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Dispute Resolution System: A Bilateral
Path towards a Multilateral Solution

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The EU's Reform of the Investor-State Dispute Resolution System: A Bilateral Path towards a Multilateral Solution

by

Ewa Żelazna*

Abstract

The EU became an actor in international investment after the entry into force of the Treaty of Lisbon. Since then, the EU's investment treaty-making practice has made a considerable impact in the field. This paper analyses the procedural rules on investor-State dispute resolution in the EU's bilateral treaties in the context of the ongoing multilateral negotiations on the international investment court and evaluates to what extent the EU's bilateral and multilateral actions have been mutually reinforcing.

Keywords: Investment Court System; Multilateral Investment Court; Investment Protection Treaties; Working Group III; International Investment Law

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I. Introduction

In 2009, foreign direct investment (FDI) was added to the scope of the EU's competence, starting a new phase in the process of EU integration that has been centred around the development and implementation of the common investment policy.¹ The expansion of the Union's competence in foreign relations has been accompanied by a number of other changes, such as the confirmation of the EU's legal personality and its treaty making capacity, as well as the consolidation of the procedure for concluding international agreements—all of which have strengthened the EU's position as an international actor.² The Treaty of Lisbon has also given the EU's external action a new normative impetus,³ by requiring that all of its policies are guided by principles and values that inspired the Union's creation and through enhancing the role of the European Parliament in the common commercial policy.⁴

The normative framework for the EU's external action provided by Article 21 TEU requires the Union to promote multilateral solution to common problems, particularly within the framework of the UN. While the Union's first steps in the field of international investment were perceived as uncertain,⁵ with time, it developed a bold approach towards reforming the existing regime. In 2017, the United Nations Commission on International Trade Law (UNCITRAL) gave a mandate to Working Group III to investigate the existing system of

¹ Art. 207 Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU); *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions: Towards a comprehensive European international investment policy*, COM (2010) 343 final.

² Art. 47 Consolidated Version of the Treaty on European Union [2012] OJ C 326/13 (TEU), Arts. 216 and 218 TFEU.

³ MANNERS Ian, *Normative Power Europe: A Contradiction in Terms?*, JMCS (2002), pp. 235-58, p. 252; PETERSMANN Ernst-Ulrich, *How to Evaluate the European Union as a Normative Power in Multilevel Governance of Public Goods? Methodological Pluralism and its Constitutional Limits in European Governance*, in Kaddous Christine (ed.), "The European Union in International Organisations and Global Governance: Recent Developments", London, Hart Publishing (2001), pp. 237-262, p. 239; KUBE Vivian, *The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU?*, EUI Working Papers Law 2016/10 (2016).

⁴ Arts. 207 and 218 TFEU.

⁵ CALAMITA Jansen N., *The Making of Europe's International Investment Policy: Uncertain First Steps*, Legal Issues of Economic Integration (2012), pp. 301-329, p. 301.

investment protection and propose changes to investor- state dispute resolution mechanism. In the context of these negotiations, the EU proposed to establish a multilateral investment court.⁶

Despite a number of attempts, it has not been possible to achieve the consensus among states on the multilateral rules on protection of international investment to date. Thus, drawing on lessons from the past, the EU has decided to implement some of its innovative solutions through its bilateral investment treaties, using them as building blocks for a systemic change. This paper examines the recent developments in the field of international investment and critically analyses the EU's strategy of paving the way for a multilateral reform with its bilateral treaties. The first part of the paper outlines the evolution of the EU's approach in its bilateral treaty-making practice. Next, the paper evaluates the Investment Court System incorporated in the EU's investment treaties, which is intended as a stepping stone for the establishment of the multilateral dispute resolution body. The last part, examines the negotiating progress at the UNCITRAL's Working Group III, focusing on the issue whether the EU's bilateral and multilateral actions have been mutually reinforcing thus far. The study concludes that while the reform proposed by the EU has its merits, its realisation through bilateral treaties poses difficult challenges, which should be carefully assessed before the EU announces its new international trade strategy.

II. The Beginnings of the EU's Policy on Investment Protection

Despite the initial uncertainty about the scope of the EU's FDI competence,⁷ the Commission announced its intentions to develop a policy on international investment protection immediately after the entry into force of the Treaty of Lisbon.⁸ While the first Communication that broadly outlined the objectives of the Union's action in the area, included hints of the Commission's plans to reform the system of investor- state arbitration, the scale of its ambition was not immediately apparent.⁹ The Commission's initial proposals were limited to strengthening the commitment to transparency in arbitration proceedings, as well as

⁶ Council Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes, 20 March 2018, 12981/17 ADD 1 DCL 1 FDI 25 WTO 229.

⁷ BUNGENGERG Marc, *The Division of Competences between the EU and Its Member States in the Area of Investment Politics*, in Bungenberg Marc, Griebel Joern, Hindelang Steffen (eds), "International Investment Law and EU Law", Berlin/Heidelberg, Springer-Verlag (2011), pp. 29-42; KRAJEWSKI Markus, *The Reform of the Common Commercial Policy* in Biondi Andrea, Eeckhout Piet and Ripley Stefanie (eds), "EU Law After Lisbon" New York, Oxford University Press (2012), pp. 292-311; CHAISSE Julien, *Promises and Pitfalls of the European Union Policy on Foreign Investment – How Will the New EU Competence on FDI Affect the Emerging Global Regime?* JIEL (2012), pp. 51- 84; SHAN Wenhua and ZHANG Sheng, *The Treaty of Lisbon: Halfway Toward a Common Investment Policy?* EJIL (2011), pp. 1049- 1073; DE LUCA Anna, *New Developments on the Scope of the EU Common Commercial Policy under the Lisbon Treaty: Investment Liberalisation vs. Investment Protection?* Yearbook on International Investment Law & Policy (2012), pp. 165- 170.

⁸ *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a Comprehensive European Investment Policy*, COM(2010)343 final.

