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Dispute Settlement Alternatives in Future EU BITS

Building the Framework for Investment
Protection

Günes Ünüvar

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Dispute Settlement Alternatives in Future EU BITS: Building the Framework for Investment Protection

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ABSTRACT

Following the inclusion of the Common Commercial Policy in the exclusive competences of the European Union, a handful of policy adjustments have occurred. Among these adjustments, investment protection has been a remarkable one - given its new, exclusive framework and an already established, state-level practice. As the new policy stands, Bilateral Investment Treaties, which had been negotiated and executed by the EU Member States in the pre-Lisbon period, can now only be negotiated and executed by the EU. These prospective 'EU BITs', *inter alia*, aim for an even stronger mechanism for the protection of investors both in the EU and in third states. A strong protection mechanism inevitably calls for a strong Dispute Settlement Mechanism, and the establishment of a DSM may prove to be challenging. The EU currently faces several questions on its path to a tangible and reliable 'EU BIT', and arguably the most outstanding one is the question of the DSMs to be incorporated in these new agreements. What are the alternatives of a DSM for these new BITs? Which alternatives are currently utilizable and which ones are not? What are the current problems that the EU face, and how can those problems be tackled? Is the International Centre for Settlement of Investment Disputes an alternative, and if not, why? Following a thorough overview, this paper aims to analyse the DSM alternatives for the EU to be used in the new EU BITs and ultimately provide a solid DSM proposal.

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1 Abbreviations

AISCC	Arbitration Institute of Stockholm Chamber of Commerce
BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
DSM	Dispute Settlement Mechanism
EC	European Community
ECJ	European Court of Justice
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
IBPC	International Bureau of the Permanent Court
IBRD	International Bank of Reconstruction and Development
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IMF	International Monetary Fund
MFN	Most-favoured Nation
PCA	Permanent Court of Arbitration
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCITRAL	United Nations Commission for International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UK	United Kingdom

2 Introduction

Ever since the Lisbon Treaty came into force and amended the previous Treaties, a handful of competence adjustments took place and several areas previously regulated and specified under the Treaties as a shared competence of the EU and the Member States have been amended. FDI, as a part of the CCP, stands as a remarkable example of these competence adjustments: before the Lisbon Treaty, “investment was a policy field with a specific division of work between the EU and its Member States”¹, however the competence over CCP is now within the exclusive competence of the EU, pursuant to Article 207(1) and Article 3(1)(e) of the TFEU.

Such adjustment has had several effects on already existing investment agreements. A BIT, before the Lisbon Treaty, was an agreement at the state-level for the Member States within their competence in the larger framework of shared competences. For the Member States, BITs were seen to be crucial instruments for establishing trade relations with third states. As the EU had held a more limited competence in investment policy, the Member States were in charge of negotiating and executing BITs with third states on their own. This created a very complex BIT ‘pool’ in the EU and with third states. Including an extensive investment definition and multi-branched investor protection clauses, most of these BITs, if not all, also included a DSM. Whereas some BITs included a state-state DSM, some included investor-state DSMs; and another group included both.

DSMs established by the BITs do not only differ in terms of being state-state or investor-state - another very important division (under investor-state) is whether to establish an institutionalized arbitration mechanism (such as the ICSID) or to conduct *ad hoc* arbitration (optionally functioning under predetermined rules such as the UNCITRAL Rules of Arbitration)². DSM was not a controversial matter before the Lisbon Treaty in terms of ‘forum selection’, since states were competent to conclude investment treaties. BITs are traditionally considered to be state-level agreements, and states are generally eligible to adopt any sort of dispute settlement forum or method, should they desire and take the necessary steps in accordance with the international law.

In this regard, the EU is facing many new challenges that essentially originate from its legal character since it is not a state. This inevitably creates several questions such as the dispute resolution clauses that the new ‘EU BITs’ will contain: what are the possibilities for the EU and third states to resolve their disputes arising from these new BITs? Should these new BITs adopt a state-state DSM, or should there be an investor-state dispute mechanism? Should these BITs focus on an *ad hoc* method for arbitration, or should they include an arbitration mechanism through institutions? Can the EU, as a party of these BITs, apply for arbitration to, for instance, the ICSID? Can the UNCITRAL Rules of Arbitration be an alternative? Could parties assign Chambers of Commerce to administer *ad hoc* tribunals? Could there be new

¹ European Commission Memorandum of 7 July 2010. Q&A: Commission Launches Comprehensive European International Investment Policy.

² United Nations Conference on Trade and Development. 2003. Dispute Settlement: Investor-State, UNCTAD Series on Issues in International Investment Arrangements. United Nations. http://www.unctad.org/en/docs/iteiit30_en.pdf.

alternatives specifically for the EU BITs, given the EU's relatively different legal status (from a state or an international organization)?

It should be clarified that the discussion regarding the DSM to be implanted in new EU BITs is, legally speaking, far from being insurmountable since it is without a doubt that international actors can always choose one option or another, take necessary measures, conduct amendments to relevant international instruments and ultimately tackle these problems. Therefore, rather than merely observing what the options are, it is also imperative to mention what the preferences may or could be. In other words, whether or not the international actors, which are political entities, would agree to conduct these legal solutions is an important aspect of this topic. For example, is it true, as some scholars suggest, that the EU seems to be rather hesitant³ about the investor-state dispute mechanism when it is known to be the most effective investor protection mechanism?

In this context, this paper will firstly aim to provide a brief background of the effects of the Lisbon Treaty with regard to investment policy. Accordingly, following a discussion about the methods of dispute settlement this paper will observe both *ad hoc* and institutionalized arbitration systems in relation to investment disputes. Furthermore, the current dispute resolution mechanisms will be individually discussed and their compatibility with the EU will be inspected.

³ Reinisch, August. 2010. The Division of Powers between the EU and its Member States after Lisbon. *Internationaler Investitionsschutz und Europarecht*, edited by Marc Bungenberg, Jörn Briebel and Steffen Hindelang. Baden-Baden, Germany: Nomos Verlagsgesellschaft, pg. 99-110.

3 The Effects of the Lisbon Treaty on Investment Policy

3.1 Competence for Investment Policy before the Lisbon Treaty

The EU (before the Lisbon Treaty, the EC (or “the Community”)) did not practice an exclusive competence in the field of international investment before the Lisbon Treaty. Instead, the Member States and the EC shared the competence. There are two reasons for this shared competence: first, the Treaties did not provide for an explicit exclusive competence for the Community; and second, there was no implied exclusive competence, since none of the regulations and measures taken in accordance with those regulations expressed or implied such a competence for the EC⁴.

Before the Lisbon Treaty, the institutional and judicial practice was very different than what it will be in the future as the new exclusive EU competence shapes itself. First of all, with its Opinion 1/94⁵, the ECJ emphasized that the FDI activities involving third states could not be considered within the exclusive competence of the EC. There was a division in competence; for example, provisions covered by almost every BIT, such as expropriation and investment protection, were out of the EU’s competence, whereas it enjoyed the competence for market access and non-discrimination matters⁶. It was, therefore, technically impossible for the EU to take an exclusive initiative to negotiate and execute broad-scoped investment agreements. Within this scheme of competence, these agreements could only be negotiated conjointly. In the following years, the Member States and the EC in fact practiced this shared competence and concluded FTAs containing FDI provisions, such as the *EU – Chile Association Agreement*⁷. It is also important to underline that the dispute settlement clauses provided for in this agreement were of a state-state nature, given that negotiating an investor-state dispute settlement fell outside the competence of the EU⁸.

This lack of exclusive competence inevitably caused complications – not only because the competence was shared, but also because every Member State had a right to veto the FTAs that included investment chapters. This inevitably slowed down the ratification process of the FTAs, startled the third states and even decreased the credibility of those agreements in the eyes of European investors. Additionally, the content of the agreements were relatively narrower than what would normally be negotiated and executed by individual Member States. The European Commission, aware of this situation, remarked that “[...] EU agreements and achievements in the area of investment lag behind because of their narrow

⁴ Shan, Wenhua and Zhang, Sheng. 2011. The Treaty of Lisbon: Half Way toward a Common Investment Policy. *The European Journal of International Law*, Vol. 21, no. 4, pg. 1050.

⁵ European Court of Justice, Opinion 1/94, ECR I-5267, 15 November 1994.

⁶ Maybel, Niklas. 2007. The European Community’s Minimum Platform on Investment or the Trojan Horse of Investment Competence. *International Investment Law in Context*, edited by August Reinisch and Christina Knahr. Eleven International Publishing. Also see; Mola, Lorenza. 2008. Which Role for the EU in the Development of International Investment Law? Working Paper 26/08, Inaugural Conference, Geneva, 15 – 17 July 2008.

⁷ EU-Chile Association Agreement, O.J. 2002 L-352, 18 November 2002.

⁸ *Ibid*, Title VIII, Articles 181-188.

content. As a result, European investors are discriminated vis-à-vis their foreign competitors [...]”(sic).⁹

With regard to BITs, the competence belonged to the Member States to negotiate and execute them. BITs have a remarkable history of practice among the EU Member States. Germany has approximately 140 BITs, followed by the UK with around 120¹⁰. These BITs, *inter alia*, usually provide for an extensive definition of ‘investment’, include provisions for MFN, provide protection against expropriation and repatriation and establish a DSM. Since almost all Member States¹¹ are signatories of the ICSID Convention and are also eligible to refer to any other dispute settlement forum, there was little argument on the compatibility of DSMs at the state level. Investor protection, thus, was regulated and executed by the Member States themselves, and there was no EU interference in that matter. It is, of course, provided that those BITs executed by Member States do not violate EU law. Pursuant to Article 307 of the then EC Treaty¹², “[t]o the extent that [...] agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established.” In accordance with this article, such incompatibilities, if not eliminated, might lead to an additional obligation to terminate the BITs causing the violation¹³.

To sum up, prior to the Lisbon Treaty’s inclusion of FDI within the EU’s exclusive competence, the only possible interference from the EU regarding the execution of those existing BITs was within the context of Article 307 of the EC Treaty. It is, of course, very important to underline that the BITs that exist today were executed by the Member States before their accession to the Community, putting aside several exceptions.

