Chapter 2
Introduction

In March 2018 the Council of the European Union (EU Council or Council) gave the Commission of the EU (EU Commission or Commission) a mandate to negotiate a Multilateral Investment Court (MIC).[1] Furthermore, since July 2017 the United Nations Commission on International Trade Law (UNCITRAL) Working Group III[2] is discussing different options for the reform of Investor State Dispute Settlement (ISDS).[3] The UNCITRAL Working Group III was mandated to:

First, identify and consider concerns regarding ISDS; second, consider whether reform was desirable in light of any identified concerns; and third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.[4]

Consensus to develop solutions (thus enter stage 3 of the UNCITRAL WGIII mandate) was reached at the Thirty-seventh session in New York from 1 to 5 April 2019[5]; the option of an institutionalized as well as multilateralised investor state dispute settlement mechanism will now be discussed in detail inside and outside UNCITRAL. This is all the more the case after the Court of Justice of the European Union (CJEU) has given its Opinion 1/17 confirming the compatibility of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) Investment Court System with the EU Treaties. The CJEU recalled "that an international agreement providing for the creation of a court responsible for the interpretation of

[1]Council of the EU (2018).

[2]UNCITRAL Working Group III is composed of the 60 member States of the Commission and attended by observers from other UN member States, non-member States, intergovernmental organizations and invited non-governmental organizations.

[3]UNCITRAL (2017a).

[4]UNCITRAL (2017b), para. 264 and 447.

[5]UNCITRAL (2019).

M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, European Yearbook of International Economic Law, https://doi.org/10.1007/978-3-662-59732-3_2

its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law. Indeed, the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court that is created or designated by such agreements as regards the interpretation and application of their provisions".[6]

This study assesses both the option of a two-tiered MIC as well as of a Multilateral Investment Appellate Mechanism (MIAM). Both models provide for a permanent, pre-appointed judiciary according to rule of law standards. The structure of the new dispute settlement mechanism should pursue the following objectives:

- procedures adhering to the rule of law,
- independence and neutrality of judges,
- publicly appointed judges,
- uniform interpretation of the law,
- efficient and expedient procedures,
- protecting states' right to regulate,
- transparency,
- an appeal mechanism.

Fulfilling these objectives would satisfy both the rule of law requirements which must be taken into account when formulating international legal protection and the legitimacy criteria.[7]

40 EU Commissioner Malmström mentioned the "Multilateral Court" for the first time on 18 March 2015 in the Committee on International Trade (INTA Committee) and at an informal meeting of the Council (Foreign Affairs) on 25 March 2015.[8] Finally, UNCITRAL decided on 10 July 2017 to work on a reform of the investment dispute settlement mechanism, including the possible establishment of an MIC.[9]

41 The EU Commission is currently investigating the feasibility of an MIC due to the modernisation of investment protection and the ISDS mechanism[10] in the CETA,[11]

[6]CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 106.

[7]Cf. for instance, Kastler (2017), p. 265.

[8]Malmström (2015): "However, I believe that we should aim for a court that goes beyond TTIP. A multilateral court would be a more efficient use of resources and have more legitimacy. That makes it a medium-term objective to be achieved in parallel to our negotiations with the United States. I hope for Parliament's support and advice as we try to achieve it." Cf. in connection also European Commission (2015), pp. 3 and 13; cf. previously already the proposals of Krajewski (2015) and the French proposal, Vers un nouveau moyen de régler les différends entre États et investisseurs, May 2015; thereto Fouchard Papaefstratiou (2015).

[9]European Commission (2017b).

[10]European Commission (2017a).

[11]Art. 8.27 and 8.29, Comprehensive Economic and Trade Agreement, OJ L 11, 14.1.2017, p. 23.

the EU-Singapore Investment Protection Agreement (IPA),[12] the EU-Mexico Global Agreement[13] and the EU-Vietnam IPA.[14]

Since the first proposals in spring 2015, the discussion about an Investment Court System (ICS) and multilateralisation has sparked an enormous debate.[15] The Commission presented the first basic structures of a bilateral investment court system in a position paper in May 2015[16] and proposed this system to the United States of America (US) in autumn 2015 in the context of the Transatlantic Trade and Investment Partnership (TTIP) negotiations.[17] At the same time, the EU Commission managed to successfully introduce this dispute settlement system into the CETA negotiations with Canada as well as into the EU Free Trade Agreement with Vietnam at a relatively late stage. Also the EU-Singapore agreement was revised again after negotiations had actually already been finished, also due to the "necessity" to isolate investment law from trade law in these agreements due to a new Commission approach as a consequence of the Singapore Opinion of the CJEU.[18] This bilateral approach on the ICS chosen by the Commission is also seen as a test or pilot phase for a future multilateral system.[19] **42**

In addition to the bilateral investment court systems introduced in the CETA, the EU-Vietnam IPA, the EU-Singapore IPA and the EU-Mexico Global Agreement, it was stated in each agreement in almost the same wording that the parties to the agreement intend to transfer the respective bilateral investment court system to a multilateral system: **43**

> The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.[20]

[12] Art. 3.9 and 3.12, EU-Singapore IPA (draft for signature) as on 2 April, 2019.

[13] Art. 11 and 14, Section- Resolution of Investment Disputes, EU-Mexico Global Agreement (draft for signature) as on 2 April, 2019.

[14] Art. 3.38 and 3.41, EU-Vietnam IPA (draft for signature) as on 2 April, 2019.