⁹ Ibid.

improving consistency and predictability of arbitral awards by introducing ‘quasi-permanent arbitrators’ and, potentially, an appellate mechanism.¹⁰ Nonetheless, at the time, the investor-state arbitration was considered an important legacy of the Member States and in the light of the Commission’s limited experience in the field, only modest changes were expected to the status quo.¹¹

Early negotiating efforts of the Commission confirmed these expectations as the initial drafts of the CETA and the EU-Singapore FTA incorporated the traditional mechanism for resolving disputes between investors and states, which closely followed the established practice of the EU Member States.¹² Nevertheless, some innovations were introduced, one of which was a roster of arbitrators, which was to be deployed if the disputing parties failed to decide on the composition of their tribunal,¹³ and the code of conduct for adjudicators.¹⁴ Both agreements also made small steps towards establishing the appellate system, by requiring treaty committees to consider the feasibility of pursuing this option in the future.¹⁵ While at the time the EU’s contribution to the field of investment seemed minor, as it transpired later, these incremental developments laid foundations for future systemic reform.¹⁶

The commencement of negotiations on the Transatlantic Trade and Investment Partnership (TTIP) agreement with the US was an important catalyst for change in the EU’s approach.¹⁷ A decision to include the investment protection chapter in the agreement brought issues concerning investment arbitration to the forefront of the public debates and added to the discontent that was already apparent in some Member States.¹⁸ The Eurobarometer data collected in Autumn 2014 indicated that majority of citizens in Austria, Germany and Luxembourg opposed the free trade and investment agreement between the EU and the US.¹⁹ Moreover, an application was made to register a European Citizens’ Initiative (ECI), the goal of which was to persuade the EU’s institutions to cancel the negotiating mandate

¹⁰ Ibid.

¹¹ CASTELLARIN Emanuel, *The Investment Chapter in the New Generation of the EU’s Economic Agreements*, Transnational Dispute Management (2013); TITI Catherine, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, European Journal of International Law (2015), pp. 639- 661; PANTALEO Luca and ANDENAS Mads, *Introduction: The European Union as a Global (Legal) Role Model for Trade and Investment?*, European Business Law Review (2017), pp. 99-102.

¹² Chapter 10 Consolidated CETA Text, Published on 26 September 2014 (CETA 2014); Chapter 9 Draft EU-Singapore FTA, Version October 2014 (EU-Singapore FTA 2014).

¹³ Art X.25 CETA 2014 (n 12); Art 9.21 EU-Singapore FTA 2014 (n 12).

¹⁴ Art. X.42 CETA 2014 (n 12); Annex 9-B EU-Singapore FTA 2014 (n 12); Annex 9-B EU-Singapore FTA 2014 (n 12).

¹⁵ Art X.42 CETA 2014 (n 12); Art 9.33 EU-Singapore FTA 2014 (n 12).

¹⁶ PAPARINSKIS Martins, *International Investment Law and the European Union: A Reply to Catherine Titi*, European Journal of International Law (2015), p. 663; TAMS Christian J, *Procedural Aspects of Investor-State Dispute Settlement: The Emergence of a European Approach*, The Journal of World Investment and Trade (2014) pp. 585-611; GÁSPÁR-SZILÁGYI Szilárd, *Quo Vadis EU Investment Law and Policy? The Shaky Path Towards the International Promotion of EU Rules*, European Foreign Affairs Review (2018), pp. 167-186.

¹⁷ *Council Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*, 17 June 2013.

¹⁸ CHAN Alexia and CRAWFORD Beverly, *The Puzzle of Public Opposition to TTIP in Germany*, Business and Politics (2017), pp. 683-708.

¹⁹ *European Commission, Standard Eurobarometer 82, Autumn 2014 : Public Opinion in the European Union*, December 2014, p 32.

for the TTIP and not to conclude the CETA.²⁰ The ‘Stop TTIP’ ECI collected over a million signatures in order to fulfil the requisite registration requirements.²¹ In addition to concerns over lowering of employment, social, environmental, privacy and consumer standards, the citizens opposed the investor-state dispute resolution mechanism.²² They expressed fears that giving large corporations an option to challenge policy decisions before international tribunals, without involvement of national courts, gave the companies too much power and posed a threat to democracy and the rule of law.²³

The Commission acknowledged the ‘vigorous public debate’ concerning the TTIP and organised a public consultation on the EU’s approach to the investment protection.²⁴ In relation to the dispute resolution procedure, the proposed text included the innovative provision on establishing the appellate mechanism for investor-state cases.²⁵ The number of responses received by the Commission was unprecedented with majority of participants opposing in principle the investor-state arbitration and more generally the TTIP.²⁶ The largest number of replies were submitted by citizens in countries where the TTIP faced the strongest backlash, including the UK, Austria and Germany.²⁷ Majority of participants considered that the EU’s approach did not make sufficient improvements to the existing system.²⁸ However, some support was expressed toward the establishment of the appeals mechanism, also at the multilateral level.²⁹

The wide-spread opposition of the civil society to the existing regime of investment protection and in particular its enforcement mechanism, gave the Commission a mandate to adopt a bolder position on the international scene. The EU’s rhetoric changed significantly in the ‘Trade for All’ policy document, released in October 2015, where it was stated that the question was not whether the system of investor-state arbitration should be changed but how this should have been done.³⁰ Moreover, the EU declared that it is prepared to lead the global reform in the area,³¹ which reinvigorated its character as the normative power in international economic relations post-Lisbon.³² Consistently with Article 21 TEU, which requires the EU external action to promote multilateral solutions to common problems and strengthen the international system based on multilateral cooperation, the ‘Trade

²⁰ Art. 2(1) of Regulation No 211/2011 of the Parliament and the Council of February 2011 on the citizens’ initiative [2011] OJ L 65/1; GC, Case T-754/14, *Elfer and Others v Commission*, ECLI:EU:T:2017:323.

