>36</sup> *Tethyan Copper Company v. Pakistan* (ICSID Case No.ARB/12/1), Decision on Provisional Measures, 13 December 2012, para.118.

<sup>37</sup> *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability, 14 December 2012, para. 481.

## **G.The role of previous decisions in investment arbitration procedure**

Drawing and reliance on the experience of past decisions plays an important role in securing the uniformity and stability of law, especially in investment arbitration where the need for a coherent case-law is evident. Because of the public interests that stake in such cases, through a coherent case-law the predictability of decisions is strengthened and their authority is enhanced.

In fact, tribunals in investment disputes, including ICSID tribunals, rely on previous decisions of other tribunals whenever they can. At the same time, it is also well established that the doctrine of precedent, as known in the common law, doesn't apply in international adjudication.<sup>38</sup> Therefore, prior decisions may not be binding, but ‘persuasive’ authorities to be relied upon. In other words, tribunals in investment arbitrations are not bound by previous decisions of other tribunals, but each tribunal is constituted ad hoc for any particular case so they cannot be expected to act like national courts.

The United Nations Conference on Trade and Development (UNCTAD) under the ‘Recent Developments in Investor-State Dispute Settlement (ISDS)’ of 28-29 May 2013, mentioned the matter of the previous decisions in investment arbitration concluding on the same results.<sup>39</sup>

It would be useful to be written down some examples according to this above mentioned conference, which lead to the non-binding power of prior decisions towards the tribunals. The tribunal in *Renta v. Russia* case held that it was not bound by either *RosInvest v. Russia* (treaty arbitration) or *Yukos v. Russia* (ECHR case), which related to the same facts but were brought under different legal instruments. At the same time, it noted that “*the lengthy texts of those decisions go over much of the same ground that has been covered in this case, and it is natural to*

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<sup>38</sup> See Shahabuddeen, *Precedent in the World Court* (Cambridge, Cambridge University Press, 1996).

<sup>39</sup> ‘Recent developments in Investor-State dispute settlement, UNCTAD, 28-29 May 2013, page 21

*examine them in the light of many of the arguments made here as well.*”<sup>40</sup> In *Bosh International v. Ukraine*, the tribunal stated that while it did not consider itself bound by past decisions of other arbitral tribunals, it recognized that it should pay due regard to their conclusions. It also reiterated the view that in the absence of compelling reasons to the contrary, tribunals ought to follow solutions established in a series of consistent cases, comparable to the case at hand.<sup>41</sup>

Similarly, in *Letco v. Liberia* case, the tribunal before quoting authority from other ICSID tribunals, stated: ‘‘Although the tribunal is not bound by the precedents established by other ICSID tribunals, it is nonetheless instructive to consider their interpretations...’’<sup>42</sup>

In addition to these cases, the tribunal in *Saipem v. Bangladesh* stated:

‘‘ The tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law’’.<sup>43</sup>

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<sup>40</sup> *Renta 4 S.V.S.A., et al v. The Russian Federation* (SCC No. 24/2007), Award, 20 July 2012, para. 24. The tribunal noted further: ‘‘*The arbitrators understand that the same arguments may be affected not only by differences in the norms articulated in the relevant legal texts, but also by the pleadings and evidence put forward in support of those arguments. Bearing in mind all of these qualifications, the present Tribunal will nevertheless pay respectful heed to the analysis and conclusions of the distinguished arbitrators and judges in these two cases. Indeed they must do so, as both sides in this case have made submissions as to their implications and relative persuasiveness.*’’

<sup>41</sup> *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine* (ICSID Case No. ARB/08/11), Award, 25 October 2012, para. 211, referring to *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan* (ICSID Case No ARB/03/19), Award, 27 August 2009, para. 145.

<sup>42</sup> *Letco v. Liberia*, award, 31 March 1986, ICSID Reports, 352

<sup>43</sup> *Saipem v. Bangladesh*, decision on jurisdiction, 21 March 2007, para.67. See also *Noble Energy v. Ecuador*, decision on jurisdiction, 5 March 2008, para.50

The importance of mentioning this matter in relevance with the investment's arbitration recent developments is the difference that exists between commercial arbitration and investment arbitration mechanism. On the one hand, arbitral resolution of international commercial disputes concern the most diverse cases under diverse geographic and trade context, involving the application of a variety of national laws, international principles and usages. Not to speak of the absence of comprehensive information on awards being rendered that renders recourse to precedent problematic. It is not self evident that previous decisions should be considered in later cases. This is so for sure when the same principles and rules, typically meant to govern international commercial, are applicable, such as the UNIDROIT Principles or the Vienna Convention on the International Sale of Goods. On the other hand, international investment law is instead a defined sector of international or rather transnational relations where efforts of harmonization and coherence through consistent jurisprudence is a valuable objective for the security of legal relations, notwithstanding the differences as to applicable treaties in individual cases.<sup>44</sup> This is why, in investment arbitration is recommendable previous decisions to be taken into account by the arbitrators in order to guarantee the stability and predictability of the law.

