МІЖНАРОДНЕ ПРАВО

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Grabchak G.V.
Yaroslav Mudriy National Law University

THE IDEA OF THE MULTILATERAL INVESTMENT COURT CREATION

Global changes of the political and economic situation all over the world are influence on the current investor-state investment dispute resolution system. The current settlement dispute system has demonstrated a number of issues such as unpredictability of the dispute outcome, the aggressive and expansive jurisdiction approaches, lack of transparency, high cost, impossibility to appeal on the substance, high amounts of compensation and many other. All these issues has been triggering the process of rapid changes in the investor-state investment dispute resolution system – the discussion of possible creation of the Multilateral Investment Court.

The number of investment disputes increases every year and the number of issues in investment arbitration increases as well. Despite the international community is deeply concerned by it at least since 2004, only half-measures are taken. For instance, International centre for investment disputes reviewed its own Rules twice – in 2006 and in 2022. However, the main problem is not an incorrect process, but a lack of appeal review and control of the concluded awards. The different conclusions in similar questions have become more frequent. Moreover, the practice of the legal representatives to have a «secondment» work as an arbitrator poses high corruption risks.

Taking all issues into account UNCITRAL Working Group III, UNCTAD and the European Commission started the unprecedent process of pushing the idea of the Multilateral Investment Court creation.

The article is devoted to the review and analysis of the idea of creating a Multilateral investment court. The article reveals the actual problems of investment arbitration, as well as the advantages and disadvantages of creating a Multilateral Investment Court, and found that the creation of a Multilateral Investment Court would be a more positive than a negative project. From our perspective, the issues of investment arbitration can no longer progress.

In this article below we will try to take part in this discussion, consider the main issues and think about the possible resolution.

Key words: *Multilateral Investment Court, investor-state dispute settlement, predictability, transparency, consistency, UNCITRAL Working Group III.*

Problem Statement. The improvement of the current investor-state dispute resolution system is a subject of discussion last twenty years. The impossibility of the appeal on the substance and conflicts of interests as well as many other questions are calling into question the legality and the necessity of existence of the such problematic dispute resolution sphere. From the other side, foreign investors need the neutral forum of dispute resolution where they can claim for all illegal acts of the host State on an equal footing. This article shows the boldest and most interesting way to solve this dilemma.

Analysis of recent studies and publications. The Ukrainian legal science of international law remains silent on the matter, On the contrary, the Multilateral investment court was studied by Paradell-Trius L., Hodgsom M., Campbell A., Nica A., MacKenzie C., Burgenberg M., Reinisch A., Benedetti C., Brown C. Particularly, this issue was discussed by Caplan M. and Zárate J. Despite the fact that I could agree with some of their concerns, their main message is unacceptable. I will try to reflect briefly in the final part of my article.

Purpose and objectives of the studies. The purpose of the article is to discuss the key features of the potential Multilateral Investment Court creation. The objectives are as follows: analysis and synthesis of the current situation with investment dis-

putes, identification of the issues and try to answer on the question regarding the need to create the Multilateral Investment Court.

Statement of a parent material. The improvement of the investor-state dispute settlement (ISDS) system is a subject of hot debates during last 20 years. The crucial issues in these discussions are the legitimacy of the ISDS, unpredictability of the dispute outcome, the aggressive and expansive jurisdiction approaches, lack of transparency, high cost, impossibility to appeal on the substance, high amounts of compensation and many other. From the other side, the investment arbitration becomes more and more popular, the number of cases increases every year. Despite the fact that International centre for settlement of investment disputes (ICSID) was a revolutionary project, which was created during «a period of prosperity» of the international courts development such as International Court of Justice and European Court of human rights, now the main stakeholders are not satisfied by the ISDS [1, p. 90].

Many countries are concerned regarding the above-mentioned issues of the ISDS. The European Union (EU) and some other countries propose to create the so called «Multilateral Investment Court» (MIC). According to theirs position, MIC has the opportunity to decide the ISDS problems, at least partially.