²¹ Art. 2(1) of Regulation No 211/2011 (n 21).

²² Stop TTIP, ECI(2017)000008, https://europa.eu/citizens-initiative/initiatives/details/2017/000008_en (consulted on 15 June 2020).

²³ *Ibid.*

²⁴ *European Commission, Staff Working Document, Report: Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, SWD(2015) 3 final.

²⁵ *European Commission, Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, 27 March 2020, pp. 41-44.

²⁶ *European Commission* (n 24), p. 14.

²⁷ *Ibid.*, p. 10.

²⁸ *Ibid.*, p. 28.

²⁹ *Ibid.*, p. 24.

³⁰ *European Commission, Trade for All: Towards a More Responsible Trade and Investment Policy*, October 2015, p. 21.

³¹ *Ibid.*

³² MANNERS (n 3).

for All' policy proposed the establishment of the International Investment Court and, in the long-term, to incorporate investment protection rules in the WTO legal framework.³³

However, international negotiations in the field of investment protection had proven contentious in the past with several failed attempts to agree on multilateral rules. The first effort dates back to the 1950s Abs-Shawcross Convention, which remained a draft.³⁴ In 1998, the OECD abandoned its plans for the Multilateral Agreement on Investment, which did not obtain requisite support of states.³⁵ Finally, efforts to incorporate investment rules in the WTO system came to a halt in 2004.³⁶ A number of reasons have been put forward to explain the past failures, which include the protectionist attitudes, complex negotiating tactics deployed across different areas at the WTO, diverging interests of capital exporting and importing states, as well as the opposition from the developing countries, who feared that the multilateral rules on investment would unduly restrain their freedom to regulate.³⁷

III. A Bilateral Path Towards the Multilateral Reform

Recognising the complexity of the task, the EU decided to implement systemic changes in the field of investment protection in an incremental way, through its bilateral treaty-making practice. The strategy has had a number of advantages, enabling the Commission to develop capacity, as well as test and refine its solutions in negotiations with more experienced treaty-partners. Moreover, the EU's actions gave a new momentum to the debates at the multilateral level about the need for a change in the investment-protection regime, creating conditions for future convergence of standards. In 2015, the United Nations Conference on Trade and Development (UNCTAD), published its annual World Investment Report, which acknowledged that there was a 'pressing need to reform the global IIAs [International Investment Agreements] regime' and provided a range of recommendations on how the existing system could be improved, some of which coincided with the EU's proposals.³⁸

The first building block of the EU's reform was supposed to be the TTIP. The concept paper entitled 'Investment in TTIP and Beyond- the Path for Reform' has made a considerable leap in the evolution of the EU's approach.³⁹ The most radical changes that were proposed therein included breaking the link between the disputing parties and investment tribunals and establishing the appellate mechanism.⁴⁰ The Investment Court System introduced in the TTIP was based on the principle that members of the first instance and the

³³ *European Commission* (n 30), p. 21.

³⁴ SCHREUER Christoph, *Investments, International Protection*, Max Planck Encyclopaedia of Public International Law (2013), para. 11.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.* SAUVÉ Pierre, *Multilateral Rules on Investment: Is Forward Movement Possible?*, *Journal of International Economic Law* (2006) pp. 325-355.

³⁸ UNCTAD, *World Investment Report 2015 ; Reforming International Investment Governance*, p. xi.

³⁹ *European Commission, Concept Paper: Investment in TTIP and Beyond- the Path for Reform*, September 2015 (TTIP Concept Paper).

⁴⁰ *Ibid.*

appellate tribunals were selected by the parties to the treaty.⁴¹ The tribunals' presidents were to assign adjudicators to specific cases randomly and on a rotation basis, giving everyone an equal opportunity to serve.⁴² The amendments significantly modified the nature of investor-state dispute resolution by weakening the position of investors, who in a traditional model of investment treaty arbitration are able to influence the composition of tribunals.⁴³ The assumption behind the EU's proposal was that aligning the way in which investor-state dispute resolution mechanism operates with the traditional model of the courts system would positively impact on the legitimacy of the investment regime and improve its public perception.⁴⁴

Despite the TTIP negotiations being unsuccessful, other countries, such as Viet Nam,⁴⁵ Canada⁴⁶, Singapore⁴⁷ and Mexico⁴⁸ were amenable to the EU's proposals, which have kept the EU's reform proposals alive. These negotiations have, however, uncovered some challenges relating to the establishment of the institutionalisation of the investor-state dispute resolution on a bilateral basis.

Firstly, the implementation of the system to date has highlighted that the maintenance of an elaborate network of tribunals could unduly burden the EU's budget, as altogether, the Investment Courts established pursuant to the aforementioned agreements envisage appointment of thirty-nine adjudicators. The number is expected to increase, as the EU bilateral negotiations progress, with the Commission planning to incorporate its new dispute resolution mechanism in around twenty international agreements.⁴⁹ The first-tier tribunals of the Investment Court System vary in size depending on the EU's negotiating partner, comprising from six up to fifteen adjudicators.⁵⁰ The appeal tribunals in all bilateral agreements consist of six members.⁵¹ All appointees are entitled to a monthly retainer fee in

⁴¹ Arts. 9-10, Section 3 Resolutions of Investment Disputes and Investment Court System, Transatlantic Trade and Investment Partnership, Published on 12 November 2015.

⁴² Ibid, Arts. 9(7) and 10(9).

⁴³ SCHREUER Christoph, MALINTOPPI Loretta, RINISCH August et al, *The ICSID Convention: A Commentary*, New York, Cambridge University Press (2009), pp. 475-476; WILSKE Stephan, SHARMA Geetanjali, RAWAL Raeesa, *The Emperor's New Clothes: Should India Marvel at the EU's New Proposed Investment Court System?*, Indian Journal of Arbitration Law (2017), pp. 79- 97; BROWER Charles, ROSENBERG Charles, *The Death of the Two-Headed Nightingale: Why the Paulson- van den Berg Presumption that Party- Appointed Arbitrators are Untrustworthy is Wrongheaded*, Arbitration International (2013), pp. 7-44.

⁴⁴ TTIP Concept Paper (n 39) pp. 4, 7.

⁴⁵ Investment Protection Agreement Between the European Union and Its Member States, of the One Part, and the Socialist Republic of Viet Nam on the Other Part, COM(2018) 692 final (EU- Viet Nam Investment Agreement 2018).

⁴⁶ Chapter 8 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23.

⁴⁷ Investment Protection Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part, COM(2018) 194 final (EU- Singapore Investment Agreement 2018).

⁴⁸ Modernisation of the Trade Part of the EU-Mexico Global Agreement, Agreement in Principle of 21 April 2018 (EU-Mexico Global Agreement 2018).

⁴⁹ *Commission Staff Working Document. Impact Assessment : Multilateral Reform of Investment Dispute Resolution*, SW(2017) 302 final, p. 21.

⁵⁰ Art. 3.38(2) EU- Vietnam Investment Agreement 2018 (n 45) ; Art. 8.27(2) CETA (n 46) ; Art. 3.9(1) EU- Singapore Investment Agreement 2018 (n 47) ; Art. 11(2) EU-Mexico Global Agreement 2018 (n 48).

⁵¹ Art. 3.39(2) EU- Viet Nam Investment Agreement 2018 (n 45) ; Art. 3.10 (2) EU- Singapore Investment Agreement 2018 (n 47) ; Art. 12(2) EU-Mexico Global Agreement 2018 (n 48) ; Art. 2 of the Draft Decision of the CETA Joint Committee Setting out the Administrative and Organisational Matters Regarding the Functioning of the Appellate Tribunals, 7 May 2020.

order to ensure their availability, which is paid in addition to fees and expenses for services provided in specific cases.⁵² The Commission estimates that the average annual fixed costs of a single, inactive Investment Court System will be at around EUR 400 000 per treaty party,⁵³ albeit in agreements with less prosperous countries, such as Viet Nam and Mexico the EU made a commitment to bear a higher proportion of fixed costs.⁵⁴ Additionally, the system will generate administrative expenses, as the management of the network of tribunals will require commitment of human and financial resources.⁵⁵

In the medium-term, the EU's intention is to replace the Investment Court System with a multilateral institution,⁵⁶ which presents itself as a more sustainable option for managing costs, as less adjudicators will be appointed, and administrative expenses will be distributed among multiple parties. However, given the complex nature of multilateral negotiations an international court may not be an option that is readily available and the longer the period required for its establishment the less effective the EU's bilateral solution becomes. The problem is not only the burden on the EU's budget, which is expected to substantially increase with time, but also the capability of the Investment Court System to achieve the main objectives of the reform, thus deliver value for money. The European Commission admitted that the bilateral solution can only achieve limited results with regards to improving overall predictability of investment awards and a large number of Investment Court Systems would negatively impact the interpretative consistency sought with the institutionalisation of investor-state dispute resolution.⁵⁷ This renders a question whether it is justified to commit considerable amount of public funds to the establishment of the new interim dispute resolution mechanism, which according to the Commission's own estimates, generates higher per case costs than the traditional ad hoc investor-state arbitration.⁵⁸

Another serious challenge relating to the establishment of the Investment Court System is availability of appropriately qualified adjudicators, particularly if diversity in tribunals' compositions is to be promoted.⁵⁹ Following the conception that the traditional courts' system provides a blueprint for improving credibility of investor-state dispute settlement, the provisions of the aforementioned investment treaties stipulate that a tribunal's member should

⁵² Arts. 3.38, 3.39 EU- Viet Nam Investment Agreement 2018 (n 45) ; Arts. 8.27, 8.28 CETA (n 46) ; Arts. 3.9, 3.10 EU-Singapore Investment Agreement 2018 (n 47) ; Art. 11, 12 EU-Mexico Global Agreement 2018 (n 48).

⁵³ *Commission Staff Working Document* (n 49), p. 37.

⁵⁴ *Ibid*, pp. 18, 37, 92; the Commission estimates that yearly EU expenditure of the Investment Court System under the EU-Vietnam FTA at EUR 700,000 plus administrative costs. *European Commission, Proposal for a Council Decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States, of the other part, and the Socialist Republic of Viet Nam, of the other part*, COM(2018) 693 final.

⁵⁵ *Ibid*, pp. 17-18, 21, 34, 39.

⁵⁶ *Council Negotiating Directives* (n 6).

⁵⁷ *Commission Staff Working Document* (n 49), p. 21.

⁵⁸ *Ibid*, pp. 102-104. VEEDER John, *What Matters About Arbitration (Alexander Lecture, London, 26 November 2015)*, Investment Treaty Arbitration (2016), p. 157.

⁵⁹ WOOD Michael, *Choosing between Arbitration and a Permanent Court: Lessons from Inter-State Cases*, ICSID Review (2017), p. 14.

possess qualifications required for appointment to a judicial office or be a jurist of recognised competence.⁶⁰ Additionally, individuals need to demonstrate expertise in public international law, international investment law, international trade law and international dispute resolution.⁶¹ While such elaborate criteria may ensure the highest level of expertise, they may also reinforce the existing paradigms in appointment of arbitrators and have an unintended consequence of undermining diversity in terms of age and gender among them.⁶² A comparison of empirical data on appointments to the WTO dispute resolution bodies and to investor-state tribunals led Pauwely to recommend that the latter system should focus on ensuring inclusivity and representation in order to improve its public perception.⁶³

Appointments to tribunals of the Investment Court System could be an opportunity to expand and diversify of the pool of available adjudicators. However, the current strict criteria and a lack of a commitment to ensuring fair gender representation in the EU's agreements may hinder the attainment of these objectives. The recent selection of individuals to a roster of arbitrators for state-to-state disputes under CETA gives a cause for concern. While Article 29.8 of CETA imposes laxer appointment criteria in comparison to the analogous provisions on the Investment Court System, only four out of fifteen individuals on the roster were women and only one of them was nominated by the EU.⁶⁴ Improving diversity in appointments to investment tribunals, where experienced individuals with requisite qualifications to large extent display similar characteristics in terms of age, gender and ethnicity could prove challenging under the current conditions in the EU's agreements.⁶⁵ Nonetheless, the EU should be mindful of the issue given its established reputation as a normative power in international economic relations and since the Investment Court System is intended as a building block of a future multilateral institution.