## **H. The discussion on an appeals mechanism in investment arbitration**

One of the advantages that investment arbitration mechanism offers to the foreign investors is that investor-State disputes are resolved by means of mechanisms governed by international standards and procedures and are not based on standards of the host State and the domestic courts. The finality of arbitration proceedings, as an arbitration award is binding and not subject to appeal on the merits, has generally been seen as an advantage over judicial settlement.

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<sup>44</sup> Giorgio Sacerdoti, "Precedent in the Settlement of International Economic Disputes: the WTO and Investment Arbitration models", Social Science Research Network, page 16

However, although finality is considered as one of the main advantages of international arbitration, for the savings it brings in costs and time, it is possible this finality to lead to inconsistent awards on the same or very similar questions or facts. That's why there have been made many discussion on the possibility of an appeal mechanism after an investment dispute has been resolved by a tribunal, in order same or similar facts to be examined for a second time. These discussions started among scholars at the early 90s<sup>45</sup> while the first discussion at the governmental level took place during the MAI negotiations.<sup>46</sup>

There has been a long discussion among the legal community over the advantages and disadvantages of an appellate mechanism. This appellate mechanism has to be distinguished from the annulment mechanism under the ICSID Convention (article 52).

i) Advantages. The main advantages put forward in discussions were consistency and coherence of the decisions, the possibility of rectification of legal errors and, possibly serious errors of fact, the fact that the review would be confined to a neutral tribunal instead of national courts and that it would enhance effective enforcement.

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<sup>45</sup> See E. Lauterpacht, "Aspects of the Administration of International Justice" 1991. S. Schwebel "The Creation and Operation of an International Court of Arbitral Awards", in *The Internationalisation of International Arbitration*, Hunter, M., Mariott, A., Veeder., 115 (1995).

<sup>46</sup> At a High Level Meeting in February 1998, one delegation proposed the establishment of an appeal mechanism in the MAI for both State-State and investor-State dispute settlement. In informal consultations, delegations broadly agreed with the objectives of ensuring the development of a coherent jurisprudence and permitting an appeal where there may have been an error in law – particularly concerning the interpretation of MAI obligations. However, concerns were expressed about the delays and costs that might be engendered by adding an appeal and departing for investor-State arbitration from the traditional philosophy of fast, inexpensive and final one step arbitration. As an alternative, it was proposed and accepted that the MAI dispute settlement mechanism would initially remain drafted as final and binding, but it would be made subject to review of practical experience in five years from signature of the MAI. If, as a result of that review, the Contracting Parties considered it advisable to introduce an appeals body, this could be done by amending the Agreement. "Selected Issues on Dispute Settlement" (Note by the Chairman) DAFFE/MAI(98)12, 13 March 1998.

ii) Disadvantages. The main disadvantages discussed were that an appeal mechanism would go against the principle of finality, would bring additional delays, costs and caseload and lead to the politicization of the system.<sup>47</sup>

Although there are many disadvantages a number of arguments have been advanced about the benefits that investors could draw from the creation of an appeals mechanism. First, statistically investors lose at least as often as governments, so they would have at least the same opportunity to appeal. Second, the posting of a bond would provide a security for the investor of the amount of the award rendered, which can be of particular significance for non-ICSID arbitration.

Up to now, the review of the advantages and disadvantages produced no consensus on the merits of adding an appeal to the investor-state dispute settlement system. With regards to the ICSID proposal upon this matter, the Administrative Council expressed the view that it would be premature to attempt to establish such an ICSID mechanism, particularly in view of the difficult technical and policy issues raised. The ICSID Secretariat, will continue however to study such issues to assist member countries when and if it is decided to proceed towards the establishment of an ICSID appeal mechanism.<sup>48</sup>

In conclusion, it is necessary to say that the need to place ‘consistency and coherence’ as the basis for an appellate system needs to be considered with some degree of caution. One should not put it on such a high pedestal as other objectives- particularly the development objective. From a development perspective, until there is agreement on a multilateral investment agreement, a treaty-specific appeal system is better. A principal concern about the efforts to introduce a non-ring-fenced appellate system in the investment sphere is that it seeks to add to the coherence and

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<sup>47</sup>Catherine Yannaca-Small, Legal Advisor in the Investment Division, OECD Directorate for Financial and Enterprise Affairs, “Improving the System of Investor-state Dispute Settlement: An Overview”, pages 192-194