3.2 Exclusive Competence for the Investment Policy and the Competence for Dispute Settlement after Lisbon

Following the entry into force of the Lisbon Treaty, FDI has been included in the area of the CCP as an exclusive EU competence¹⁴. Pursuant to Article 207 of the TFEU, “The [CCP] shall be based on uniform principles, particularly with regard to [...] foreign direct investment [...].” In line with the new exclusive competence, the European Commission proposed a regulation establishing transitional arrangements for BITs between Member States and third states (the “Regulation”)¹⁵. The need for transitional provisions mainly arise from the fact that BITs executed by the Member

⁹ European Commission Note for the Attention of the 133 Committee. Upgrading the EU Investment Policy. Brussels, 30 May 2006.

¹⁰ UNCTAD. Database, http://www.unctadxi.org/templates/docsearch____779.aspx.

¹¹ Poland is the only EU Member State that has not signed the ICSID Convention.

¹² Article 351, TFEU.

¹³ See, European Court of Justice, *Commission of the European Communities v. Republic of Austria*, Case C-205/06 [2009]; *Commission of the European Communities v. Kingdom of Sweden*, Case C-249/06 [2009] and *Commission of the European Communities v. Republic of Finland*, Case C-118/07 [2009].

¹⁴ Bungenberg, Marc. 2010. Going Global? The EU Common Commercial Policy After Lisbon. In *European Yearbook of International Economic Law 2010* edited by Christoph Herrmann and Jörg Philipp Terhechte. Springer: Berlin. Pp. 123 – 151.

¹⁵ Commission Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment treaties between Member States and third countries, COM(2010) 344, 2010/0197 (COD).

States will in fact remain in force, at least until the EU BITs replace them entirely in the future. Thus, this proposal aims to clarify the legal status of these national BITs. It “establishes the framework and conditions to empower Member States to enter into negotiations with a third country with a view to modifying an existing bilateral agreement relating to investment”.¹⁶

Nonetheless, it could be claimed that the exact scope of the EU competence, even though broader in comparison with the pre-Lisbon situation, is not precisely laid out. It is, however, clear that the new competence covers areas such as market access, post-establishment standards of treatment, performance requirements and investor-state dispute settlement provisions¹⁷. Since dispute settlement provisions are an exclusive competence of the EU (unless otherwise specified by the Treaties)¹⁸, the DSMs established by the future EU BITs (and/or any extensive trade agreement executed as a mixed agreement) will, in any case, function between the EU and third states. With its *Communication Towards a comprehensive European international investment policy*¹⁹, the Commission explicitly underlined the importance of a solid DSM. Examining the state-state and investor-state DSMs separately, the Commission ensures that future trade and investment agreements will cover state-state DSMs. As for the investor-state dispute settlement, the Commission is evidently well aware that the absence of a reliable investor-state DSM “would in fact discourage investors and make a host economy less attractive than others”²⁰. Therefore, it is very clear that the EU is intending to include an investor-state DSM for its future investment agreements.

¹⁶ *Ibid.*

¹⁷ Burgstaller, Markus. 2009. Vertical Allocation of Competences for Investment Treaties in the European Union, Asian International Economic Law Network (AIELN) Inaugural Conference, Tokyo, 12 June 2009.

¹⁸ European Court of Justice, Opinion 1/91, ECR I-6079 [1991].

¹⁹ Commission Communication towards a Comprehensive European International Investment Policy, COM(2010) 343.

²⁰ *Ibid.*

4 Available Dispute Resolution Mechanisms

4.1 Dispute Resolution through Amicable Settlement

Almost all, if not in fact all, international investment treaties have their own provisions as to how the dispute settlement procedure should function. It is true that the methods may vary one way or another, but a significant portion of these treaties have adopted the principle of the so-called ‘amicable dispute settlement’ as the first and compulsory step of dispute settlement. What is meant by this principle is that the parties shall first put their utmost efforts into resolving the problem amicably, without referring the case to a dispute settlement body such as an institution or an *ad hoc* arbitral tribunal. Should these amicable efforts fail to resolve the dispute, then the parties may or may not make recourse to the determined dispute settlement methods. In fact, even though it does have exceptions²¹, dispute settlement should normally be understood in a much wider context – the first step being the amicable settlement and the second being the dispute settlement through arbitration.

Amicable settlement can be conducted through various ways: the negotiations can be bilateral, through mediation or conciliation; basically any way that the parties see fit, as long as it resolves the dispute and it remains informal and between the parties. In fact, many of the relatively small disputes, at least in investment disputes within the scope of a BIT, can be easily tackled by such means. However, there might be some major disputes that parties fail to agree or compromise by amicable means. This is where the second step, or dispute settlement by arbitration, introduces itself.

4.2 Dispute Settlement through Arbitration

4.2.1 State-State Dispute Settlement

Traditionally speaking, the initial concept of dispute settlement in international law was limited to state-state dispute settlement, in which a dispute would be resolved between two conflicting states²². Private non-state actors were seen to entirely lack the capability of acting as an international law actor. Even though it was recently established, the WTO DSM²³ would pose as an example. It is only a state-state mechanism, where a private party is not directly entitled to file a case against a state on its own. The home state of such a private party, however, can file a case against the state that is allegedly in breach of a WTO rule. This system, even though significant, fails to provide a direct remedy for the private parties who are, in most cases, more directly affected by the breach than the state of the investor itself. Additionally, it is of course possible to file a case against the state at the tribunals or courts of the state concerned. This, however, is looked upon with suspicion by

²¹ Reed, Lucy, Paulsson, Jan and Blackaby, Nigel. 2011. *Guide to ICSID Arbitration*, Second Edition. Bedfordshire, United Kingdom: Kluwer Law International. *Also see*, Douglas, Zachary. 2009. *The International Law of Investment Claims*. Cambridge: Cambridge University Press.

²² *Supra* note 3, UNCTAD, 2003.

²³ As established by the Understanding on Rules and Procedures Governing the Settlement of Disputes. January 1995. http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

private parties, since the impartiality of the courts of a state can be rather untrustworthy when one of the parties is the state in dispute.

According to the UNCTAD, there are some reasons why state-state dispute settlement is not preferable for private investors. First of all, the decision whether or not the home state should act upon the request of the private investor belongs to the home state. Therefore, a state can decide not to bring any action against the host state, refusing to establish diplomatic protection. A state may wish to refrain from acting against the host state due to bigger international relations concerns. In connection with this, it should be underlined that even relatively small claims need the direct involvement and action of the state, making the smallest investor-state dispute a state-state dispute. It is also a situation undesired diplomatically and economically for both states and the investor. Assuming, conversely, that the home state agrees to bring an action against the host state, it is still far from being obliged to transfer the proceeds of the claim to the investor²⁴. In the case of international companies that may have established in more than one state, there are some outstanding hardships arising from the need to determine the nationality of the company (hence, the home state)²⁵.

A brief observation of the reasons listed above will justify why many investors have the tendency to refuse and stand clear of state-state dispute settlement, and why a more effective mechanism was needed. It was the increasing private involvement in economic life and the need for an impartial and direct dispute settlement that gave acceleration to the necessity to provide private parties with the entitlement to certain direct rights and protection, in case of disputes arising between them and the states they are conducting business transactions with and investing in.

4.2.2 Investor-State Dispute Settlement

As far as the drawback of the state-state DSMs are concerned, BITs are invaluable international tools providing reliable provisions for foreign investors for many decades. Under a BIT, the investor is protected against expropriation and repatriation, provided with a protection against discrimination, as well as an assurance of the MFN principle and national treatment are several examples that may be, by default, found in almost every BIT executed between states. Most BITs give the opportunity to an investor-state DSM.

Investor-state dispute settlement is also an accurate mechanism that encourages the investors to invest in a particular state. In addition to the reasons given above, bringing a dispute to the national courts of that state is not as reliable as dispute settlement through arbitration, which is expected to be relatively more objective than the national courts of a state that the investor is to take judicial action against. Therefore, an international arbitration mechanism in that sense is necessary and it is more than likely that the EU BITs will and should include an arbitration-based DSM.

Unlike what has been pointed out by some scholars, the EU in fact has expressed a willingness to include an investor-state DSM in its future BITs both in its Commission

²⁴ Jennings and Watts. 1992. *Oppenheim's International Law: Volume 1*. Harlow, Essex: Longman, 1992.

²⁵ *Supra* note 3, UNCTAD, 2003.

and Regulation proposals, as well as other various instruments throughout the last years²⁶. In the Commission *Communication*, the importance of investor-state dispute settlement is emphasized: “Investor-state dispute settlement [...] is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others. [...] [F]uture EU agreements including investment protection should include investor-state dispute settlement.”²⁷

It is apparent that the question of what the EU BITs would include within this investor-state DSM needs a fulfilling answer. As we will specifically focus on below, there are several possibilities that the EU BITs could theoretically include as these possibilities stand as of today, and there are some that could be utilized in the future. The reason underlying this point is important: some of the most important and widely utilized mechanisms established and currently functioning are not compatible with the legal identity of the EU. To illustrate and point out the most controversial subject, the ICSID Convention can only be signed by the Member States of the World Bank or parties of the Statute of the International Court of Justice. The EU is not a state and, in any case, does not qualify for these options²⁸. Whether or not that automatically removes the possibility of the EU BITs being able to contain ICSID arbitration should be clarified. A variety of other institutional arbitration alternatives, as well as *ad hoc* arbitral tribunal mechanisms will also be inspected.

4.2.2.1 Dispute Settlement through Ad Hoc Arbitration

Ad hoc arbitration refers to arbitration by which disputes arising between two parties, in our case from investment disputes, are settled by the parties through arbitral tribunals established by them. In other words, parties of a BIT may agree to settle the disputes arising from their investment relations through arbitration by a tribunal containing arbitrators chosen by them; governed by rules determined by the parties, usually via the arbitrators appointed. Thus, overall, the parties are responsible for selecting the arbitrators, the procedure and the administrative support²⁹. The agreement between the parties is considered to be the basis of jurisdiction and composition of an arbitral tribunal³⁰.

Such flexibility and freedom of choice granted to the parties within an *ad hoc* arbitration context naturally have its drawbacks. First of all, since the basis of the arbitration depends on the agreement concluded between the parties, the bargaining power and therefore the content of the agreement might place one of the parties on a higher ground³¹. This situation will inevitably affect the arbitration principles adopted. Such risk may damage the credibility of arbitration and may cause grave consequences, given that the decisions given by these arbitral tribunals are final. Another problem with the *ad hoc* tribunals is that deciding on the nature of the dispute, the applicable law and the procedure might take a long time, especially if the dispute is grave and is considered to be crucial by the parties. Selection of

²⁶ *Supra* note 4, Reinisch, 2010; *supra* note 2, Commission Memorandum, 2010.