In addition to establishing the Investment Court System, all of the EU's bilateral treaties contain separate provisions intended to build international support for the multilateral investment court. The strongest commitments towards this goal are present in the CETA and the EU-Mexico agreement, which provide that the parties to the treaties shall actively support the initiative and when the new international court is established, it is to replace the Investment Court Systems.⁶⁶ Clauses in EU- Singapore and EU-Vietnam investment

⁶⁰ Arts. 3.38(4), 3.39(7) EU- Viet Nam Investment Agreement 2018 (n 45) ; Arts. 8.27(4) CETA (n 46) ; Arts. 3.9(4), 3.10(4) EU- Singapore Investment Agreement 2018 (n 47) ; Art. 11(4), 12(7) EU-Mexico Global Agreement 2018 (n 48).

⁶¹ Ibid.

⁶² FONTANELLI Filippo, AMELI Koorosh, BANTEKAS Ilias, et al., *Lights and Shadows of the WTO-Inspired International Court System of Investor-State Dispute Settlement*, European Investment Law and Arbitration Review (2016), pp. 205-207.

⁶³ PAUWELYN Joost, *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus*, The American Journal of International Law (2019), pp. 761-805.

⁶⁴ Council Decision (EU) 2019/2226 of 19 December 2019 on the position to be taken on behalf of the European Union in the CETA Joint Committee as regards the adoption of the List of Arbitrators pursuant to Article 29.8 of the Agreement [2019] OJ L 336/288.

⁶⁵ BERWIN LEIGHTON PAISNER, *International Arbitration Survey: Diversity on Arbitral Tribunals. Are We Getting There?*, BLP 2017; *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings*, The ICCA Reports No. 8 (2020), pp. 43-57.

⁶⁶ Arts. 8.29 CETA (n 47) ; Art. 14 EU-Mexico Global Agreement 2018 (n 49).

treaties provide parties with more flexibility, by leaving the final decision on whether to adhere to the jurisdiction of a multilateral dispute resolution mechanism to the joint treaty committees.⁶⁷ This creates a possibility for the Investment Court System and the multilateral investment court to coexisting in the future, depending on the preferences of the EU's negotiating partner. However, such an option would considerably increase costs of the reforms for the Union.

Similar provisions supporting the establishment of the multilateral investment court have appeared in a few recent Bilateral Investment Treaties (BITs) of the EU Member States.⁶⁸ Strong commitments to the jurisdictions of the multilateral investment court, stipulating that the institution would replace the traditional arbitration mechanism, can be found, for example, in the investment agreements between Hungary and Cabo Verde, as well as Slovakia and Iran.⁶⁹ Slovakia and the United Arab Emirates BIT leaves open a possibility for the contracting parties to incorporate the new developments in investor-state dispute settlement into the agreement.⁷⁰ Since the Treaty of Lisbon, the Member States may conclude BITs only if expressly authorised by the EU.⁷¹ The process of authorisation is governed by Regulation 1219/2012 and provides the European Commission may require that a Member State includes a particular clause in its BIT in order to ensure its consistency with the EU's investment policy.⁷² The framework, therefore, provides an opportunity for the EU to use its Member States bilateral treaty-making practice in order to build broader international support for its reform proposals.

While the multilateral institution obtained some backing of the EU Member States, the Investment Court System has not been incorporated into their treaty-making practice. Nonetheless, it is noteworthy that the 2019 Dutch Model BIT breaks the link between disputing parties and the composition of arbitral tribunals, which is broadly in line with the EU's idea for improving legitimacy of the investor-state dispute settlement. The Dutch solution appears to be more cost-effective than that of the EU, as instead of establishing new institutions, it uses the existing appointing authorities.⁷³

⁶⁷ Art. 3.41 EU- Viet Nam Investment Agreement 2018 (n 46) ; Art. 3.13 EU- Singapore Investment Agreement 2018 (n 48).

⁶⁸ See for example : Art 15 the Netherlands Model Investment Agreement, 22 March 2019 ; Art 21 Belgium-Luxembourg Economic Union Model BIT 2019; Art 28 The Slovak Republic Model BIT; Art 8(17)Czech Republic Model BIT.

⁶⁹ Art. 9(11) Agreement between the Government of Hungary and the Government of the Republic of Cabo Verde for the Promotion and Reciprocal Protection of Investments, signed on 28 March 2019; Art. 24(4), Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, entered into force on 20 August 2017.

⁷⁰ Art. 26(4) Agreement between the Slovak Republic and the United Arab Emirates for the Promotion and Reciprocal Protection of Investments, entered into force on 5 February 2018.

⁷¹ Art. 2 TFEU.

⁷² Art. 9 of Regulation (EU) No 1219/2012 of the European Parliament and the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, [2012] OJ L 351/40.

⁷³ Art. 20 the Netherlands Model Investment Agreement.