The first issue which we want to discuss, is a **legitimacy issue**. It should be noted, that the ISDS system serves as a dispute settlement authority in parallel with other areas of law. Many arbitrators interpret such a special niche sphere in the abusing manner. They maliciously interpret the Investment treaty provisions and give them the priority and completely ignoring other treaties, as well as national legislation of the host States [2].

The next issue is a **transparency**. The ISDS system has two opposing principles – the confidentiality of the proceeding (particularly awards) and the transparency principle. The legal basis of the transparency (among the parties' agreement to publish the final award and procedural positions) is a UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration [3] and Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) [4]. The Mauritius Convention obliges the Contracting Parties to hold public hearings, publish awards, written positions of the parties and other relevant information etc. However, the number of members speaks for itself. There are only 9 Member-States to date.

To our mind the lack of transparency harms the democratic foundations. The published awards and written positions force the host State to be responsible not only before the investors, but also before the society.

The **unpredictability** issue is a sensitive as for the investors, as for the host States. When the investors think whether to trigger the dispute, they cannot predict how the proceedings would finish. This thesis as well as the high arbitration costs and costs for the interests representation make them think. For instance, there were two similar cases between the CME [5] and Lauder [6] respectively versus the Czech Republic. Despite they are similar, the arbitral tribunals concluded them differently. As a result, the investors increasingly reluctant to go to the investment arbitration [7, p. 8–10]. Instead they look for other ways how to decide, and such ways promote corruption and other dirty tricks.

Mr. Hodgson and mr. Campbell analyzed the average expenditure of the investment arbitration for investors and for States and found that the average cost amount for investors is circa 6 million dollars and for States – 4 million dollars [8]. It should be kept in mind, that it`s only the first stage of proceeding. Usually after the arbitration one of the parties (depending on the result of the arbitration) starts the procedure of award annulment in the arbitration jurisdiction and (if the investor was double-successful) the award enforcement in the convenience forum. We think that such a **high cost** dispute settlement from the one side is beyond the reach of the majority of those in need and on the other side puts too high a financial frontier, which makes this way unfair even for those with finances.

All these issues are interconnected and in complex create uncomfortable conditions with unpredictable results for both dispute parties.

UNCTAD in 2013 published the paper which explains a summary of a possible reform of ISDS [9]. To our knowledge, it`s the first official reflection of international organizations in ISDS sphere regarding MIC. Thereafter UNCITRAL created a special Working Group III which deeply investigates the MIC creation process and proposes several issues about it. As of today, the next UNCITRAL Working Group III will take place on 9-13 October 2023. In particular, UNCITRAL Working Group III during 2017–2020 has discussed all the above-mentioned ISDS issues.

The European Commission (EC) has also reflected on the MIC topic in 2015. The main idea of the EC paper was to create a more transparent system for attraction of foreign investments. The EU, as the largest exporter and importer of the foreign investments wants to stabi-

lize and protect the rules of foreign investments regime because the transparent rules formulate the favorable investment climate, which has a great impact on the economy of the EU host States [10].

One of the features of the MIC is a «new» method of judges'[1] appointment. The appointment should be transparent, based on the competence, gender, nationality, equal representation of the States etc. According to UNCITRAL Working Group III the geographical diversity helps to present different legal and cultural background of the appointed judges [11]. According to Mr. Mackenzie the transparent appointment of the MIC judges would be the most advantage of the MIC system. The Contracting Parties of the MIC treaty would have a right to appoint a candidate and the MIC plenary authority would select the best candidates according to the requirements [12]. From our point of view, such approach of appointment is similar to the almost same procedure in the International Court of Justice.