[15] Cf. European Commission (2016), Ghahremani and Prandzhev (2017), Blair (2017), Ambrose and Naish (2017), Kaufmann-Kohler and Potestà (2016, 2017), Howse (2017a), Happ and Wuschka (2017), Hoffmeister (2017), Brown (2017), Katz (2016), Alvarez Zarate (2018), Ghori (2018), Howard (2017), Howse (2017b), Brower and Ahmad (2018), Benedetti (2019), Schill (2019) and Calamita (2017).

[16] European Commission (2015).

[17] Cf. under http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

[18] CJEU, Opinion 2/15, ECLI:EU:C:2017:376; on this see, *inter alia* Bungenberg (2017), Hindelang and Baur (2019) and Usynin and Gáspár-Szilágyi (2018).

[19] Pauwelyn (2015).

[20] Article 8.29 CETA, Establishment of a multilateral investment tribunal and appellate mechanism; Art. 3.41, EU-Vietnam IPA (draft for signature) as on 2 April, 2019; Art. 14, Section- Resolution of Investment Disputes, EU-Mexico Global Agreement (draft for signature) as on 2 April, 2019; Art. 3.9, EU-Singapore IPA (draft for signature) as on 2 April, 2019.

44 A number of procedural elements have also been included in the relevant agreements and in the Investment Protection Agreements between the EU and Singapore, EU and Vietnam and in the EU-Mexico Global Agreement in order to achieve greater transparency and to reject clearly inadmissible or unjustified complaints at an early stage. The rule on cost distribution states that the losing party has to bear the costs. These provisions already constitute a number of innovative elements in investment protection in comparison to the existing agreements of the EU Member States, as well as to almost all other existing agreements.

45 The European Parliament "shares the ambition of establishing, in the medium term, a multilateral solution to investment disputes."[21] Thus, in its resolution on the TTIP negotiations in 2015, the Parliament recommended the following:

> to ensure [. . .] to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives[22]

46 This feasibility study aims to illustrate options for the organisational and procedural design of an MIC. For the specific design of this new system, the requirements of Article 21 of the Treaty on European Union (TEU) are a decisive prerequisite from the EU's perspective.[23] Accordingly, this provision already indicates that the EU shall plead primarily for multilateral solutions. At the same time, it stresses the particular importance of complying with the EU's rule of law principle.[24] In light of these rule of law considerations, procedural equality of arms should be ensured.[25] For example, the G20 Guiding Principles for Global Investment Policymaking also

[21]European Parliament resolution (2016), para. 68.

[22]European Parliament resolution (2015), para. 2.d)xv).

[23]The significance and compulsory consideration of Article 21 TEU was last emphasised again by the Court of Justice of the European Union (CJEU) in its Singapore opinion. Cf. CJEU, Opinion 2/15, Singapore FTA, ECLI:EU:C:2017:376, para. 142 et seq.: "One of the features of this development is the rule laid down in the second sentence of Article 207(1) TFEU that 'the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'. Those principles and objectives are specified in Article 21(1) and (2) TEU [. . .]. The obligation of the European Union to integrate those objectives and principles into the conduct of its common commercial policy in apparent from the second sentence of Article 207(1) TFEU read in conjunction with Article 21(3) TEU and Article 205 TFEU." See in regard to the relevance of rule of law considerations etc. CETA, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 105 et seq.

[24]Thereto in general, Schröder (2016) and Bungenberg and Hazarika (2019).

[25]On the aspect of "equality of arms" as an aspect of the rule of law, cf. Fleiner and Basta Fleiner (2004), p. 250; hereto also for example the jurisprudence on Article 6 European Convention on Human Rights (ECHR), cf. European Court of Human Rights (ECtHR), No. 2689/65, *Del-court v. Belgium*; ECtHR, No. 8562/79, *Feldbrugge v. the Netherlands*; ECtHR, No. 14448/88, *Dombo Beheer B.V. v. the Netherlands*; ECtHR, No. 17358/90, *Bulut v. Austria*; ECtHR, No. 13645/05, *Ko-kelvisserij e.a. v. the Netherlands*; thereto in the literature Safferling (2004), p. 181 et seqq.; Grabenwarter and Struth (2015), Article 6, para. 46 et seqq.

provide that "dispute settlement procedures should be fair, open and transparent, with appropriate safeguards to prevent abuse."[26] In various papers,[27] the Council of Europe has developed basic requirements concerning the rule of law for judicial systems, which must be duly respected while designing the MIC.

This study discusses the option of a two-tiered system as well as a multilateral system of appeals. Both options bring ISDS in line with constitutional requirements of the rule of law and the protection of fundamental rights.[28] The views and positions on these proposed systems of other entities with international legal personality as well as of third countries are being taken into consideration. In the long term, setting up an MIC may also require convincing 'heavyweights' in the area of protection of foreign investment such as China or the US, in addition to the EU and its current 28 Member States including their respective International Investment Agreement (IIA) networks, of the advantages of such a system. Canada, Vietnam, Singapore and Mexico have already committed themselves in this respect. **47**

The two-tiered solution and the mere appellate mechanism discussed below are both different models of a multilateral approach. **48**

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[26]G20 Guiding Principles for Global Investment Policymaking, July 2016, para. III: "Dispute settlement procedures should be fair, open and transparent, with appropriate safeguards to prevent abuse."

[27]Cf. for instance Council of Europe (2014, 2016).

[28]Schill (2015), p. 8.

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