IV. Multilateral Progress

The EU has put into action its plans to transform the Investment Court System into a multilateral dispute resolution body at the forum of the UNCITRAL. The reform of the system of international investment protection was considered at the forty-ninth session of the UNCITRAL Commission⁷⁴ and a year later, the task was assigned to the Working Group III.⁷⁵ The objectives set in the mandate were to identify key problems with the current mechanism of investment arbitration, evaluate whether a reform was necessary, and develop relevant solutions.⁷⁶ The report from the fiftieth session emphasised that the work should be aimed at restoring the confidence in the overall system, which coincided with the goal of the EU.⁷⁷ However, already at this early stage some countries expressed their reservations about the multilateral solution, highlighting that ‘... the diversity in approaches to investor- State dispute settlement reflected thoughtful decisions by sovereign States on what approach best suited their particular legal, political, and economic circumstances.’⁷⁸ Although the UNICITRAL Commission concluded that the idea of the permanent multilateral investment court should be given due consideration,⁷⁹ the attitudes of some countries signalled that building the consensus for this option will be an uphill battle for the EU.

The Union is not formally a member of the UNCITRAL Commission and at the Working Group III it enjoys the enhanced observer status, which enables its involvement in the deliberations, but without the right to vote.⁸⁰ Nonetheless, the EU possesses a considerable influence at the Working Group III, as twelve out of sixty participating states are members of the EU.⁸¹ EU Member States are bound to fully coordinate their position with that of the Union and act in its interests, where measures adopted by an international body may directly impact on the EU's *acquis*.⁸² Moreover, some of the EU's third country partners who supported the institutionalisation of the investor- state dispute resolution mechanism

⁷⁴ *Report of the United Nations Commission on International Trade Law : Forty-ninth session (27 June-15 July 2016)*, A/71/17, paras. 187-194.

⁷⁵ *Report of the United Nations Commission on International Trade Law : Fiftieth Session (3-21 July 2017)*, A/72/17, para. 264.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, para. 243.

⁷⁸ *Ibid.*, para 244.

⁷⁹ *Ibid.*, para 255.

⁸⁰ United Nations General Assembly Resolution 65/276: Participation of the European Union in the work of the United Nations (United Nations General Assembly [UNGA]) UN Doc A/RES/65/276, GAOR 65th Session Supp 49 vol III, 31, GAOR 65th Session Supp 49; Further on the subject of the EU's participation in the UN see: ZAPPIA Mariangela, ‘The United Nations: A European Union Perspective’ in Kaddous (ed.), ‘The European Union in International Organisations and Global Governance: Recent Developments’, London, Hart (2017), pp. 25-32.

⁸¹ These are: Austria (2022), Belgium (2025), Croatia (2025), Czechia (2025), Finland (2025), France (2025), Germany (2025), Hungary (2025), Italy (2022), Poland (2022), Romania (2022), Spain (2022); *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Eight Session (Vienna, 14-18, October 2019)*, A/CN/1004, para. 5.

⁸² Art 218(9) TFEU; ECJ, Case C-399/12, *Germany v Council*, ECLI:EU:C:2014:2258, paras 49, 52-55, 63-64; ECJ, Case C-45/07 *Commission v Greece*, ECLI:EU:C:2009:81, paras 30-31; ECJ, Opinion 2/91 *ILO Convention*, ECLI:EU:C:1993:106, para. 5; Council (EU), *Council Negotiating Directives* (n 6) para. 1.

in their bilateral treaties, such as Canada, Mexico, Singapore and Viet Nam also partake in the Working Group III, which in theory should improve the Union's position.⁸³

The EU made the first proposal to establish the two-tier international court as a panacea for all ills identified in the system of investment protection, at the thirty-fifth session of the Working Group III.⁸⁴ Next, in preparation for the third phase of the deliberations, the goal of which goal was to develop concrete solutions, the EU submitted an outline of the reform option.⁸⁵ The EU's solution was built on the assumption that only wholesale systemic change can effectively address all concerns identified by the Working Group III.⁸⁶ Thus, the appeals instance with a possibility of remand were intended to enhance correctness of arbitral awards, improving consistency and predictability within the system.⁸⁷ The requirement to pay the security for costs was suggested in order to prevent opportunistic litigation that could unduly lengthen the proceedings.⁸⁸ Based on its bilateral practice, the EU suggested that efficiency could be further improved by a mechanism that allows for the automatic enforcement of arbitral awards.⁸⁹ The costs of the new institution were to be covered by states, parties to the international convention establishing the multilateral court, each contributing in accordance with their level of development, and potentially other users.⁹⁰ Independence and impartiality of adjudicators was to be guaranteed through a transparent and robust process of appointment, long non-renewable tenures and strict ethical codes.⁹¹ In comparison to its bilateral practice, the EU included a stronger commitment to diversity and following the example of the Rome Statute of the International Criminal Court, it suggested incorporating a provision that requires a fair representation of female and male judges.⁹²

While the EU made a compelling case for the systemic change, the legitimacy of the UNCITRAL as a multilateral forum for harmonisation and modernisation of international law is ensured by the state-led nature of the process and the decision-making by consensus.⁹³ In this context, it is noteworthy that throughout the course of negotiations at the Working

⁸³ *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its thirty-eight session (Vienna, 14-18 October 2019)*, A/CN.9/1004, para. 5.

⁸⁴ *Possible Reform of Investor-State Dispute Settlement (ISDS) : Submission from the European Union*, 12 December 2012, A/CN.9/WG.III/WP.145.

⁸⁵ *Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the European Union and Its Member States*, 18 January 2019, A/CN.9/WG.III/WP.159/ Add.1.

⁸⁶ *Ibid*, para. 10.

⁸⁷ *Ibid*, para. 43-45.

⁸⁸ *Ibid*, para. 15.

⁸⁹ *Ibid*, paras 30-32 ; Art. 3.57 EU- Vietnam Investment Agreement 2018 (n 45); Art. 3.22 EU- Singapore Investment Agreement 2018 (n 47); Art. 31 EU-Mexico Global Agreement 2018 (n 48); Cf. Art. 8.41 CETA (n 46) ;

⁹⁰ *Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the European Union and Its Member States*, 18 January 2019, A/CN.9/WG.III/WP.159/ Add.1, paras. 33-34 ; cf : *Possible Reform of Investor-State Dispute Settlement (ISDS) : Submission from the Government of Morocco*, A/CN.9/WG.III/WP.195, p. 3.