²⁷ *Supra* note 20, Commission Communication COM (2010) 343.

²⁸ *Ibid.*

²⁹ *Supra* note 3, UNCTAD, 2003.

³⁰ Sutton, D; Kendall, J and Gill, Judith. 1997. Russell on Arbitration, Twenty-First Edition. London: Sweet & Maxwell, pg. 109 - 175.

³¹ *Supra* note 3, UNCTAD, 2003.

arbitrators, too, is known to be challenging since they are appointed by the parties. An arbitrator appointed by one of the parties might be considered unreliable by the other party, since the judicial behaviour of the arbitrators might be considered as 'advocating' of the parties rather than dispute settlers³².

Parties, of course, always have the alternative of choosing various methods of institutional arbitration (provided that they fulfill the preconditions). In any case, current *ad hoc* arbitration practice is mostly based on uniform rules. Appointment of arbitrators, pursuant to most BITs, is still conducted by the parties; but there are several predetermined sets of rules for the disposal of parties to be used for an investment dispute. The utilization of these rules, however, depends entirely on the parties as they are free not to include them in their agreements.

In the following subsections, we will examine some of the most commonly used *ad hoc* arbitration mechanisms such as UNCITRAL Rules of Arbitration and the Permanent Court of Arbitration and envisage their compatibility for future EU BITs.

A. UNCITRAL Rules of Arbitration

UNCITRAL acts as the legal body of the UN in the field of international trade law since its establishment and is conducting its work in various fields, *inter alia*, international arbitration related to international trade law. In 1976, UNCITRAL published its Rules of Arbitration³³. By their nature, the Rules of Arbitration are not limited to any specific type of commercial dispute but extend their scope to practically any commercial dispute, therefore including investment disputes.

Rules of Arbitration can be used both in *ad hoc* arbitrations and administered arbitrations, but the majority of the cases in which UNCITRAL Rules were used are *ad hoc* arbitrations; especially where the parties have agreed to submit disputes to arbitration under these rules³⁴. In the last three decades, these rules are consistently being referred to in BITs, as well as multilateral investment treaties. Along with the ICSID, UNCITRAL is one of the DSMs that are most commonly referred to for investment disputes. According to a UNCTAD report published in 2010, out of 357 known disputes, 225 were submitted to ICSID, whereas 91 of them were settled under UNCITRAL Rules³⁵.

The Rules of Arbitration have been thoroughly reviewed from 2006 to 2010 by a specialist Working Group on International Arbitration. On 25 June 2010, the final text of the revised Rules of Arbitration (hereinafter "2010 Rules") was adopted. Currently, the 2010 Rules are in force and shall apply to future dispute settlement cases where UNCITRAL Rules are referred to.

³² *Ibid.*

³³ United Nations Commission on International Trade Law Arbitration Rules. UN General Assembly Resolution 31/98, 28 April 1976.

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html.

³⁴ Levine, Judith. 2011. Navigating the Parallel Universe of Investor-State Arbitrations under the UNCITRAL Rules. In *Evolution in Investment Treaty Law and Arbitration* edited by Chester Brown and Kate Miles. Cambridge: Cambridge University Press.

³⁵ UNCTAD. 2011. Latest Developments in Investor-State Dispute Settlement, IIA Issues Note No. 1. UNCTAD/WEB/DIAE/IA/2010/3. http://www.unctad.org/en/docs/webdiaeia20103_en.pdf.

- Eligibility: Can the EU use UNCITRAL rules?

The first and foremost question to be answered is the question of eligibility. In other words, a clarification as to who can refer to these rules in their agreements, and by whom these rules can be used is necessary. Pursuant to Article 1 (1) of the 2010 Rules: “Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the [Arbitration Rules], then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.”

First of all, in comparison to the previous version of the Rules, the scope of the article has been remarkably broadened: pursuant to previous Article 1, a written reference was required³⁶ for the parties to refer to the Rules. Now however, within the defined legal relationship of the parties, a reference to UNCITRAL Rules can be made - contract-based or not. This definitely encompasses the investor-state disputes arising from a treaty, but now is not limited to them³⁷. Second, and probably the most important fact is, as is the case for both the 2010 Rules and the original Rules of Arbitration, parties who are eligible to refer to the UNCITRAL Rules have not been limited to any specific type: it can be the states, international organizations or the private actors possessing the right to bring a claim pursuant to international law. The wording of the Rules only refers to ‘parties’, opening a way for this interpretation. Additionally, there are no limits whatsoever based on nationality.

Within the EU context, the eligibility to refer to UNCITRAL Rules surprisingly seems to be a source of misinterpretation, especially for specific institutions of the Union. Following the Regulation proposal and the *Communication* of the Commission, the European Parliament prepared two resolutions³⁸ with a reference to investment policy to establish its position. With its resolution dated 6 May 2011, the Parliament states the following: “The European Parliament [...] [i]s aware that the EU cannot use existing [ICSID] and [UNCITRAL] dispute settlement mechanisms since the EU as such is a member of neither organization; calls on the EU to include a chapter on dispute settlement in each new EU investment treaty in line with reforms suggested in [the] resolution [...]”³⁹

It would not be wrong to say that the resolution reflects an unexpected point of view in terms of eligibility of UNCITRAL Rules of Arbitration. According to the Parliament, since the EU is not “a member of [UNCITRAL]” it is not able to use the Rules of Arbitration. The Commission, however, sets its focus almost exclusively on the problems arising due to the current ICSID Convention and

³⁶ Supra note 34, UNCITRAL Arbitration Rules, 1976.

³⁷ Supra note 35, Levine, 2011.

³⁸ Resolution 2010/2203(INI) of the European Parliament of 6 May 2011 on the Future European International Investment Policy, and Resolution 2010/0197 (COD) of the European Parliament of 10 May 2011 on the Proposal for a Regulation of the European Parliament and of the Council Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries.

³⁹ *Ibid*, 2010/2203(INI) of the European Parliament of 6 May 2011.

the EU's eligibility to ICSID with various instruments, including the Regulation proposal and its *Communication*⁴⁰. There are only few public references to UNCITRAL by the Commission, and practically none regarding the incompatibility of this particular DSM.

It is hard to determine why and how the Parliament came to the conclusion that being a member of UNCITRAL is a pre-requisite to be able to use the UNCITRAL rules, and we strongly disagree with this outcome of the Resolution dated 6 May 2011 in that regard. Indeed, given the legal context of the UNCITRAL Rules of Arbitration, we are convinced there are no restrictions whatsoever, at least as far as the EU is concerned, with regard to using these rules and including them in future EU BITs. This was also underlined by several scholars⁴¹. Additionally, UNCITRAL very expressly finalized the argument on this issue of compatibility, stating that “[n]othing in the Rules limits their use to nationals of States which are Member States of the Commission.”⁴² Therefore, the EU is entitled to use the Rules of Arbitration if it wishes so.

- Outcome: Can (or should) the UNCITRAL Rules of Arbitration be used?

As was pointed to above, the EU is without doubt legally eligible to use the UNCITRAL Rules of Arbitration within the legal *status quo*. The Rules of Arbitration provide for an extensive and accurate procedural framework, despite the current gaps and criticism directed to several aspects of UNCITRAL arbitration⁴³.

The question of capability should be accompanied with the question of preferability: why should the EU include the UNCITRAL Rules of Arbitration? The answer to this question is simple, because currently UNCITRAL stands as the best alternative. UNCITRAL is the second most common method used, including by the Member States within the provisions of their national BITs. Even though an extensive inspection will be provided below, it is sufficient to say at this stage that, since the EU is unable to use ICSID arbitration pursuant to the current provisions on eligibility, it seems to us that UNCITRAL should, at least in a transitional manner, be used until the provisional obstacles are overcome with the ICSID arbitration. Following a resolution, UNCITRAL can always be preserved as an alternative option.

⁴⁰ *Supra* notes 16 and 20, the Regulation Proposal COM(2010) 344, 2010/0197 (COD) and the Commission Communication COM(2010) 343.

⁴¹ *Supra* note 5, Shan and Zhang, 2011.

⁴² UNCITRAL. FAQ – UNCITRAL and Private Disputes /Litigation.
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html

⁴³ *Supra* note 35, Levine, 2011.

B. *Optional Rules for Arbitrating Disputes of the PCA and a Comparative Approach to the UNCITRAL and the PCA*

The PCA offers a permanent framework for arbitral tribunals established to resolve specific disputes⁴⁴. Under the PCA, there are several sets of rules of procedure depending on the notion of the parties or the nature of the dispute: for instance, a set of rules regulate the dispute settlement between two states⁴⁵ whereas another set regulates the disputes between two parties of which only one is a state.⁴⁶ As for the investment disputes and investor-state dispute settlement, however, one needs to focus on the optional rules for two parties of which at least one of the parties is a private entity, since the others regulate different disputes and procedures (such as rules regulating disputes between two states or an international organization and a state).

The PCA rules offer a similar framework with UNCITRAL for the conduct of arbitration between a state and a private party. The main difference between UNCITRAL and PCA is that PCA offers an (limited) institutional support by the IBPC, however the nature of the support is administrative. This limitation prevents the PCA from being a “fully-fledged institutional system of arbitration, but [it] offers parties an *ad hoc* arbitration to use as the arbitration agreement between them.”⁴⁷

The UNCITRAL Rules of Arbitration, furthermore, clearly refer to the PCA under several of its provisions, and states that parties to the dispute can appoint the Secretary-General of PCA as an appointing authority of arbitrators, should they desire to do so. In any case, if the parties fail to appoint arbitrators within thirty days, any party is free to refer to the Secretary-General to appoint the arbitrators⁴⁸. It can be seen from this provision that the administrative support provided by the PCA is in fact acknowledged by the Rules of Arbitration. As was mentioned in the previous section, the administrative (or, in general, institutional) support is what UNCITRAL lacks, and such a relationship between UNCITRAL rules and the Permanent Court helps both systems to complement each other.