<sup>48</sup> See “Suggested changes to the ICSID Rules and Regulations”, p. 4, Working Paper of the ICSID Secretariat, May 12, 2005

development of international investment law through a somewhat circuitous non-transparent route.<sup>49</sup>

## **Conclusion**

In conclusion and in order to end my thesis stating as many recent sources as possible, i will be based on the recent UNCTAD Conference of the 26ht June of 2013. As a principal matter there will be analyzed a few concerns about the whole mechanism and more specifically: 1) Concerns about the Legitimacy and Transparency of the decisions, 2) Concerns about arbitrator's independence and impartiality and 3) Concerns regarding the costs and time-intensity of arbitrations. ( see A) In a second step, some proposals for improvement of the ISDS mechanism will follow (see B) and in the end the concluding remarks will be stated. ( see C)

### **A)**

After having mentioned few of the current problems and recent developments in investment arbitration, it would be useful to mention some useful proposals for reform of Investor-State dispute settlement as were updated in the United Nations Conference on Trade and Development on the 26<sup>th</sup> of June 2013. However, firstly it is necessary to mention some of the expressed concerns about the whole mechanism.

Starting with the purpose of the establishment of the Investor-State Dispute Settlement (ISDS) mechanism, it is to be said that it was designed for depoliticizing investment disputes and creating a forum that would offer investors a fair hearing before an independent, neutral and qualified tribunal.<sup>50</sup> The rendering of final and enforceable decisions in a flexible way was an attraction for the parties. The fact that the disputes would be taken out of the domestic sphere of the State, equipped the

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<sup>49</sup> Karl P. Sauvant, ‘‘Appeals Mechanism in International Investment Disputes’’, Oxford University Press, p. 278

<sup>50</sup> ‘‘Reforms of Investor-State dispute settlement: in search of a roadmap ,UNCTAD, 26 June 2013, p. 2

investors with an important guarantee that their claims will be adjudicated in an independent and impartial manner. However, the actual functioning of ISDS under investment treaties has led to concerns about systemic deficiencies in the regime<sup>51</sup>, which will be analyzed in the text.

### **1) Concerns about the Legitimacy and Transparency of the decisions**

Initially and concerning the legitimacy and transparency of the decisions, it is true that in many cases foreign investors have made ISDS claims to challenge measures adopted by States in the public interest, like policies to promote social equity, foster environmental protection or protect public health). At this point, it is doubtful whether three individual arbitrators have the sufficient legitimacy to assess the validity of States acts, especially concerning sensitive public policy issues. In addition, even though the transparency of the system has improved since the early 2000s<sup>52</sup> ISDS proceedings can still be kept fully confidential if both disputing parties so wish even in cases where the dispute involves matters of public interest.<sup>53</sup>

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<sup>51</sup> Michael Waibel et al. (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010), D. Gaukrodger and K. Gordon, “Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community”, OECD Working Papers on International Investment, No. 2012/3; P. Eberhardt and C. Olivet, “Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom” (Corporate Europe Observatory and Transnational Institute, 2012)

<sup>52</sup> See for example, the 2006 amendments to the ICSID Arbitration Rules and the 2013 agreement reached by an UNCITRAL Working Group regarding transparency in ISDS proceedings. In the case of UNCITRAL, the new rules have a limited effect in that they are designed to apply not to all future arbitrations but only to arbitrations under future IIAs.

<sup>53</sup> This applies to cases brought under arbitration rules other than ICSID (only ICSID keeps a public registry of arbitrations). It is indicative that of the 85 cases under the UNCITRAL Arbitration Rules administered by the Permanent Court of Arbitration (PCA), only 18 were public (as of end 2012). Source: the Permanent Court of Arbitration International Bureau. See further UNCTAD, *Transparency: A Sequel, Series on Issues in IIAs II* (New York and Geneva, 2012)



## 2) Concerns about arbitrator's independence and impartiality

It is a well-known and one of the most important principles of arbitration that arbitrators must be independent and impartial concerning the parties, their counsel and the subject matter of the dispute. Among others, Article 14(1) of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the “SCC Rules”) expressly provides that arbitrators “must be impartial and independent”.

In the context of international arbitration, the concept of independence is related to the personal connection or relationship between the arbitrator and the parties or their counsel personal social and financial. This is considered to be an objective test, mainly because it has nothing to do with an arbitrator's state of mind.