⁹¹ *Ibid*, paras. 16-24.

⁹² *Ibid*, para. 21.

⁹³ *Report of the United Nations Commission on International Trade Law, Fiftieth Session (3-21 July 2017)*, Official Records of the General Assembly, Seventy-first Session, Supplement No. 17 (A/71/17), para 259.

Group III, the uniform support for the permanent investment court was difficult to attain.⁹⁴ Some countries, including large economies like China and Russia raised in writing objections to the idea that the link between the disputing parties and tribunals should be broken.⁹⁵ The group of states that opposed the EU's proposal as a matter of principle adhered to the view that traditional investment arbitration effectively protects the interests of all stakeholders and ensures the legitimacy of the entire system by depoliticising the dispute resolution process.⁹⁶ Moreover, one country, doubted whether the EU's proposal would sufficiently guarantee diversity among adjudicators, pointing out that this was one of the problems identified with the TTIP.⁹⁷ The submission highlights that the bilateral practice of the EU can impact on the multilateral negotiations, and not always in a positive way.

However, majority of states, which made individual submissions neither unequivocally supported nor categorically rejected the EU's initiative. Notably, none of the countries, which subscribed to the Investment Court System provided a written statement in support of a multilateral dispute resolution body, which puts to question the effectiveness of the EU's bilateral strategy. The resource-intensive nature of the task deterred countries from making any clear commitments and it is likely that the negative impact of the COVID-19 pandemic on the economy will exacerbate the issue.⁹⁸ A lot of the states asked for a flexible and incremental approach to the implementation of the systemic reform, starting from solutions on which most countries agree.⁹⁹ In addition to the EU's proposal, a number of other ideas were submitted, which ranged from adjustments to the existing dispute settlement procedure while preserving its inherent character, to the establishment of institutions such as, the advisory centre and the stand-alone appellate body.¹⁰⁰ The multitude of possible solutions made it difficult to find an agreement on the best way forward in the multilateral negotiations, which led to a decision that the Working Group III would develop all solutions simultaneously in the third phase of the deliberations.¹⁰¹

⁹⁴ *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-fourth Session (Vienna, 27 November - 1 December 2017) Part II*, A/CN.9/930/Add.1/Rev.1, paras 17-19; *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-fifth Session (New York, 23-27 April 2018)*, A/CN.9/935, paras. 51-54; SVOBODA Ondrej, *EU and Its Member States at the UNCITRAL: Pushing for the Multilateral Investment Court Against the Odds*, Rennes, LAWTTIP Working Papers 2019/6 (2019).

⁹⁵ *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of China*, A/CN.9/WG.III/WP.177, p. 4; *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of the Russian Federation*, A/CN.9/WG.III/WP.188/Add.1, paras. 6-9.

⁹⁶ *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Resumed Thirty-eighth Session*, A/CN.9/1004/Add.1, paras 103-104.

⁹⁷ *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Bahrain*, A/CN.9/WG.III/WP.180, para. 38.

⁹⁸ *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Thailand*, A/CN.9/WG.III/WP.162, para. 10.

⁹⁹ *Submission from the Governments of Chile, Israel and Japan*, A/CN.9/WG.III/WP.163; *Submission from the Government of Costa Rica*, A/CN.9/WG.III/WP/164; *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Columbia*, A/CN.9/WG.III/WP.173.

¹⁰⁰ *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Eighth Session (Vienna, 14-18 October 2019)*, A/CN.9/1004, para. 24.

¹⁰¹ *Ibid*, para 25; *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session (New York, 1-5 April 2019)*, A/CN.9/970, paras 62-85.

For the EU, the approach may not be optimal, as it disperses states' attention across a wide variety of tasks, which may not provide efficiency and effectiveness in the negotiating process. Nevertheless, most aspects put forward for future debates are relevant to the implementation of the EU's proposal and could be used to build further support for a systemic change in the future. The EU's own experience demonstrates that allowing time and space for a debate can be conducive to achieving convergence of views among political actors. In this regard, the EU institutions did not present a united front on the approach to investor-state dispute settlement immediately after the entry into force of the Treaty of Lisbon.¹⁰² In the beginning, the Council favoured maintaining the status quo, which was understandable given the Member States' extensive network of BITs, all of which incorporate the traditional arbitration procedure.¹⁰³ The European Parliament, on the other hand, adopted a more progressive stance on the matter, calling for the establishment of a new system with publicly appointed judges and the appeal instance.¹⁰⁴ The intensifying public pressure led eventually to the consensus in the inter-institutional debates that the radical reform was necessary.

A catalyst for consensus-building on the international scene could be the appeals mechanism, which is supported by majority of states and has been incorporated into some bilateral treaties.¹⁰⁵ These developments provide a fertile ground on which the EU's reform ideas could thrive. The paper prepared by the UNCITRAL Secretariat suggests dispensing with the right of the disputing parties to appoint members of the appellate tribunals, which could become a building block of a systemic change, in line with the EU's approach.¹⁰⁶ However, at this stage in deliberations a number of options for establishing the appellate mechanism are being considered and not all of them will equally benefit the EU.¹⁰⁷ If the appeals mechanism is embedded in the existing institutional structures of ICSID or ad hoc tribunals are permitted,¹⁰⁸ the EU will have to continue with the institutionalisation of the investor-state dispute settlement on a bilateral basis providing little opportunity to rationalise its own costs and improving coherence of the entire system.

At this stage in negotiations what appears to be the best solution for the EU is a multilateral convention that allows states to opt into different reforms and select a dispute mechanism

¹⁰² CALAMITA (n 5).

¹⁰³ LAVRANOS Nikos, *In Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 Establishing A Transitional Regime for Existing Extra-EU BITs – A Member State Perspective* Transnational Dispute Management (2012), pp. 1-14.