The next upgrade of the appointment is a prohibition for judges to work as private lawyers in parallel. For the involvement of the most qualified professionals, a good salary is offered for covering all expenses. As an alternative, the EC proposes the part-time appointment. However, it seems more questionable from the transparency and independency prospective [13, p. 44–45]. We think there is no place for half measures in such matters.

One more interesting question regarding the appointment is the appointment term. From the one side, the judges should serve a long term, but without a right of re-appointment. The long-time term is necessary because of the issue of unpredictability and inconsistency of the awards. From the other side, this can result in the insufficient level of the MIC treaty Contracting States representation. Finally, the one term-appointment should decrease the risks of partiality[2].

Last but not the least, the MIC creation would formulate the appellate mechanism. As we mentioned several times above, one of the common issues to date is an inconsistency of the case outcome. From our point of view the appeal instance would handle this moment and ensure consistency of law application. Two-instance dispute settlement system is exactly what is missing in the current ISDS. Lack of control mechanism was one of the main motives of the MIC creation [14]. It should be noted that the appeal mechanism creation was the topic of discussion by a number of treaty created international dispute forums including ICSID. Furthermore, the appeal option is already included in a number of treaties - EU with CETA, EU-Vietnam and EU-Singapore IPA.

The great example of two-instance necessity is a *CMS Gas Transmission Company v. The Argentine Republic* case, where the ICSID annulment committee found two legal inconsistences. However, it could not be fixed because of the lack of the competence of the ICSID *ad hoc* committee to annul the award on such ground.

The predictability issue is one of the most important things in any dispute settlement system, whatever we discuss national or international system. Obviously, the investment disputes are one of the most complicated disputes all over the world and to predict how the dispute will going is impossible. However, the existence of the appeal option would fix this moment mainly through the consistent interpretation and application of the treaties and relevant international law in general. Moreover, the creation of the appeal body would provide the consistency also because of a control mechanism (which is typical function of appeal courts). Further, the obligation of the first instance to follow the appeal instance practice often does not need to be explicit [15].

From our prospective it is important to minimize the quantity of appeal judges. This argument is based on the necessity for further accuracy and correctness of the MIC precedents as well as the continuity of the interpretation and application of the relevant law. The big number of judges potentially can lead to the unnecessary discussions on the sidelines [16]. To put it simply, «one head is good, two is better». The appellate mechanism is would allow to make a double-check of the settlement body conclusions and filtrate some inaccuracies of the first instance.

Near the end of this article, I want reflect a little on two articles of scholars, that I really respect – Mr. Lee M Caplan [17] and Mr. José Manuel Alvarez Zárate [18]. Both have commented the MIC idea and came to the conclusion that the MIC conception would not decide the ISDS issues. Theirs concerns divide on two major arguments – political appointments of judges and uselessness of consistency, because *«it may be important to have a second bite at the apple»* [17, p. 58]. Particularly Mr. Caplan proposes as an alternative the stringent code of conduct for arbitrators (which, by the way, was drafted by the UNCITRAL Working Group III [19]). Only practice will show the result, but from my point of view the code of conduct in such worse situation is not enough.

[1] Honestly the stakeholders of the MIC idea call them «adjudicators» although in fact they are judges. For accuracy, I will call them «judges» in ~~this Article. Authors remark.~~

[2] For instance, ICJ Article 13 allows the re-election of the judge, while ECHR's Article 23 prohibits this practice.

Regarding political appointments I want to note, that there are no ideal ways how to settle the dispute. Perhaps humanity has not yet invented them. The absolute majority of the court systems have the political lobby and political appointments. However, the ultimate chaos which we shortly described above is also not an option. The arbitrators which work as legal representatives in parallel is a hotbed of corruption as well as lobbying of investors or States interest (depends on what side the particular arbitrator works). Thus, we cannot avoid the lobbying of the interests in any case.