Unlike independence, the concept of “partiality” is more abstract being a state of mind that only can be proved through facts. Impartiality is the absence of any bias in the mind of the arbitrator towards a party or the matter in dispute. It is connected with actual or apparent bias of an arbitrator, either in favor of one of the parties or in relation to the issues in dispute. Impartiality is thus a subjective and more abstract concept than independence that primarily involves a state of mind.

Nowadays, an increasing number of challenges to arbitrators lead to the result that they are perceived as biased or predisposed. On the one hand, the disputing parties tend to appoint individuals sympathetic to their case and on the other hand, arbitrators play the game of “changing of hats” (meaning that they serve as arbitrators in some cases and counsel in others), facts that amplify these concerns.<sup>54</sup>

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<sup>54</sup> For further details, see Gaukrodger and Gordon (2012 : 43-51)

### 3) Concerns regarding the costs and time-intensity of arbitrations

According to the official web page of the International Chamber of Commerce (ICC), “Arbitration can be faster and less expensive than litigation in the courts. Experienced arbitrators have developed expertise in designing procedures that maximize time and costs efficiency and thereby minimize the disruption to the ordinary business of parties involved in arbitration proceedings. That said, a complex international dispute can take a great deal of time and money to resolve, even by arbitration. Even in such cases, the limited scope for challenging arbitral awards, as compared with court judgments, offers a clear advantage in terms of limiting time and costs. The finality of arbitration ensures that the parties should not be entangled in a prolonged and costly series of appeals”.<sup>55</sup>

However, arbitration practice in general and more specifically ISDS practice has proved that arbitration might not represent a speedy and low-cost method of dispute resolution. On average, costs, including legal fees (which on average amount to approximately 82% of total costs) and tribunal expenses, have exceeded \$8 million per party per case. These costs are a significant burden on public finances, but also on investors, especially those with limited resources.

Large law firms, who dominate the field, tend to mobilize a team of attorneys for each case who charge high rates and apart from this, taking into account the fact that many legal issues remain unsettled contributes to the need to investigate and study many previous arbitral awards. All these factors are responsible for the high costs and the long duration of arbitrations.

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<sup>55</sup> <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/> (ten good reasons to choose ICC Arbitration)

## B)

### **Proposals for improvement of the ISDS mechanism**

All these concerns indicate the need to reform and reshape the mechanism in order the whole procedure to get improved and the results to be the prospective ones.

According to the UNCTAD conclusions concerning the reform of Investor-State dispute settlement there are five broad paths for reform and these are:

1. Promoting alternative dispute resolution
2. Tailoring the existing system through individual IIAs
3. Limiting investor access to ISDS
4. Introducing an appeals facility
5. Creating a standing international investment court<sup>56</sup>

Although all of them are really important for the improvement of the mechanism, they won't be analyzed in depth· this is because the meaning of these references is to be proposed some potential solutions regarding the investment arbitration evolution and which can be connected to the already First of all, a tailoring of the existing system would include changes that could lead to a more sufficient result. These changes could lead to an imposition of time limits for bringing claims, to an increase of the contracting parties' role in interpreting the treaty in order to be avoided legal interpretations that go against their intentions· could also lead to the establishment of a mechanism for consolidation of related claims, something that would be efficient regarding the safeguard of the consistency of awards and the reduction of the costs of the proceedings.

According to the UNCTAD conclusions, providing also more transparency in ISDS and introducing an appeals facility would also be reform ways for the improvement of the mechanism. These subjects have already been analyzed above and balancing the pros and cons of the adoption or not of these amendments someone can assume them as useful or not. Concerning the appeal mechanism and as a supplementary comment,

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<sup>56</sup> [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf), p. 4

among the pros of this mechanism, is that <sup>57</sup>an appeals mechanism it is potential to secure consistent and balanced opinions, which could rectify the legitimacy concerns about the current ISDS regime.

C)

### **Concluding remarks**

Taking into account the numerous challenges arising from the current ISDS regime and the various legitimacy concerns about the international investment arbitration it is advisable States to decide jointly which solutions would be the appropriate ones. The fact that ISDS system is a system of application of law means that firstly or in parallel must be achieved the development of substantive international investment law. However, investment arbitration will probably remain the most important modus of dispute settlement between host States and foreign investors and for this reason all proposals for its improvement have to be noted, at a first step by all scholars and practitioners that confront with its shortages and its legal gaps.

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<sup>57</sup> An alternative solution would be a system of preliminary rulings, whereby tribunals in ongoing proceedings would be enabled or required to refer unclear questions of law to a certain central body.

This option, even though it does not grant a right of appeal, may help improve consistency in arbitral decision making. See e.g., C. Schreuer, “Preliminary Rulings in Investment Arbitration”, in K. Sauvant, *Appeals Mechanism in International Investment Disputes* (OUP, 2008).

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