It is not only the Rules of Procedure that make a cross-reference, since it has been stated that the PCA have “adopted and adapted the UNCITRAL Rules.”⁴⁹ In fact, the Introduction of Optional Rules of the PCA expressly refers to the UNCITRAL Rules of Arbitration. The reference also marks the main differences between the two: These Rules supersede the ‘1962 Rules of Arbitration and Conciliation for Settlement of International Disputes between Two Parties of Which Only One Is a State.’ The Rules are based on the UNCITRAL Arbitration Rules [...].⁵⁰

⁴⁴ Permanent Court of Arbitration. Structure, http://www.pca-cpa.org/showpage.asp?pag_id=1039.

⁴⁵ Permanent Court of Arbitration. Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, <http://www.pca-cpa.org/upload/files/2STATENG.pdf>.

⁴⁶ *Ibid.* Permanent Court of Arbitration Optional Rules for Arbitration Disputes between Two Parties of Which Only One is a State, <http://www.pca-cpa.org/upload/files/1STATENG.pdf>. This set of rules will be hereinafter referred to as “Optional Rules”.

⁴⁷ *Supra* note 3, UNCTAD 2003.

⁴⁸ UNCITRAL Rules, 2010.

⁴⁹ *Supra* note 35, Levine, 2011.

⁵⁰ *Supra* note 46, PCA Optional Rules for Two States.

Besides the comparison provided above, PCA and UNCITRAL systems also have a relationship when considered together as a single entity. The PCA is known to have administered many cases under the UNCITRAL Rules of Arbitration, and the number of cases administered is gradually increasing⁵¹.

Due to its almost identical nature to the UNCITRAL Rules of Arbitration, whether or not the Optional Rules of the PCA should be provided as an option under the BITs does not stand as a prominent question to be tackled in order to construct a DSM. In our opinion, the real focus with regard to PCA should be on the administrative support it provides for *ad hoc* arbitral tribunals.

Administrative support through the PCA's International Bureau provides various advantages on different matters such as cost reduction, lightening the burden of arbitrators in terms of administrative tasks, providing support, running the case and managing the deposits. The PCA also benefits from qualified staff, particularly experienced in the matters handled by the arbitral tribunals within the PCA administration⁵². Such administrative assistance, without doubt, would benefit the investors and the states (or the EU) to hasten the process.

To finalize, we consider the PCA to be an additional administrative mechanism that could be attached to a possible *ad hoc* arbitration clause in the future EU BITs, to strengthen the reliability of *ad hoc* arbitration. Even though the EU is not a party to any of the PCA founding conventions⁵³; the PCA does not limit its scope only to states as is evident from the numerous optional rules designated to cover different parties. Yet whether the EU would be considered as a 'state' or an 'international organization' is a crucial question that needs answering, because the optional rules for international organizations and private parties, as well as the optional rules for international organizations and states define the international organization as an 'intergovernmental organization'⁵⁴. The EU, alternatively, forms a "*supranational union*" in principle⁵⁵. Should this question find its answer in the affirmative, such administrative and institutional support would be beneficial for the future *ad hoc* tribunals where the EU or a European investor is a party.

C. Arbitration Institute of Stockholm Chamber of Commerce

The AISCC (or "the Institute") was established in 1917 as an independent section of the Stockholm Chamber of Commerce and is among the most commonly used investment DSMs. Very similar to the PCA, AISCC provides for administrative support and arbitration.

With regard to the eligibility of AISCC, the Institute does not provide different sets of arbitration based on legal personality. That is to say, the rules (and/or administrative

⁵¹ In 2005, there were only 8 cases based on BITs and Multilateral Investment Treaties known that have been administered by the PCA according to UNCITRAL rules. This number increased to 38 in 2010. See Levine, 2011.

⁵² *Supra* note 35, Levine, 2011, pg. 384.

⁵³ Convention for the Pacific Settlement of International Disputes and 1907 Convention for the Pacific Settlement of International Disputes, 1899.

⁵⁴ *Supra* note 47, PCA Optional Rules for International Organizations and States.

⁵⁵ Kiljunen, Kimmo. 2004. The European Constitution in the Making. The Center for European Policy Studies. Brussels: CEPS.

support) are applicable to any dispute as long as parties agree to include AISCC in their investment agreement, whether they are states or other international legal actors. Parallel to this uniformity of rules, the Rules of Arbitration of the Institute only refer to 'parties', avoiding mentioning terms such as 'state', 'international organization' or other possible international actors that may execute such investment agreements, thus making it eligible for any party in so far as they are parties to an agreement from which disputes arise⁵⁶.

D. The International Court of Arbitration (ICA) of the ICC

The ICC Court of Arbitration was first established in 1923, which was then renamed the International Court of Arbitration in 1989⁵⁷.

The framework provided by the ICA does not differ from the PCA or the AISCC to a large extent. According to Article 1 of the Rules of Arbitration, the "[ICA] does not itself resolve disputes" but it merely administers arbitrations. It should also be mentioned point that the administrative support provided by the ICA is conducted only pursuant to the ICC Rules of Arbitration; therefore the administration and the set of rules provided there within are attached together⁵⁸.

Any 'party' that has "agreed to submit to arbitration under the Rules" may benefit from the ICC system⁵⁹. ICC, like AISCC, avoids limiting the arbitration mechanism to the disposal of states or any other certain international actor. This eventually means that ICC Arbitration is a viable option for the future EU BITs, provided that parties (of a future EU BIT) agree to submit their disputes to the ICC.

4.2.2.2 Dispute Settlement through Institutional Arbitration: The ICSID

Besides the *ad hoc* arbitration and the alternatives provided under its scope, the other way around the investor-state dispute settlement through arbitration passes through the institutions. Under this system of dispute settlement, the dispute is in principle submitted to an institution handling both the administrative and judicial proceedings in accordance with its constitutive instrument. Therefore, the institution referred to in case of a dispute will not merely support the arbitral proceedings in an administrative standpoint but will in fact conduct the judgment as well.

Institutional arbitration is assumed to be a more reliable means of dispute resolution in comparison with the *ad hoc* system⁶⁰, for the institution which the case is referred to is in charge of most of the initiatives granted to the parties under an *ad hoc* arbitral tribunal. This inevitably means less flexibility and therefore a relatively smaller role for the influence of bargaining powers of parties playing a role and giving higher ground to one of them in the process. Another interesting point connected to this outcome is that since institutional arbitration is likely to have been

⁵⁶ Article 1 of the Rules of Arbitration of the AISCC.

⁵⁷ Derains, Yves and Schwartz, Eric A. 2005. A Guide to the ICC Rules of Arbitration. The Netherlands: Kluwer Law International.

⁵⁸ International Chamber of Commerce, International Court of Arbitration. Introduction to Arbitration – ICC arbitration – distinctive features, <http://www.iccwbo.org/court/arbitration/id4089/index.html>.

⁵⁹ Article 6 (1), Rules of Arbitration of ICC.

⁶⁰ *Supra* note 3, UNCTAD, 2003, pg. 14.

constructed upon a multilateral instrument (ie, the ICSID Convention for ICSID arbitration), a greater sensitivity to the interests of developing countries may be shown⁶¹.

Statistically speaking, institutionalized arbitration has a clear dominance over *ad hoc* arbitration. Namely the ICSID, the only institutionalized arbitration mechanism, had almost as many cases as was handled by the rest of the DSMs in 2010, and when the cases resolved by the Chambers of Commerce is added to this number⁶², little effort is needed to figure out what the most favoured method is for the parties in terms of investor-state dispute settlement. Despite these figures may vary from year to year⁶³, the fact that institutional arbitration is always a common preference stands unchanging.

From an EU perspective, the institutional arbitration stands as the focal point and the most controversial discussion which needs to be tackled. The following subsections will examine ICSID Arbitration in detail and inspect its compatibility, as well as other problems associated with institutional arbitration.

A. An Overview of ICSID Arbitration

The initial steps for the ICSID (or the Centre) were taken in 1961, which led to the creation of the OECD Draft Convention on the Protection of Foreign Property. The idea which engulfed the purpose of the entire process was that the parties, even though with certain divergences in thought, believed that “the best way to provide satisfactory legal infrastructure for the promotion of international private investment flows would be providing effective procedures for impartial settlement of disputes rather than by seeking multilateral agreement on the establishment of general substantive standards.”⁶⁴

Over the years, the initiative turned into a global one and on 18 March 1965, the ICSID Convention was opened for signature and ratification. It became operational on 14 October 1966⁶⁵. As of 2012, the ICSID Convention has 158 signatories⁶⁶.

Structurally, there are several reasons that make the ICSID stand aside from the rest of the systems developed to provide an alternative to dispute settlement. First of all, the ICSID forms the first and only institutional DSM designated specifically for disputes arising from investment protection and promotion agreements⁶⁷. Furthermore, the ICSID conducts the judgments and the administrative procedures, unlike the models under *ad hoc* arbitration.

⁶¹ *Ibid.*

⁶² *Supra* note 36, UNCTAD, 2011.

⁶³ See Peterson, Luke. 2006. Investment Treaty News: 2006 – A year in review.

http://www.iisd.org/pdf/2007/itn_year_review_2006.pdf.

⁶⁴ Schreuer, Malintoppi, Reinisch and Sinclair. 2009. The ICSID Convention - A Commentary, Second Edition. Cambridge: Cambridge University Press.

⁶⁵ ICSID. About ICSID,

http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home.

⁶⁶ South Sudan has ratified the agreement on 20 April 2012. See ICSID. 2012. South Sudan Signs and Ratifies to ICSID Convention.

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&pageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement105>.

⁶⁷ *Supra* note 3, UNCTAD, 2003, pg. 36.

Within the context of a general framework, another feature of ICSID arbitration worth attention is the matter of jurisdiction. The ICSID Convention has substantive rules that strengthen the juridical presence of the Centre. The Convention states that “[c]onsent of the parties to arbitration under [the ICSID] Convention shall [...] be deemed consent to such arbitration to the exclusion of any other remedy”⁶⁸, which means that once parties accept ICSID jurisdiction, any other remedy becomes automatically unavailable, including diplomatic protection⁶⁹. It should also be noted that once parties give consent to ICSID arbitration, they will not be able to withdraw their consent unilaterally⁷⁰.

B. The Issue of Eligibility

Given that the ICSID officially stands as the most commonly used dispute settlement system with a structure particularly designated for investment disputes, solid arbitration jurisprudence and a remarkable international reputation, it would be surprising for competent authorities not to consider including it as an alternative for a DSM. This is very much the case for the EU – in the current international legal framework, the ICSID could undoubtedly be considered as a necessary addition to a future EU BIT. After all, EU BITs are expected to provide investor protection at least at the level of Member States’ BITs, so that the investors would not lose any protection they have possessed within the context of national BITs. What the EU BITs should additionally do is to improve this credibility and protection; therefore not including the ICSID (at least in the draft agreement) could hardly be justified.

This may be the logical outcome – however, the matter goes beyond logic. Article 67 of the ICSID Convention states that the “Convention shall be open for signature on behalf of States members of the [World] Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of International Court of Justice [...]”⁷¹ The situation is multi-layered: the Convention can be signed by a ‘state’, and this state has to be a member of the World Bank or the signatory of the Statute of International Court of Justice.

Examining this requirement from the EU’s perspective brings about several problems. First of all, the EU is not a state. Its functions, activities and competences are based on the principle of conferral⁷² and not a notion of sovereignty, despite the deceiving similarities it has with a state⁷³. Additionally, becoming a member of the World Bank, pursuant to the IBRD Articles of Agreement, requires the membership of the IMF in advance⁷⁴. This therefore makes reference to the Agreement of the International Monetary Fund (“IMF Agreement”), which under Article II, provides membership only for states⁷⁵. The EU, currently, is not a signatory of the Statute of

⁶⁸ Article 26, ICSID Convention.

⁶⁹ *Ibid.*

⁷⁰ Article 25, ICSID Convention.

⁷¹ Article 67, ICSID Convention.

⁷² Article 3 of the Treaty of the European Union. Also see Mathijsen, Pierre. 2010. *A Guide to European Law*, Tenth Edition. London, UK: Sweet & Maxwell. pg. 28.

⁷³ For an article in relation to the definition of a “state”, Craven, Matthew. 2010. *Statehood, Self-determination and Recognition*. In *International Law* edited by Malcolm D. Evans, Third Edition. Oxford: Oxford University Press, pg. 204 – 251.

⁷⁴ Article II, Section 1(b) Articles of Agreement of the International Bank of Reconstruction and Development (IBRD).

⁷⁵ Article II, Section 2, Articles of Agreement of the International Monetary Fund.

International Court of Justice either. Therefore, this means that the EU is not eligible to become a signatory of the ICSID Convention, since the participation of a 'regional association' is not possible⁷⁶.

Eventually, the practical consequence of this legal situation is that even if the EU includes an ICSID Arbitration clause to its future EU BITs, an asymmetrical situation will arise concerning the protection of investors. That is to say, whereas a European investor will be able to bring a claim against the third state at the ICSID (provided that the third state is a member of the ICSID), a foreign investor will not be able to bring a claim against the EU⁷⁷. Under such circumstances, it is not hard to predict that no third state would willingly accept the inclusion of an ICSID provision in a prospective BIT executed with the EU.

C. Negotiating a Compatible ICSID Convention

The impossibility of including the ICSID in a future EU BIT has been constantly highlighted by many scholars⁷⁸, and it was further underlined that if there is any possibility for the ICSID to be included in such a BIT, the only possible method of doing so is to amend the ICSID Convention in such a way that it can also cover the possibility of a non-state actor (for instance, an international organization) becoming a party to the ICSID. Whereas it is considered to be a minor problem by some⁷⁹, another group of scholars consider it to be unlikely⁸⁰.

Theoretically, the ICSID Convention is in fact eligible for revision. Article 65 of the ICSID Convention states that "any Contracting State may propose amendment of [ICSID] Convention"⁸¹, and Article 66 further provides that "[...]each amendment shall enter into force [...] after [...] all Contracting States have ratified, accepted or approved the amendment."⁸² As is apparent, the only possible way to amend an ICSID Convention provision is a unanimous ratification by all members. Given the vast number of contracting parties of the Convention and combining the duration of the negotiations for amendment and the duration for ratification of all members, this process is likely to take years, if not decades. Furthermore, this is of course provided that all contracting parties in fact agree to such an amendment. Therefore, it could be argued that the theoretical possibility is obstructed by a practical impossibility.

To further the challenge it should be recalled that, in addition to being a state, being a member of the World Bank is also relevant to accede to the ICSID Convention. Therefore, since the membership of the World Bank sets the pre-requisite of being a signatory of the IMF Agreement, the EU either might have to promote an amendment to this agreement as well⁸³, or will have to propose an amendment to the ICSID

⁷⁶ Braun, Tillmann Rudolf. 2010. For a Complementary European Investment Protection in European Yearbook of International and Economic Law, edited by Marc Bungenberg, Jörn Griebel and Steffen Hindelang. Berlin: Springer Heidelberg Dordrecht, pg. 102; also *supra* note 7, Mola, 2008.

⁷⁷ *Ibid.*

⁷⁸ *Ibid*; *supra* note 4, Reinisch, 2010.

⁷⁹ *Supra* note 5, Shan and Zhang, 2011.

⁸⁰ *Supra* note 3, Reinisch, 2010.

⁸¹ Article 65, ICSID Convention.

⁸² Article 66, ICSID Convention.

⁸³ Bungenberg, Marc. 2008. Centralizing European BIT Making under the Lisbon Treaty. Biennial Interest Group Conference, Washington D.C., 13 - 15 November 2008.

Convention including the removal of the pre-requisite of being a member of the World Bank, which is, immensely challenging.

Of course, to claim that the amendment process should not even be initiated would be an utterly pessimistic approach to the matter. Instead, the EU should set its position and work by commencing the procedure through its Member States that are parties to the Convention, promoting the abovementioned amendment nonetheless.

D. ICSID Additional Facility

In addition to the ICSID Convention, another set of rules under the name the ICSID Additional Facility Rules were adopted in order to administer a certain group of proceedings that fall out of the Convention's scope⁸⁴. Pursuant to Article 2(a) of the Additional Facility Rules, the Secretariat of ICSID has been granted authority to administer the investor-state dispute settlement proceedings in the case of "conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State"⁸⁵.

Therefore, the provision covers disputes arising between a state which is not a party to the ICSID Convention and an investor national of a party state, or between a state party to the ICSID Convention and an investor national of a non-party state. Parallel to the ICSID Convention, the Additional Facility Rules follow the state-oriented approach in its definitions. Therefore in the current legal framework, the EU falls out of the scope of the Additional Facility Rules despite the fact that it matches the 'non-member' criteria.

However, the Additional Facility Rules are much more viable for the EU in the absence of ICSID Arbitration within the scope of the Convention. The primary reason is that the amendment procedure for the Additional Facility Rules is in fact practically possible for the EU. According to Article 6 of the ICSID Convention, the adoption of the rules of procedure shall be conducted "by a majority of two-thirds of the members of the Administrative Council."⁸⁶ In comparison with the amendment procedure laid out by the Convention provisions, the adoption of rules of procedure is relatively simple, thus practically more achievable for the EU. Therefore, we believe that the following the amendment of these Additional Facility Rules the EU can in fact include them in its future BITs as a dispute settlement alternative since the necessity of becoming a party of the ICSID Convention will no longer pose an obstacle for the EU.

⁸⁴ ICSID. ICSID Dispute Settlement Facilities.

http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&romPage=Dispute%20Settlement%20Facilities&pageName=Disp_settl_facilities

⁸⁵ Article 2, ICSID Additional Facility Rules. Article 2 additionally covers disputes that do not arise directly from investment disputes between the aforementioned parties, and fact-finding proceedings under sub-paragraphs 2(b) and (c).

⁸⁶ Article 6, ICSID Convention.

E. Outcome

The controversy that the ICSID Convention has caused with regard to the future EU BITs is already a fiercely debated topic, for it is possible to come across direct and indirect references to the matter in the relevant academic doctrine. As pointed out above, the hardships caused by the conditions put forward by the ICSID Convention are quite challenging to tackle. The amendment procedure is to take a long time, and it is not even granted that after working on such an initiative for a remarkable period, the amendment will actually take place.

There is no debate on the matter that the ICSID is currently unavailable for the EU. However, there is no reason why the amendment process should not be launched in order to provide an ICSID Convention inclusion in the long run. There is no urgency to include ICSID Arbitration (pursuant to the Convention) at the moment, and the ICSID provides for additional provisions that can be utilized with relatively easy amendments. The EU can simultaneously pursue the revision of those rules along with the ICSID Convention amendment in order to provide (at least) a transitional institutional DSM.

5 Dispute Settlement Mechanisms of the Member State BITs

BITs are intended to promote and protect investment in the contracting country by the counterparty investor⁸⁷, even though a particular examination is necessary to fully comprehend the scope and intention of each. BITs have been actively exercised by the Member States for many decades. Germany was the first-ever state to execute a BIT in the world⁸⁸. As of today, Member States of the EU have executed and concluded approximately 1,300 BITs including intra and extra-EU BITs.

In connection with the discussion regarding the prospective DSMs for the new EU BITs, we consider it appropriate to continue our analysis of alternatives for a DSM in the future EU BITs with a close examination of the current prominent model BITs in Europe. It is further foreseeable that during the preparation of the EU BIT draft, the model BITs used by prominent Member States of the EU such as Germany, France and the UK will influence the negotiations to a certain extent. In fact, it is well-known that the models used by the European states, to various extents, reflect the Germany – Pakistan BIT⁸⁹. It is therefore very important to investigate these model BITs to have a more concrete picture of what the future EU BITs would resemble.

5.1 Common Features and Differences of German⁹⁰, French⁹¹ and British⁹² BIT Models

When the model clauses are observed, the similarities are in fact express. The differences, even though minor, do exist – however they do not reflect in its entirety a wholly different tradition of dispute settlement practice. It could be claimed that these facts indicate a similar, if not almost unified, practice of DSMs in the pre-Lisbon situation. The level of proximity depends on state-state or investor-state dispute settlement: the former forms a more uniform practice whereas the latter proves to be more diverse.

For the state-state dispute settlement, three major European systems follow an identical, two-layer system including an amicable settlement and the establishment of an *ad hoc* arbitral tribunal, should diplomatic attempts fail to resolve the dispute. It should be noted that this is not exclusive to the model BITs of Germany, France and the UK as this applies to almost all BITs executed by Member States.