¹⁰⁴ *European Parliament Resolution of 8 July 2015 Containing the European Parliament's Recommendation to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI))*, [2017] OJ C 265/35, para. 2(d)(xv).

¹⁰⁵ *Possible Reform of Investor-State Dispute Settlement (ISDS): Appellate and Multilateral Court Mechanism. Note by the Secretariat*, A/CN.9/WG.III/WP.185, paras 6 and 42.

¹⁰⁶ *Ibid*, paras 34-35.

¹⁰⁷ *Ibid*, paras 43-45; *Possible Reform of Investor-State Dispute Settlement (ISDS): Appellate Mechanism and Enforcement Issues*, A/CB.9/WG.III/WP, paras. 42-56.

¹⁰⁸ *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Resumed Thirty-Eight Session*, A/CN.9/1004/Add.1, paras. 22-26, 31, 41.

from a wide range of options.¹⁰⁹ The ‘open architecture’ of the multilateral instrument was suggested in the EU’s original proposal.¹¹⁰ It has a number of advantages, as it would allow the EU to lead the initiative of establishing a multilateral court with a core group of interested states, which may improve efficiency of the process. Once established, the permanent court would replace the EU’s Investment Court System, which would allow it to rationalise the number of appointed adjudicators. Costs to the taxpayers could be further reduced if the user fees are implemented. While at this stage in negotiations the idea seems like a reasonable compromise, none of current proposals discuss in detail basic arrangements for the new international institutions. The EU’s experience with the Unified Patents Court is a good example that the devil is in the detail.¹¹¹ It also suggests that even if states participating in the Working Group III agree in principle to the multilateral investment court, its establishment may be years, if not decades away. In the light of this, the EU should carefully reconsider, ahead of the announcement of its new trade strategy, whether the implementation of the Investment Court System in the interim delivers value for money for the Union and its citizens, particularly as the internal market tries to rebuild from the negative effects of the COVID-19 pandemic.

V. Conclusions

In today’s reality, when the assertion of community interests in international relations between states is being consistently undermined, the UNICTRAL negotiations on the reform of the system of investment protection provide a much needed counterbalance.¹¹² The EU’s strategy for implementing a systemic change in the field demonstrates that bilateral and multilateral actions of international actors do not have to pull in opposite directions. Through concluding its bilateral investment treaties, the EU was able to gain experience, develop its reform proposal, build broader political support and create a new momentum. As the progress in multilateral negotiations is inherently slow, and its attainment could be even more challenging due to the COVID-19 pandemic, the EU should use the flexibility that bilateral negotiations provide and continue to reflect upon and improve its current practice.

The negotiations at Working Group III have thus far demonstrated that the EU’s bilateral building blocks may be operating for some time, before they are replaced by the multilateral

¹⁰⁹ *Possible Reform of Investor-State Dispute Settlement (ISDS) : Multilateral Instrument on ISDS Reform. Note by the Secretariat, A/CN.9/ WG.III/ WP.194*, para. 11; SCHILL Stephan, VIDIGAL Geraldo, *Cutting the Gordian Knot : Investment Dispute à La Carte*, Geneva, International Centre for Trade and Sustainable Development (2018); ROBERTS Anthea and ST JOHN Taylor, *UNCITRAL and ISDS Reform: Visualising a Flexible Framework*, EJIL Talk! Blog (2019).

¹¹⁰ *Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the European Union and Its Member States*, 18 January 2019, A/CN.9/WG.III/WP.159/ Add.1, para 39.

¹¹¹ ALBERTI Jacopo, *New Developments in the EU System of Judicial Protection : The Creation of the Unified Patent Court and Its Future Relations with the CJEU*, *Maastricht Journal of European and Comparative Law* (2017), pp. 6-24.

¹¹² SIMMA Bruno, *From Bilateralism to Community Interest in International Law*, *Collected Courses of the Hague Academy of International Law* (1994), vol. 250.

investment court. Therefore, the EU should carefully consider whether the Investment Court System is the optimal solution to deliver necessary change in the interim. The assessment in this chapter has highlighted that the large-scale, bilateral institutionalisation of investor-state dispute resolution will create a considerable burden on the EU's budget and has a limited capability to deliver desired objectives of improving consistency and coherence within the system. The economic challenges created by the COVID-19 pandemic necessitate a re-evaluation of the EU's strategy. In this context, the bilateral treaty-making practice of the EU Member States, such as the Dutch Model BIT could provide an inspiration on how a meaningful change could be achieved in the transitional period without imposing undue expenses on EU citizens. Another aspect that requires reconsideration are provisions on the appointment of adjudicators. The current design of the Investment Court System is a missed opportunity to expand the pool of available adjudicators as it does not contain strong commitments to gender diversity or capacity building.

The EU should not be afraid to modify its bilateral approach in response to changing circumstances and feedback provided by various stakeholders, particularly at this stage in its implementation, when the pitfalls of path dependence can be still avoided.¹¹³ As seen in the deliberations of Working Group III, the quality of the EU's bilateral strategy affects its credibility in the multilateral negotiations and may impact upon its capability to lead future reforms in the field of international investment protection, which have been desired by many states participating in the current negotiations at the UNCITRAL.¹¹⁴

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¹¹³ HATHAWAY Oona, *The Path Dependence in the Law : The Course and Pattern of Legal Change in a Common Law System*, Iowa Law Review (2001), pp. 101- 165.

¹¹⁴ SCHILL Stephan, *Investor-state Dispute Settlement Reform at UNCITRAL: A Looming Constitutional Moment?* (2018), pp. 1- 3.

List of abbreviations

BIT	Bilateral Investment Treaties
CETA	Comprehensive Economic and Trade Agreement
ECI	European Citizens' Initiative
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
IIA	International Investment Agreement
OECD	Organisation for Economic Co-Operation and Development
TEU	Treaty on the European Union
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organisation

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