What concerns the second bite at the apple, from our prospective the question is not posed on the right way. Wee think that more correct would be to ask, how to create the ISDS general principles of application of the public interest as well as some other crucial issues in almost all investment disputes, which are usually on the table. Answering this question, we cannot think about any other tries to get the second chance. We should proceed from the fact that a future precedent system would give a clear understanding of guideline how to evaluate the State behavior and compare it with the acts of the investor. In such way, the State must analyze their potential action and understand the risks of the action. The State cannot afford, in exercising its own powers, to constantly look back and wonder whether it will accidentally result in the reimbursement of several billion dollars or not. Investor, in his turn, also should understand whether his investing in a gross dispute resolution be justified.

Considering all the above mentioned, with all due respect I cannot agree with Mr. Lee M Caplan and Mr. José Manuel Alvarez Zárate.

All stated above clearly demonstrates the lack of common consensus regarding the MIC creation. However, the ISDS issues continue to progress. In absence of any alternatives, the investors and the States continue to engage in disputes with unexpected and uncontrollable results. The necessity of creation of an impartial and transparent ISDS system is still relevant. From our prospective, the MIC creation perhaps not the ideal, but the best alternative to investment arbitration.

Conclusions. The ISDS system is a part of infrastructure of international commercial activity, which importance is difficult to assess. How we tried to argue in this article, the MIC creation would potentially decide the big pool of ISDS issues: lack of transparency, unpredictability, inconsistency etc. It should be noted that the MIC creation would not put a cross on the general principles of the traditional investment arbitration. Rather, it should be seen as a new logical development circle. We will follow with a great interest further development.

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Грабчак Г.В. ІДЕЯ СТВОРЕННЯ БАГАТОСТОРОННЬОГО ІНВЕСТИЦІЙНОГО СУДУ

Глобальні зміни політичної та економічної ситуації в усьому світі впливають на поточну систему вирішення інвестиційних спорів. Поточна система врегулювання спорів продемонструвала ряд питань, таких як непередбачуваність результату спору, агресивний і експансивний підхід до юрисдикційних питань, відсутність прозорості, висока вартість, неможливість оскарження по суті, високі суми компенсації та багато іншого. Всі ці питання ініціювали процес швидких змін у системі вирішення інвестиційних спорів між інвестором та державою - обговорення потенційного створення Багатостороннього інвестиційного суду.

Кількість інвестиційних спорів збільшується з кожним роком, а разом з нею збільшується кількість питань в інвестиційному арбітражі. Незважаючи на глибоку стурбованість міжнародної спільноти проблемою принаймні з 2004 року, вживаються лише напів-заходи. Наприклад, Міжнародний центр з врегулювання інвестиційних спорів двічі переглядав власні Правила - у 2006 та 2022 роках. Однак головною проблемою є не некоректний процес, а відсутність апеляційного розгляду та контролю за прийнятими рішеннями. Різні висновки в подібних питаннях зустрічаються все частіше. Крім того, практика юридичних представників паралельно надавати послуги у якості арбітра створює високі корупційні ризики.

Беручи до уваги всі проблемні питання, Робоча група ІІІ ЮНСІТРАЛ, ЮНКТАД та Європейська комісія розпочали безпрецедентний процес просування ідеї створення Багатостороннього інвестиційного суду.

Стаття присвячена огляду та аналізу ідеї створення Багатостороннього інвестиційного суду. У статті розкрито актуальні проблеми інвестиційного арбітражу, а також переваги та недоліки створення Багатостороннього інвестиційного суду, та з'ясовано, що створення Багатостороннього інвестиційного суду було б більш позитивним, ніж негативним проєктом. З нашої точки зору, проблеми інвестиційного арбітражу більше не можуть прогресувати.

У цій статті ми спробуємо взяти участь у цій дискусії, розглянути основні питання і обміркувати їх можливе вирішення.

Ключові слова: *Багатосторонній Інвестиційний Суд, врегулювання спорів між інвестором та державою, передбачуваність, прозорість, послідовність, Робоча група ІІІ ЮНСІТРАЛ.*