One difference between the German and French Model BITs on state-state dispute settlement is that the role granted to the President of the ICJ by the German BIT is granted to the Secretary-General of the UN by the French BIT. The article reads: “If

⁸⁷ Sarisoy Guerin, Selen. 2010. Do the European Union’s Bilateral Investment Treaties Matter? The Way Forward After Lisbon. Working Document No. 333. Brussels, Belgium: Centre for European Policy Studies.

⁸⁸ Agreement between the Federal Republic of Germany and the Islamic Republic Pakistan concerning the Reciprocal Promotion and Protection of Investments, 25 November 1959.

⁸⁹ Bernasconi-Osterwalder, Nathalie. 2010. European Parliament Hearing on Foreign Direct Investment, Foreign Investment for Sustainable Development Program, International Institute for Sustainable Development. <http://www.iisd.org/publications/pub.aspx?pno=1365>.

⁹⁰ 2008 German Model BIT. <http://italaw.com/documents/2008-GermanModelBIT.doc>.

⁹¹ 2006 French Model BIT. <http://italaw.com/documents/ModelTreatyFrance2006.pdf>.

⁹² *Supra* note 22, Douglas, 2009.

the periods specified [...] have not been met, either Contracting Party [...] shall invite the Secretary-General of the United Nations Organization to make the necessary appointments.” As for the UK Model, regarding the establishment of an *ad hoc* tribunal in case of diplomatic negotiations failing to end the dispute, German and UK Models overlap almost entirely.

Investor-state DSMs, however, are not as uniform as the state-state mechanism. In connection with the amicable settlement, the wording in the French BIT hints at a stronger necessity than the German BIT, since the former model states that parties “shall” settle, whereas the latter states that parties “should as far as possible” settle. This difference in wording, in this case, does not make a significant practical difference; but it is also very likely that the latter wording might be interpreted that the amicable settlement phase can be skipped. Concerning the duration of the amicable settlement, two differences between the German and the French Models should be underlined. First, the French Model allows both parties of the dispute to apply for arbitration. The German Model only allows the investor to submit the dispute to arbitration, giving a significant advantage to the investor. The second difference is that the French Model does not, like its German counterpart, give a variety of choices of institutional or *ad hoc* arbitration to parties; the only defined mechanism that can be used is the ICSID arbitration pursuant to the second paragraph of Article 7 of the French Model BIT. The alternatives to be provided in the case of the other state not being a party to the ICSID Convention are therefore vague.

The UK Model BIT has a relatively different structure than the German and French Models. The first variation of the UK Model in fact includes the written consent of the parties to submit the dispute to the ICSID, unlike the French and German Models. Furthermore, the UK Model states that after failing to resolve the dispute on a national level through local remedies, either of the parties may submit to the ICSID for conciliation or an arbitration procedure. Conciliation here is provided as an alternative to arbitration on the same phase. The German and French Models, conversely, usually provide conciliation as the first, introductory phase in dispute settlement. The second version of Article 8 reflects the resemblance of the UK Model to other dispute settlement clauses used in different model BITs. However, unlike the French and German Models, the period set for amicable settlement is three months.

5.2 National Models in the Context of Future EU BIT Dispute Settlement Clauses

It can be claimed that the abovementioned analysis partially sheds some light to what a common EU BIT dispute settlement clause would resemble, however, further deduction is necessary in order to come up with a tangible outcome. As was illustrated above, ICSID Arbitration, at least currently, is not an option for the EU to include in its BITs – whereas it has been further emphasized that it forms the main dispute settlement alternative in all of the model BITs above. As for the other alternatives provided under these model BITs discussed (UNCITRAL, PCA, ICC and AISCC) such controversy does not exist, and therefore such specific examination might not be necessary. However, before tackling the legal blockade that the ICSID has put in front of the DSMs of the future EU BITs, it is basically impossible to

provide for a fully satisfactory framework and come up with a reliable and legally stable proposition.

The ultimate question to be asked about the ICSID, in light of the discussion provided under the respective section, is not whether or not to include ICSID Arbitration despite the risk of asymmetrical protection (or a lack of protection, depending on the investor). In our opinion, the ultimate question that should be asked is how to include ICSID Arbitration in those EU BITs as effectively as possible given the current legal circumstances and the initiatives available. The EU is not (and currently cannot be) a member of the ICSID Convention or the World Bank, it is not a signatory of the Statute of the ICJ and unless the necessary amendments are conducted, ICSID Arbitration can never be used within the scope of an EU BIT. This is the sole reason why the EU cannot include an express ICSID clause in its future BITs, at least not in the sense that a state which is a member of the ICSID can easily do. As far as the ICSID is concerned, a comparative approach between the ordinary state model and a future EU model will fail since what is practiced by the Member States cannot be applied to an EU model, for the reasons discussed throughout relevant sections of this paper.

Therefore, looking at the matter from another point of view, namely from the point of view of a state that is not an ICSID member, is more likely to provide us with the applicable model we are striving to construct. The model BITs provided above can only apply to negotiations between two states that are both members of the ICSID, since they assume negotiating states to be eligible to use ICSID Arbitration. The situation is, however, different in the case of the BITs between ICSID Member States and states that are not eligible to use ICSID Arbitration.

The Germany – Albania BIT⁹³, signed several days before the ratification of the ICSID Convention (14 November 1991) by the Assembly of the Republic of Albania, provides a striking example. Although the procedure was almost complete and the ratification of the ICSID Convention was a few weeks away, it was not possible for Albania to include an ICSID Arbitration clause in its investment treaties signed before the date of ratification (therefore, its date of membership). Conversely, excluding ICSID Arbitration from this agreement would prove to be improper, since the date of signature and date of membership were extremely close to each other. Given the situation, a transitional and conditional dispute settlement clause effective in the future was drafted. According to Article 11(4) of the Germany – Albania BIT, in the event that both parties (of the BIT) are also parties of the ICSID Convention the disputes arising between the parties (of the BIT) shall be subject to arbitration under the ICSID Convention⁹⁴. Instead of including a non-conditional clause, the condition of membership was elaborated so that if the parties are (or become) parties of the ICSID Convention, it shall be eligible. Germany followed the same method with other states that were not members of the ICSID at the time of execution of the BIT⁹⁵.

⁹³ The Agreement between the Federal Republic of Germany and the Republic of Albania for the Reciprocal Promotion and Protection of Investments dated 31 October 1991.

⁹⁴ Article 11(4) of the Germany – Albania BIT.

⁹⁵ Agreement between the Federal Republic of Germany and the Republic of Lithuania concerning the Reciprocal Promotion and Protection of Investments, dated 28 February 1992.

Switzerland, even though not an EU Member State, is highly associated with the European practice and is therefore strongly relevant to this discussion. It has concluded many BITs with states that are not members of the ICSID, and is known to have a common *ad hoc* arbitration practice⁹⁶. Within this context, several of Switzerland's BITs such as the Switzerland – Lithuania BIT⁹⁷ are worth mentioning. Article 9(3) of this agreement states that, like the Germany – Albania BIT, “[i]n the event of both Contracting Parties having become members of the [ICSID Convention], disputes under this article may, upon the request of the investor, as an alternative to the procedure mentioned in paragraph 2 of this article, be submitted to [the ICSID].”⁹⁸ Other BITs concluded by Switzerland with other states that were not members of the ICSID at the time such as Vietnam⁹⁹ and Cape Verde¹⁰⁰ contain similar, if not identical, clauses. Irrespective of their membership of the ICSID, these conditional clauses in fact included a future ICSID Arbitration clause for the investors of non-members of the ICSID Convention, avoiding the necessity of revising or even re-negotiating BITs between these states after the non-member state becomes a member.

Following this comparative analysis, we consider the illustrated method to be the most suitable model for a future EU BIT with regard to a possible ICSID clause. As was pointed out, the EU BITs can include mechanisms such as UNCITRAL, PCA, AISCC and ICC without any conditions and without any problems, as long as parties agree to do so. As for the ICSID, the situation is much more complicated, yet it is not impossible to resolve if such a conditional and transitional clause is included. Additionally, it should be kept in mind that the ICSID Additional Facility can also be provided as an alternative without any problems, since its scope covers BITs between an ICSID member state and a state that is not an ICSID member. It is, of course, provided for that the Rules of Arbitration for the Additional Facility is amended accordingly to also cover international (or supranational) organizations.

⁹⁶ Dolzer, Rudolf and Stevens, Margrete. 1995. *The International Centre for Settlement of Investment Disputes – Bilateral Investment Treaties*. The Netherlands: Kluwer Law International, Martinus Nijhoff Publishers. pg. 152-153.

⁹⁷ Agreement between the Swiss Confederation and the Republic of Lithuania concerning the Reciprocal Promotion or Protection of Investments, dated 23 December 1992.

⁹⁸ *Ibid*, Article 9.

⁹⁹ Agreement between the Swiss Confederation and the Socialist Republic of Vietnam concerning the Reciprocal Promotion and Protection of Investments, dated 3 July 1992.

¹⁰⁰ Agreement between the Swiss Confederation and the Republic of Cape Verde concerning the Reciprocal Promotion and Protection of Investments, dated 28 October 1991.

6 Conclusion

The radical shift of competences presented by the Lisbon Treaty evidently brings about radical responsibilities, consequences and duties for the EU. BITs, regardless who executes them, remain and probably will remain the backbone of investment protection in the absence of multilateral rules, and as was demonstrated in the pre-Lisbon period, the Union constantly had the urge to undertake the initiative to establish a Europe-wide, unified practice applicable for all Member States¹⁰¹. The initial and the ultimate challenge remains the same: the establishment of reliable, credible and stronger protection for the investors and a unified, foreseeable practice that will evolve in time and by experience. It should be underlined that no current functioning EU common policy was successfully established overnight, and a strong, stationary FDI policy (in fact, CCP in general) cannot be established unless the EU is determined to take the risks and necessary bold steps.

Given that no such regional initiative was ever attempted before, the EU BITs are unique by nature and completely new to academicians and practitioners. In the above sections, we have attempted to clarify some of the most outstanding issues that have already arisen or might arise in the future. BITs have a global acknowledgement and a more or less settled, predictable practice; however the inclusion of a *supranational union* (which has already proven to be peculiar by all means) as an international actor and party is likely to disrupt this state-oriented perception. Inevitably attached to such uniqueness, dispute resolution mechanisms to be installed within this new EU context are by no means unproblematic.

The density of the controversy varies, however. The problems should not be overstated – as was demonstrated, independent from the parties and their legal identity; some of the DSMs are in fact responsive to the current legal *status quo*. For instance, the so-called ‘state-state’ DSM is likely to be included in the future EU BITs probably only with minor conceptual differences (to illustrate, as far as the EU is concerned, it may be called the EU-state dispute settlement). Furthermore, although it did cause a rather unexpected confusion for several institutional bodies such as the European Parliament, UNCITRAL can be adopted without any modification. Likewise, institutions providing for optional rules and administrative support such as PCA, AISCC and ICC remain relatively untroubled. It is likely that these mechanisms will be prioritized by the EU until the time when deeper legal questions, such as ICSID Arbitration, are fortunately resolved.

ICSID Arbitration presents a multi-branched legal obscurity: neither the Convention nor the Additional Facility is presently utilizable. As for the Convention, a long and stressful period for the EU is on the horizon; it is undoubtedly one of the most challenging legal problems that the EU has assumed. The ICSID Convention is a successful multilateral convention with remarkable participation from states, and the vast number of signatories of this Convention is probably the primary problem, given that all signatories must ratify any proposed amendment that might eventually let the EU participate. The success of the ICSID is apparently a disadvantage for the EU in the short (or long?) run, but should this troublesome phase elapse with

¹⁰¹ *Supra* note 5, Shan and Zhang, 2011.

affirmative consequences, the success will supplement the EU BITs and ensure their credibility - provided that no unexpected problems arise in the future. The ICSID Additional Facility, however, deserves a more optimistic approach. With a relatively easy amendment procedure, it can be included in the EU BIT framework and serve as a stepping-stone towards the ultimate target of the ICSID Convention.

It was one of the primary efforts of this paper to extract the issues presented above from their abstract nature and put forward a solid, tangible layout by which the problems and the proposed solution alternatives can be clearly observed. Thus, the current practice (including the practice of the Member States) proves to be invaluable data to deduce and craft an EU framework. To further such efforts and finalize this objective, and in light of the analysis provided throughout the paper, we would like to propose a feasible dispute settlement model for future EU BITs:

Settlement of Disputes between Contracting Parties

1. Disputes between the Contracting Parties concerning the interpretation or application of this treaty shall (alternative, 'should as far as possible') be settled by the competent authorities¹⁰² of the two Contracting Parties;
2. If a dispute cannot thus be settled, it shall upon the request of the either Contracting Party be submitted to an arbitral tribunal;
3. The arbitral tribunal shall be constituted for each case as follows: each Contracting Party shall appoint one member, and these two members shall agree upon a national of a third State (by which, should be understood, a national of a state other than the EU Member States and the other Contracting Party) as their chairman to be appointed by the competent authorities of the two Contracting Parties. The members should be appointed within two months, and the chairman within three months, from the date on which either Contracting Party has informed the other Contracting Party that it wants to submit the dispute to an arbitral tribunal;
4. If the periods specified in paragraph (3) have not been observed, either Contracting Party may, in the absence of any other relevant agreement, invite the President of the International Court of Justice (alternatively, the Secretary-General of the United Nations) to make the necessary appointments. If the President is a national of either Contracting Parties (a national of any of the EU Member States and the other Contracting Party) or if he is otherwise prevented from discharging the said function, the Vice-President should make the necessary appointments. If the Vice-President is a national of either Contracting Party (a national of any of the EU Member States and the other Contracting Party) or if he, too, is prevented from discharging the said function, the Member of the Court next in seniority who is not a national of either Contracting State (the same conditions provided for the President and the Vice-President in terms of nationality apply) should make the necessary appointments;

¹⁰² The EU, strictly speaking, does not have a government in the sense that a state does. What should be understood by such a term are the executive actors of the EU, such as the Commission.

5. The arbitral tribunal shall reach its decisions by a majority of votes. Its decisions shall be binding. Each Contracting Party shall bear the cost of its own member and of its representatives in the arbitration proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting States. The arbitral tribunal is competent to make a different regulation concerning costs. In all other respects, the arbitral tribunal shall determine its own procedural rules.¹⁰³

Settlement of Disputes between a Contracting Party and an investor of the other Contracting Party

1. Disputes concerning investments between a Contracting Party and an investor of the other Contracting Party shall (alternatively, should as far as possible) be settled amicably between the parties to the dispute;
2. If the dispute cannot be settled within six months of the date on which it was raised by one of the parties to the dispute, it shall, at the request of the investor of the other Contracting Party, be submitted to arbitration. The two Contracting Parties hereby declare that they consent to the dispute being submitted to one of the following DSMs of the investor's choosing:
 - a. In the event of both Contracting Parties having become a party, arbitration under the auspices of the Convention on the Settlement of Investment Disputes between States and National of Other States of 18 March 1965 (ICSID);
 - b. Arbitration under the auspices of the International Centre for Settlement of Investment Disputes pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID) in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, where the personal or factual preconditions for proceedings pursuant to (a) do not apply, but at least one Contracting Party is a member of the Convention referred to therein, or¹⁰⁴;
 - c. An individual arbitrator or an *ad hoc* arbitral tribunal which is established in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL) as in force at the commencement of the proceedings, or;
 - d. An arbitral tribunal which is established pursuant to the Dispute Resolution Rules of the International Chamber of Commerce (ICC) or the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), or;
 - e. Any other form of dispute settlement agreed by the parties to the dispute.

¹⁰³ *Supra* note 90. A comparison with the German model BIT may prove to be useful to emphasize the differences between a BIT executed by a Member State and a BIT executed by the EU as an organization.

¹⁰⁴ It should be clarified once again that the inclusion of this sub-article is conditional – it may only be included provided that an amendment in order to include non-state international actors within the scope of the Additional Facility has been introduced and accepted.

3. The award shall be binding and shall not be subject to any appeal or remedy other than those provided for in the Convention or arbitral rules on which the arbitral proceedings chosen by the investor are based. The award shall be enforced by the Contracting Parties as a final and absolute ruling under their domestic law¹⁰⁵.
4. Arbitration proceedings pursuant to this Article shall take place at the request of one of the parties to the dispute in a state which is a Contracting Party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958.
5. During arbitration proceedings or the enforcement of an award, the Contracting Party involved in the dispute shall not raise the objection that the investor of the other Contracting Party has received compensation under an insurance contract in respect of all or part of the damage.

Following the traditional European tendency, we have mainly based our model on the current German Model; however we have provided for different alternatives from the French and the UK Models. Such a model, although not definite, presents more or less what a legally (and politically) possible EU BIT dispute settlement clause could resemble. In any case, it is certain that an interesting, yet challenging path is ahead for the EU – and we shall observe developments with immense enthusiasm and curiosity.

¹⁰⁵ Given that the enforcement shall take place at the EU level, the term used for such a clause shall nonetheless include the EU *acquis communautaire* in its entirety.

7 Bibliography

Books

- Craven, Matthew. 2010. Statehood, Self-determination and Recognition. In International Law edited by Malcolm D. Evans, Third Edition. Oxford: Oxford University Press.
- Derains, Yves and Schwartz, Eric A. 2005. A Guide to the ICC Rules of Arbitration. The Netherlands: Kluwer Law International.
- Dimsey, Mariel. 2010. The Resolution of International Investment Disputes. In International Commerce and Arbitration vol. 1, edited by Ingeborg Schwenzer. The Netherlands: Eleven International Publishing.
- Dolzer, Rudolf and Stevens, Margrete. 1995. The International Centre for Settlement of Investment Disputes – Bilateral Investment Treaties. The Netherlands: Kluwer Law International, Martinus Nijhoff Publishers.
- Douglas, Zachary. 2009. The International Law of Investment Claims. Cambridge: Cambridge University Press.
- Jennings and Watts. 1992. Oppenheim's International Law: Volume 1. Harlow, Essex: Longman.
- Kiljunen, Kimmo. 2004. The European Constitution in the Making. The Center for European Policy Studies. Brussels: CEPS.
- Legum, Barton. 2008. Options to Establish an Appellate Mechanism for Investment Disputes. In Appeals Mechanism in International Investment Disputes edited by Karl P. Sauvant. Oxford: Oxford University Press.
- Levine, Judith. 2011. Navigating the Parallel Universe of Investor-State Arbitrations under the UNCITRAL Rules. In *Evolution in Investment Treaty Law and Arbitration* edited by Chester Brown and Kate Miles. Cambridge: Cambridge University Press.
- Mathijsen, Pierre. 2010. A Guide to European Law, Tenth Edition. [pg. 28], London, UK: Sweet & Maxwell.
- Maybel, Niklas. 2007. The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence. In International Investment Law in Context, edited by August Reinisch and Christina Knahr. Eleven International Publishing.
- Reed, Lucy, Paulsson, Jan and Blackaby, Nigel. 2011. Guide to ICSID Arbitration, Second Edition. Bedfordshire, United Kingdom: Kluwer Law International.
- Reinisch, August. 2010. The Division of Powers between the EU and its Member States after Lisbon. In *Internationaler Investitionsschutz und Europarecht*, edited by Marc Bungenberg, Jörn Briebel and Steffen Hindelang, 99-110. Baden-Baden, Germany: Nomos Verlagsgesellschaft.
- Schreuer, Christoph H., Malintoppi, Loretta, Reinisch, August and Sinclair, Anthony. 2009. The ICSID Convention - A Commentary, Second Edition. Cambridge: Cambridge University Press.

Sutton, D; Kendall, J and Gill, Judith. 1997. *Russell on Arbitration*, Twenty-First Edition. London: Sweet & Maxwell.

Periodical Materials

Braun, Tillmann Rudolf. 2010. For a Complementary European Investment Protection. In *European Yearbook of International and Economic Law*, edited by Marc Bungenberg, Jörn Griebel and Steffen Hindelang. Berlin: Springer Heidelberg Dordrecht.

Gantz, David. 2006. An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges. In *Vanderbilt Journal of Transnational Law* No. 39, Nashville, USA: Vanderbilt University.

Shan, Wenhua and Zhang, Sheng. 2011. The Treaty of Lisbon: Half Way toward a Common Investment Policy. *The European Journal of International Law*, Vol. 21, No. 4.

Working Papers / Conference Papers / Presentations

Bernasconi-Osterwalder, Nathalie. 2010. European Parliament Hearing on Foreign Direct Investment, Foreign Investment for Sustainable Development Program, International Institute for Sustainable Development. <http://www.iisd.org/publications/pub.aspx?pno=1365>. (Last accessed on April 26, 2012).

Bungenberg, Marc. 2008. Centralizing European BIT Making under the Lisbon Treaty. Biennial Interest Group Conference, Washington D.C., 13 – 15 November 2008.

Burgstaller, Markus. 2009. Vertical Allocation of Competences for Investment Treaties in the European Union, Asian International Economic Law Network (AIELN) Inaugural Conference, Tokyo, 12 June 2009.

De Gucht, Karel. 2010. The Implications of the Lisbon Treaty for EU Trade Policy, S&D Seminar on EU Trade Policy, 8 October 2010.

MacLachlan, Campbell. 2009. Investment treaty arbitration: The legal framework. In *ICCA Congress Series* No. 14, edited by A. J. van den Berg. Alphen aan den Rijn: Wolters Kluwer. [pp. 95, 128].

Mola, Lorenza. 2008. Which Role for the EU in the Development of International Investment Law? Working Paper 26/08, Inaugural Conference, Geneva, 15 – 17 July 2008.

Peterson, Luke. 2006. Investment Treaty News: 2006 – A year in review. http://www.iisd.org/pdf/2007/itn_year_review_2006.pdf. (Last accessed on April 26, 2012).

Sarisoy Guerin, Selen. 2010. Do the European Union's Bilateral Investment Treaties Matter? The Way Forward After Lisbon. Working Document No. 333. Brussels, Belgium: Centre for European Policy Studies.

Tams, Christian J. 2006. An Appealing Option? The Debate about an ICSID Appellate Structure. In *Beiträge zum Transnationalen Wirtschaftsrecht* edited by Christian Tietje, Gerhard Kraft and Rolf Sethe. Halle: Martin-Luther-Universität Halle-Wittenberg.

UNCITRAL Working Group II. 2010. International Institute for Sustainable Development (IISD), 'Ensuring Transparency' in Investor-State Dispute Resolution under the UNCITRAL Arbitration Rules. Vienna, 4-8 October 2010.

UNCTAD. 2011. Latest Developments in Investor-State Dispute Settlement, IIA Issues Note No. 1. UNCTAD/WEB/DIAE/IA/2010/3.
http://www.unctad.org/en/docs/webdiaeia20103_en.pdf. (Accessed on April 26, 2012).

United Nations Conference on Trade and Development. 2003. Dispute Settlement: Investor-State, UNCTAD Series on Issues in International Investment Arrangements. United Nations. http://www.unctad.org/en/docs/iteit30_en.pdf. (Accessed April 26, 2012).

Press Releases

European Commission Memorandum of 7 July 2010. Q&A: Commission Launches Comprehensive European International Investment Policy.

Internet Sites

Arbitration Institute of the Stockholm Chamber of Commerce. About the SCC, <http://www.sccinstitute.com/hem-3/om-oss-3.aspx>. (Last accessed on April 18, 2012).

Arbitration Institute of the Stockholm Chamber of Commerce. Another strong year for SCC. <http://www.sccinstitute.com/hem-3/statistik-2.aspx>. (Last accessed on April 22, 2012).

ICSID. 2012. South Sudan Signs and Ratifies to ICSID Convention. <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement105>. (Last accessed on April 26, 2012).

ICSID. About ICSID. http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home. (Last accessed April 26, 2012).

ICSID. ICSID Dispute Settlement Facilities. http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Dispute%20Settlement%20Facilities&pageName=Disp_settl_facilities. (Last accessed on April 22, 2012).

ICSID. Member States. http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home. (Last accessed on April 20, 2012).

International Chamber of Commerce. International Court of Arbitration. Introduction to Arbitration – ICC arbitration: distinctive features. <http://www.iccwbo.org/court/arbitration/id4089/index.html>. (Last accessed April 24, 2012).

International Chamber of Commerce. What is ICC? <http://www.iccwbo.org/id93/index.html>. (Last accessed April 24, 2012).

International Chamber of Commerce. Who Can Benefit?
<http://www.iccwbo.org/court/arbitration/id4585/index.html>. (Last accessed April 24, 2012).

Permanent Court of Arbitration. International Bureau. http://www.pca-cpa.org/showpage.asp?pag_id=1043. (Last accessed on April 26, 2012).

Permanent Court of Arbitration. Structure. http://www.pca-cpa.org/showpage.asp?pag_id=1039. (Last accessed on April 26, 2012).

UNCTAD. Database. http://www.unctadxi.org/templates/docsearch___779.aspx. (Last accessed on April 26, 2012).

UNCITRAL. FAQ – UNCITRAL and Private Disputes /Litigation.
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html. (Last accessed on April 26, 2012).

UNCITRAL. Origin, Mandate and Composition of UNCITRAL.
<http://www.uncitral.org/uncitral/en/about/origin.html>. (Last accessed on March 25, 2012).

Legal Cases/Opinions

European Court of Justice, *Commission of the European Communities v. Kingdom of Sweden*, Case C-249/06 [2009].

European Court of Justice, *Commission of the European Communities v. Republic of Austria*, Case C-205/06 [2009].

European Court of Justice, *Commission of the European Communities v. Republic of Finland*, Case C-118/07 [2009].

European Court of Justice, Opinion 1/91, ECR I-6079 [1991].

European Court of Justice, Opinion 1/94, ECR I-5267 [1994].

Legal Provisions

Commission Communication towards a Comprehensive European International Investment Policy COM(2010) 343, Final.

Commission Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment treaties between Member States and third countries, COM(2010) 344, 2010/0197 (COD).

Council of the European Union, 15375/06, Minimum Platform on Investment for EU Free Trade Agreements, 27 November 2006.

European Commission Note for the Attention of the 133 Committee. Upgrading the EU Investment Policy. Brussels, 30 May 2006.

Resolution 2010/0197 (COD) of the European Parliament of 10 May 2011 on the Proposal for a Regulation of the European Parliament and of the Council Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries.

Resolution 2010/2203(INI) of the European Parliament of 6 May 2011 on the Future European International Investment Policy.

Resolution of the UN General Assembly, 2205(XXI), 17 December 1966.

[http://daccess-dds-](http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/08/IMG/NR000508.pdf?OpenElement)

[ny.un.org/doc/RESOLUTION/GEN/NR0/005/08/IMG/NR000508.pdf?OpenElement.](http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/08/IMG/NR000508.pdf?OpenElement)

(Last accessed on April 26, 2012).

UNCITRAL Working Group II Report on the work of its fifty-fifth (A/CN.9/736) session.

UNCITRAL Working Group II Report on the work of its fifty-sixth (A/CN.9/741) session.

UNCITRAL Working Group II Report on the work of its fifty-third (A/CN.9/712) and fifty-fourth (A/CN.97717) sessions.

United Nations General Assembly. Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17). [para. 314].

International Treaties

Agreement between the Federal Republic of Germany and the Republic of Albania for the Reciprocal Promotion and Protection of Investments dated 31 October 1991.

Agreement between the Federal Republic of Germany and the Islamic Republic Pakistan concerning the Reciprocal Promotion and Protection of Investments, 25 November 1959.

Agreement between the Federal Republic of Germany and Republic of Lithuania concerning the Reciprocal Promotion and Protection of Investments, dated 28 February 1992.

Agreement between the Republic of Turkey and Belgium-Luxembourg Economic Union concerning the Reciprocal Promotion and Protection of Investments dated 27 August 1986.

Agreement between the Swiss Confederation and the Republic of Cape Verde concerning the Reciprocal Promotion and Protection of Investments, dated 28 October 1991.

Agreement between the Swiss Confederation and the Republic of Lithuania concerning the Reciprocal Promotion or Protection of Investments, dated 23 December 1992.

Agreement between the Swiss Confederation and the Socialist Republic of Vietnam concerning the Reciprocal Promotion and Protection of Investments, dated 3 July 1992.

Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments dated 15 March 1991.

Articles of Agreement of the International Bank of Reconstruction and Development (IBRD), as amended 16 February 1989.

Articles of Agreement of the International Monetary Fund (IMF), Bretton Woods, New Hampshire, 1944.

Constitution of the International Chamber of Commerce (ICC), revised on 5 December 2003.

Convention for the Pacific Settlement of International Disputes and 1907 Convention for the Pacific Settlement of International Disputes, 1899.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“the ICSID Convention”), Washington, 1965.

EU - Chile Association Agreement, O.J. 2002 L-352, 18 November 2002.

Treaty of the European Union, (“TEU”), 1993.

Treaty of the Functioning of the European Union, (“TFEU”, Treaty of Rome), 1958.

Other Documents

2006 French Model BIT. <http://italaw.com/documents/ModelTreatyFrance2006.pdf>. (Last accessed on April 26, 2012).

2008 German Model BIT. <http://italaw.com/documents/2008-GermanModelBIT.doc>. (Last accessed on April 26, 2012).

ICSID. Additional Facility Rules, as amended on 10 April 2006.

Permanent Court of Arbitration. Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State. <http://www.pca-cpa.org/upload/files/1STATENG.pdf>. (Last accessed on April 26, 2012).

Permanent Court of Arbitration. Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States. <http://www.pca-cpa.org/upload/files/2STATENG.pdf>. (Last accessed on April 26, 2012).

Permanent Court of Arbitration. Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and Private Parties. <http://www.pca-cpa.org/upload/files/IGO1ENG.pdf>. (both accessed on April 26, 2012).

Permanent Court of Arbitration. Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States. <http://www.pca-cpa.org/upload/files/IGO2ENG.pdf>.

Rules of Arbitration of the International Chamber of Commerce, in force as from 1 January 2012.

Understanding on Rules and Procedures Governing the Settlement of Disputes. January 1995. http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm. (Last accessed on April 26, 2012).

United Nations Commission on International Trade Law Arbitration Rules. UN General Assembly Resolution 31/98. 28 April 1976. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html. (Last accessed on April 26, 2012).

United Nations Commission on International Trade Law Arbitration Rules, as amended and pre-released on 12 July 2010. <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/pre-arb-rules-revised.pdf>. (Last accessed on April 26, 2012).