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Marc Bungenberg • August Reinisch

From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court

Options Regarding the Institutionalization
of Investor-State Dispute Settlement

Second Edition

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Preface

On 20 March 2018, the Council of the EU gave the EU Commission a mandate to negotiate the creation of a new multilateral court for investment disputes. In an important development, on 30 April 2019, the Court of Justice of the European Union decided that the ISDS mechanism provided for by the free trade agreement between the EU and Canada (CETA) is compatible with EU law. Already in 2017, the United Nations Commission on International Trade Law (UNCITRAL) decided to discuss a reform of investment arbitration, including the possible establishment of a Multilateral Investment Court (MIC). This new development is intended to provide a response to the strong criticism of international investment law, in general, and of ad hoc arbitration between investors and states, in particular, which has been expressed in recent years. UNCITRAL Working Group III was mandated to: first, identify and consider concerns regarding ISDS; second, consider whether reform was desirable in light of any identified concerns; and third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to UNCITRAL. The decision to develop solutions was taken at the 37th session in New York (1–5 April 2019). The option of an institutionalized as well as multilateralised investor-state dispute settlement mechanism will now be discussed in detail. This “now freely available” perhaps study is supposed to be a starting point for discussions at a time where still only few other comprehensive proposals for a future ISDS system after a structural reform are tabled. This book is by no means meant to be the result; rather, it is one point of departure for discussions.

The first edition of this “feasibility study” was originally launched in the course of 2017. The second edition with open access was prepared in spring 2019. It is intended to contribute to a broader discussion on the option of establishing a new international special court for investment protection. Although based on the debate about a reform of investment arbitration, it does not discuss the advantages and disadvantages of replacing the current system of investor-state arbitration. Rather, it presents options for a potential institutionalized form of investor-state dispute settlement and for the design of an MIC.

The “cornerstones” of such a new permanent court are its strict rule of law-orientation, which includes the highest demands on the judicial appointment

procedure as well as on the personal integrity, independence and qualification of the judges. Second, the costs should be significantly lower compared to the status quo. Third, transparency considerations and aspects of consistency of case law should receive particular attention. Fourth, decisions of an MIC would have to be effectively enforceable.

This study was originally written in German with the support of Dr. Anja Trautmann, LL.M., Mag. Céline Braumann, LL.M. and Mag. Sara Mansour Fallah. The update for the second edition was assisted again by Mag. Céline Braumann, and furthermore by Anna Holzer, Angshuman Hazarika and Andrés Eduardo Alvarado Garzón. We are thankful for the good cooperation with Springer and the *European Yearbook of International Economic Law* for accepting this publication as a Special Issue.

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August Reinisch

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Abbreviations

AB	Appellate Body
ACtHPR Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights
ASEAN	Association of Southeast Asian Nations
ADR	Alternative Dispute Resolution
BIT	Bilateral Investment Treaty
BIPA	Bilateral Investment Promotion and Protection Agreement
CCJ Agreement	Agreement establishing the Caribbean Court of Justice
CEPA	Comprehensive Economic Partnership Agreement
CECA	Comprehensive Economic Cooperation Agreement
CETA	Comprehensive Economic and Trade Agreement
DSU	Dispute Settlement Understanding
ECT	Energy Charter Treaty
EP	European Parliament
EU	European Union
FTA	Free Trade Agreement
IACtHR	Inter-American Court of Human Rights
ICC	International Chamber of Commerce
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
IUSCT	Iran-United States Claims Tribunal
SME	Small- and Medium-Sized Enterprises
MFN	Most Favored Nation
MIAM	Multilateral Investment Appellate Mechanism

MIC	Multilateral Investment Court
MNE	Multinational Enterprises
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
OAS	Organization of American States
OECD	Organisation of Economic Co-operation and Development
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
SOEs	State-Owned Enterprises
TPP	Trans-Pacific Partnership
Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
Transparency Convention	United Nations Convention on Transparency in Treaty-based Investor-State Arbitration
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization