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Executive Summary

The EU's proposal to establish a new Investment Court System during the TTIP negotiations has well represented the cumulative resentment of the public, governments, civil societies as well as academics in regard to the existing ISDS mechanism. Such issues as the lack of legitimacy, transparency, consistency, the absence of a review mechanism, and the high burden to public finance in the existing system have been criticized as undermining the sovereignty of the State and its right to regulate for legitimate policy objectives such as the environment, health, and safety. Despite the merits of the existing ISDS mechanism, the increasing demand for improved safeguards against abusive claims and discretionary power of private adjudicators should be adequately addressed in consideration of the democratic principles and the objectives of sustainable development goals. It is also noteworthy that the function of the traditional ISDS system, devised as a preferential instrument for foreign investors, has evolved over time as the distinction between capital-exporting and capital-importing countries became blurred and more attention is focused on the equality and balance of power among domestic and foreign businesses as well as between investors and the host States.

In this vein, the establishment of a permanent tribunal and the public appointment of tribunal members with a fixed-term, as proposed by the EU in the new ICS, are indicative of the shifting paradigm in the discourse of treaty-based investor to State arbitration systems. Despite the fact that the system of ICS can hardly solve all of the problems, it may possibly improve the level of legitimacy by incorporating public features of the procedure. At the same time, it is noteworthy that the objective of improving the legitimacy and consistency of the dispute settlement system cannot be ach-

ieved without the prospect of establishing a multilateral dispute settlement mechanism with consolidated and harmonized standards of investment rules. Considering the difficulties of reaching a multilateral agreement on investment as witnessed in the past decades, the approach of the Mauritius Convention, which adopted an opt-in mechanism, would be useful as it reduces the risk of failure in negotiations while building a consensus among participants and allowing them to decide when to ratify the Convention in consideration of their domestic circumstances.

Considering the extensive network of trade and investment agreements that Korea has concluded in the past decade, it is more than necessary for the Korean government to pay close attention to the recent development in this process and actively participate in discussions on the possibility of establishing a multilateral investment court and the key principles of investment protection and facilitation in international fora.

JEL Classification: F13, K33

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Contents

Tables

Figures

List of Abbreviations

APEC	Asia-Pacific Economic Cooperation
BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
CTI	Committee on Trade and Investment
DDA	Doha Development Agenda
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FOI	Freedom of Investment
FTA	Free Trade Agreement
G20	Group of 20
ICC	International Chamber of Commerce
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ISDS	Investor - State Dispute Settlement
MAI	Multilateral Agreement on Investment
MFN	Most Favored Nation
MIC	Multilateral Investment Court
MNC	Multinational Corporation
NAFTA	North American Free Trade Agreement
NGO	Non Governmental Organization
NT	National Treatment
OECD	Organization for Economic Co-operation and Development
PCA	Permanent Court of Arbitration

RCEP	Regional Comprehensive Economic Partnership
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SDG	Sustainable Development Goal
TIP	Treaty with Investment Provision
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

The EU's Investment Court System and Prospects for a New Multilateral Investment Dispute Settlement System

YANG Hyoeun†

1. Introduction

1.1 Overview

Background

While the system of treaty-based investment arbitration between States and investors has been in practice since the 1960s and more than 3,300 international investment agreements (IIAs)[1] exist at present, the debates on the need for reforming the dispute settlement mechanism have been heated in the past few years as the EU and the US have negotiated the provisions on

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1) In 2015, the number of IIAs reached to 3,304 including 2,946 Bilateral Investment Treaties (BITs) and 358 Treaties with Investment Provisions (TIPs). TIPs include free trade agreements (FTAs), regional trade and investment agreements (RTIAs), economic partnership agreements (EPAs), cooperation agreements, economic complementation agreements, closer economic partnership agreements, agreements establishing free trade areas, and trade and investment framework agreements (TIFAs). UNCTAD (2016), p. 115.

investment dispute settlements in their new trade deal, namely the Transatlantic Trade and Investment Partnership (TTIP). Even though many critics have raised concerns over the lack of legitimacy of the investor-state dispute settlement (ISDS) system and its negative impact on public policy and many proposals have been made to reform the system, no considerable attempt was made to overhaul the entire structure of the ISDS until the TTIP provoked intensive public debates on the appropriateness of the ISDS to be incorporated in an investment treaty in Europe. Facing strong opposition to the TTIP and the inclusion of ISDS provisions in it by civil societies and NGOs in many Member States of the EU, such as Germany and Austria, the European Commission conducted an online public consultation to gather opinions from a wide range of stakeholders on investment protection and the investor-state dispute settlement system in TTIP from March to July 2014. Unsurprisingly, among the 150,000 responses to the public consultation, most of the responses indicated either concerns or oppositions to the inclusion of the ISDS in TTIP and requested for a substantial reform of the system if not rejected it at all.[2] In recognition of the widespread public opposition to the ISDS, then, the European Parliament adopted a resolution which recommended the Commission to establish a permanent investment court with an appellate mechanism to replace the current arbitration system of the ISDS. The text of the European Parliament's resolution on the ISDS is quite concrete as it indicates the desirable structure and core features of the new system as below:

2) European Commission, Report – Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), 13 January 2015.

… 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;[3)]

As a response to the public consultation and resolution of the European Parliament, the Commission has proposed a new investment court system (ICS) by publishing a draft text of the TTIP investment chapter which includes a wide range of reform features of the dispute settlement system both in its substances and procedures.[4)] While the Commission put the proposal on the TTIP negotiation table,[5)] it has also negotiated with Canada to replace the already agreed ISDS provisions in the Comprehensive Economic and Trade Agreement (CETA) with the new investment court system (ICS). To the surprise of many observers, the Canadian government agreed to the EU's proposal, adding weights on the EU's efforts on establishing a permanent investment court. As the European Parliament gave its consent to the CETA on 15 February 2017, the CETA has become the EU's first trade agreement with a third country that has the ICS in the investment chapter.[6)]

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3) European Parliament, *European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)* (2014/2228(INI)).

4) European Commission, *European Union's proposal for Investment Protection and Resolution of Investment Disputes*. It was tabled for discussion with the US and made public on 12 November 2015.
Trade in Services, Investment and E-commerce, Chapter II − Investment.

5) European Commission, "EU finalizes proposal for investment protection and Court System for TTIP," Press release, Brussels, 12 November 2015.

6) European Commission, *CETA − a trade deal that sets a new standard for global trade*, News Archive, Strasbourg, 15 February 2017 and European Commission, *Overview of FTA and*

Likewise, the final text of the EU-Vietnam FTA contains the two-tier mechanism of investment tribunal system.[7] Even though the prospect of the EU's investment court system cannot be foreseen at this quite early stage of initiation, the success of including it in the CETA and the EU-Vietnam FTA should be considered as a meaningful progress in the efforts of the EU in reforming the investor-state dispute settlement system.

Furthermore, the Commission made it clear that the ICS in bilateral trade agreements are meant to be developed into a permanent multilateral investment court (MIC) and that the Commission would work on discussing optimal options to establish a MIC with like-minded countries. While the EU intends to include the ICS in all ongoing and planned negotiations including deals with China, Myanmar, Tunisia, Chile, Philippines, Indonesia, Australia and New Zealand, it has also taken steps forward in order to formulate consensus and promote ideas on establishing a multilateral investment court mechanism in international fora.[8] Ultimately, it is the goal of the EU to replace the fragmented network of IIAs, including the newly created investment court system, with MIC as a fundamental way of solving problems associated with the existing ISDS system.

Considering that investors from the EU Member States have been the most frequent users of the ISDS system as its inventor and also proponents of its merits for decades,[9] it is interesting to observe the widespread public discontent at the inclusion of the ISDS in the TTIP in Europe and the sub-

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Other Trade Negotiations, Updated in May 2017.

7) EU-Vietnam Free Trade Agreement, agreed text as of 1 January 2016, published on 1 February 2016, http://trade.ec.europa.eu/doclib/docs/2016/ february/tradoc_154210.pdf.

8) *Reforming investment dispute settlement*, Speech by Cecilia Malmström, European Commissioner for Trade, Stakeholder event, Brussels, 27 February 2016.

9) European Commission, *Investor-to-State Dispute Settlement (ISDS) Some facts and figures*, 12 March 2015.

sequent reform efforts of the European Commission. Notably, the EU Member States have concluded 1,400 of IIAs by 2015 with the purpose of protecting and promoting foreign investment.[10] By the end of 2014, according to the UNCTAD, cases brought by investors from the EU Member States accounted for more than half of ISDS cases initiated and there have been only 29 cases against EU Member States challenged by investors from outside the EU, representing less than 5 percent of all ISDS cases globally.[11] This indicates that the possibility of being challenged by foreign investors from outside of the EU is far lower than from investors within the EU except that the US as a contracting partner in TTIP may pose a higher risk of bringing new ISDS cases against the EU or a Member State of the EU in case of an alleged breach of the treaty. One of the most relevant explanations for this changing attitude of the EU as an institution towards the ISDS system, and the subsequent reform efforts of the Commission in the midst of negotiating trade agreements, can be attributed to the conclusion of the Lisbon Treaty in 2009 that conferred competence for the investment protection to the EU.[12]Considering the strengthened position of the European Parliament in approving trade deals with investment measures, the intensified public scrutiny on ISDS, and that the Parliament is intrinsically concerned with safeguarding democratic principles and public opinions, it should be the sole choice of the Commission to prove the validity and legitimacy of the dispute settlement system by means of reforming the old system in order to persuade the Parliament to approve a trade deal. Indeed, the EU proclaimed that it would include ISDS provisions in its ongoing and future trade deals at first and then decided to replace it with the ICS as a response

10) The European Commission (2015), *Trade for all: Towards a more responsible trade and investment policy*, p. 21.

11) *Ibid.*

12) European Commission (2015), Concept Paper, "Investment in TTIP and beyond − the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court."

to the massive public discontent against the existing ISDS system in the context of negotiating TTIP.

Scope of analysis

Considering the progress of the EU's reform efforts on the investment dispute resolution system and its ambition to establish a multilateral investment dispute settlement system in the form of a permanent court comprising individual BITs and the new ICS, it is important to analyze the validity of the claims against the existing ISDS system and how the new ICS would possibly solve some of those problems. As mentioned earlier, debates on reforming the ISDS system and investment protection standards are not anew in the avenue of international trade and investment. At the same time, it is not a particular issue of the EU, but bears relation to any country engaged in the complex network of international investment treaties, including the increasing number of FTAs. While developed countries, often representing foreign investors, have preferred to use the ISDS system as a way of protecting their investments overseas in the past, recent statistics on ISDS cases reveals that the frequency of developed countries seating as respondents has significantly increased. Considering that the size of FDI has significantly increased in the past decades and that FDI flows in both directions between developed and developing countries, the momentum is growing for the reform of the existing ISDS system, reflecting recent features of global investment and social values.[13] Indeed, the number of ISDS cases has sharply increased in the past few years and the reform of the investor-state dispute settlement system will ultimately affect both developed and developing countries.

From the perspective of Korea, the EU's new approach to investment treaties has importance in two aspects. First, in terms of the reform of the ISDS system in bilateral agreements, Korea and the EU are scheduled to re-

13) *See* Anders Aslund, "The World Needs a Multilateral Investment Agreement," Policy Brief, Number PB13-01, Peterson Institute for International Economics, January 2013.

view the Korea-EU FTA in the near future, in line with the agreement between both governments to hold a formal consultation. Since the European Commission has declared that it will pursue the ICS in its future investment negotiations, including new negotiations and the renegotiation of the existing treaties, it is necessary to have a comprehensive understanding of the rationales and key features of the ICS before the negotiation starts. Furthermore, in terms of the EU's attempt to establish a multilateral investment court, it is critical for Korea to actively participate in the process of setting international standards on investment when considering its extensive networks of trade and investment agreements. Indeed, the EU's intention of developing the ICS into a multilateral investment court system will have an effect on setting new international investment standards and will influence the global sphere of investment rules, including the system of dispute settlement, which will directly affect the treaties and practices of investment relationship with other countries. In this sense, it is crucial to understand the approach of the EU in establishing a multilateral investment court and how other countries have responded to the initiative.

Thus, this research will first review the development of bilateral and multilateral investment rules in the past decades and explore recent progress in reforming the global investment regime. After then, Chapter 2 will analyze the issues at hand regarding the existing ISDS system and how those issues have been dealt with in the course of debates on the reform of ISDS. Based on this, Chapter 3 will analyze the main features of the EU's new dispute settlement system, namely the investment court system (ICS), in the CETA and how the EU's new system differs from the traditional ISDS system. In Chapter 4, regarding the discussion on establishing a multilateral investment court, it will be necessary to analyze the possibilities and constraints of establishing a multilateral investment court based on the EU's initiative on it. Chapter 5 will conclude the analysis by drawing policy implications on the necessity of reforming the ISDS system and the possibility of establishing a

multilateral investment dispute settlement system.

1.2 Bilateral investment rules

Since the first bilateral investment treat (BIT) was signed between Germany and Pakistan in 1959,[14] the cumulative number of IIAs including BITs and treaties with investment provisions (TIPs) reached 3,324 by the end of 2016.[15] Unlike the establishment of multilateral trade agreements throughout the 1960s and 1970s, the absence of a multilateral investment agreement resulted in a range of reciprocal bilateral investment agreements mainly in the form of concession agreements for exploiting natural resources and building infrastructure.[16] In this sense, the initial purpose of signing bilateral investment treaties was to mitigate an adverse investment environment against foreign investors in countries where the legal system provided lower degree of legal certainty and predictability.[17] As a compromise between capital-exporting developed countries looking for reasonable return to their overseas investment and developing countries with the need for injection of capital, human resources, and new technology for economic development, both developed and developing countries have found the bilateral investment treaties as a beneficial instrument for their own economic interests.[18] The investor-State dispute settlement (ISDS) system in-

14) *Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes),* Germany and Pakistan, 25 November 1959, 457 U.N.T.S. 24 (entered into force 28 April 1962; replaced by Germany − Pakistan BIT (2009)).

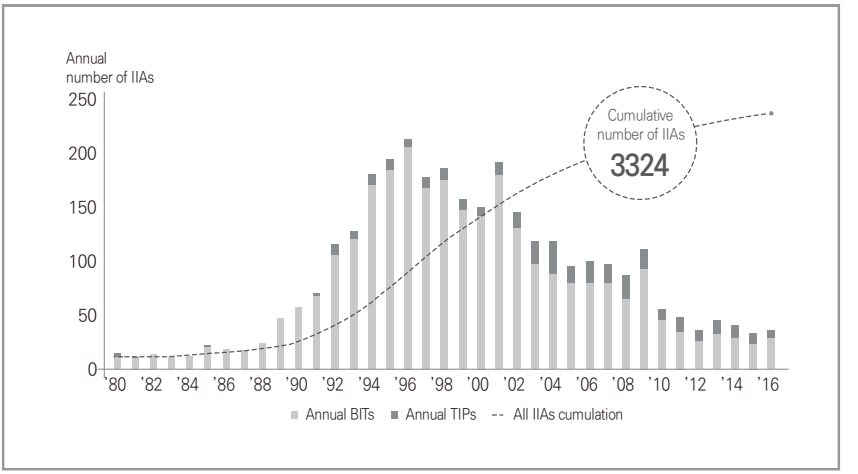
15) UNCTAD (2016), World Investment Report, Chapter III Recent Policy Developments and Key Issues, p. 111.

16) *See* Footer Mary E., "International investment law and trade: the relationship that never went away," in *Investment Law within International Law: Integrationist perspectives*, Freya Baetens (ed.) CUP (2013).

17) *See* Stoll, Peter-Tobias and Holterhus, Till Patrik "The Globalization of International Investment Law in Constitutional Perspective," *Shifting Paradigms in International Investment Law*, Steffen Hindelang and Markus Krajewski (ed.), pp. 339-356, OUP (2016).

corporated in most of IIAs was designed to provide private foreign investors with additional rights to challenge the host State in case of discriminatory acts and expropriation of the home State[19] so that their investments can be protected, not based on the legal standards of the host State but that of the agreement signed between the host State and the home State of the investors. Furthermore, the merit of incorporating ISDS lied in that investors can have recourse to investment arbitration in case of raising a dispute against the host State without relying on its home State to bring a claim on its behalf through diplomatic channels.[20] Consequently, the initial concept of ISDS was to give preferential grounds for foreign investors while restricting the discretionary power of the host State which would allegedly disadvantage foreign investors.

Figure 1.1. The Number of IIAs Signed per Year, 1980 – 2016



Source: UNCTAD (2017b), p. 111.

18) Footer (2013).

19) *See* Koeth, Wolfgang, "Can the Investment Court System (ICS) save TTIP and CETA?" EIPA Working paper 2016/W/01.

20) Footer (2013).

The collapse of communism and revive in free market economies saw that the former Soviet Union countries and other emerging economies became prone to the idea of contracting new investment treaties as a way of signaling their intention of attracting FDIs with more favorable terms and conditions.[21] Consequently, the number of BITs skyrocketed and around 2,000 BITs were concluded between 1990s and early 2000s. Notably, socialist countries also have shown interests in concluding BITs: China has 129 BITs, seconded only to Germany with 135, and Russia has 74 BITs.[22]

At the same time, however, as the number of BITs rose and the predominance of multinational corporations (MNCs) in many developing economies strengthened, the problems associated with MNCs in the areas of tax evasion, antitrust, balance of payments controls, and security regulations have raised concerns on the possibility of undermining sovereign states' right to regulate due to the investment treaties.[23] Most recently, the high profile ISDS cases brought by MNCs against developed countries such as Australia, Canada, and Germany have provoked the resentment against the investor-state investment arbitration system under BITs and caused the general public as well as policymakers and academics to scrutinize the negative impact of international investment agreements on the sovereign power of the state in regard to the principles of democracy, human rights, and safeguarding the public interest.[24] Following the heightened criticism to the problems of BITs and as most of the recent ISDS cases were brought under IIAs con-

21) Aslund (2013).

22) *See* Collins, David, *An Introduction to International Investment Law*, p. 37.

23) *Ibid.*

24) *See* Stoll and Holterhus (2016). For ISDS cases involving the above mentioned countries, *See Lone Pine Resources Inc v The Government of Canada*, UNCITRAL case, Notice of Arbitration (6 September 2013); *Philip Morris Asia Ltda v The Commonwealth of Australia*, PCA Case No 2012-12; *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12, Notice of Arbitration (31 May 2012).

cluded before 2000, recently negotiated investment treaties tend to adopt more precise and innovative features in drafting the provisions.[25]

1.3 Multilateral investment rules

In contrast to the development of bilateral investment treaties, multilateral efforts on setting rules on investment have staggered in the past decades. While some of the existing bilateral investment treaties incorporate advanced features of investment rules such as the investment chapter in the Korea-US FTA, the development of investment rules at the multilateral level has not been successful. In general, it had been considered far more difficult to reach a comprehensive agreement on investment than on trade as developing countries are more sensitive to the influence of foreign investment in their territories rather than that of trade.

In the 1990s, however, the hard-won success of Uruguay Round with the comprehensive and substantial trade liberalization gave an impetus for further negotiations on investment. Notably, a sizeable attempt towards concluding a multilateral investment agreement was once initiated by a group of OECD members in 1995 for negotiating the Multilateral Agreement on Investment (MAI) with the intention of providing "high standards for the liberalization of investment regimes and investment protection, with effective dispute settlement."[26] While negotiations were held only among OECD Members, the final agreement would be open to accession by non-member countries as well.[27] For the investor-state dispute settlement, MAI would also provide for investment arbitration mechanism like the practice of existing BITs, incorporating arbitration rules of ICSID, UNCITRAL or the ICC.[28]

25) *See* UNCTAD, *Phase 2 of IIA Reform: Modernizing the existing stock of old-generation treaties*, Issue 2, June 2017.

26) Press release, "OECD Begins negotiations on a multilateral agreement on investment," Paris, 27 September 1995, OECD.

27) *Ibid.*

After a series of negotiations, however, the withdrawal of the French Government in 1998, affected by criticism in regard to the negative impact of the agreement to the State sovereignty and its sensitive industries such as audiovisual products, effectively stalled the negotiation and no further negotiation has been attempted.[29] Beyond the case of France, the rising anti-globalization movements since the mid-1990s and the strong opposition to major trade and investment agreements by civil societies have largely influenced the failure of the negotiations. Moreover, the fact that the agreement would be negotiated among OECD members while the outcome would have significant impact on the economy of developing countries, who could participate in the negotiation process only as observers, provided little incentive for developing countries to contribute to the progress of a multilateral investment agreement, if not outright opposing it. Indeed, the distinctive interests on FDI between developed and developing countries should be noted as one of the key factors contributing to the failure of the negotiation[30] as capital exporting countries were more concerned with minimizing the interference of the State in the market while many of developing countries preferred to safeguard economic independence rather than facilitating investment led by private investors.[31]

Finally, it should be noted that the Singapore WTO Ministerial Conference of 1996 decided to set up three new working groups on trade and investment, on competition policy, and on transparency in government procurement. It also instructed the WTO Goods Council to review the possibility of simplifying trade procedures ("trade facilitation").[32] These

28) Footer (2013).

29) *Ibid.*

30) *See* Muchlinski, Peter T. (2000), "The rise and fall of multilateral agreement on investment: where now?" *The International Lawer*, Vol.34, No.3, Foreign Law Year in Review: 1999 (Fall 2000), pp. 1033-1053, published by the American Bar Association.

31) Collins (2017), p. 58.

32) WTO, Investment, competition, procurement, simpler procedures, https://www.wto.org/en

so-called "Singapore issues" expanded the scope of investment related negotiations at the multilateral level and were included on the Doha Development Agenda (DDA) with negotiations to start after the 2003 Cancun Ministerial Conference.[33] However, three of the "Singapore issues" were ultimately dropped facing strong opposition of developing countries and the WTO members agreed on 1 August 2004 to proceed with negotiations on trade facilitation only.[34]

Resurgence of multilateralism in investment

While the failure of negotiations on the Multilateral Agreement on Investment (MAI) in the auspice of the OECD and the drop of the investment issues from the DDA have well demonstrated the difficulty of reaching a consensus on investment rules, the increasing criticism against the fragmented and old-style investment regime based on dispersed IIAs, and the convergence on the function of FDI among developed and developing countries following the fast growth of emerging economies, have brought a new momentum for multilateralism in investment rules. Most notably, the entry into force of the Treaty of Lisbon on 1 December 2009, which gave competence on investment regulation to the EU, and the subsequent negotiations of the EU on investment chapters with its trading partners have refreshed the discussions on the need as well as the prospect for coordinated standards of investment rules at the multilateral level. Moreover, the rising trends of mega-regional FTAs such as the Trans-Pacific Partnership (TPP), the Regional Comprehensive Economic Partnership (RCEP), and the Transatlantic Trade and Investment Partnership (TTIP) mark the resurgence

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glish/thewto_e/whatis_e/tif_e/bey3_e.htm (accessed on 2017. 8. 2).

33) *See* Sandrey, Ron (2016), *WTO and the Singapore Issues*, tralac Working Paper, No 18. Stellenbosch: US Printers.

34) WTO, Investment, competition, procurement, simpler procedures, https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm (accessed on 2017. 8. 2).

of consolidation in investment rules.[35] Despite the opposition of the US to the EU's proposal of an investment chapter including the new investment court system (ICS), the TTIP was originally meant to set a consolidated standard of investment rules which would be applied to future investment agreements with emerging economies such as China.[36]

Compared to the failure of the MAI that marked the divergent position on investment between developed and developing countries, the *G20 Guiding Principles for Global Investment Policymaking (the G20 Principles)* adopted in the 2016 Hangzhou G20 Summit shed light on the possibility of reaching a new level of global consensus on investment rules. *The G20 Principles* is a set of non-binding principles of investment policy endorsed by G20 leaders, and is meaningful as the first multilateral consensus on investment matters agreed by a wide spectrum of developed, developing and transition economies since the failure of the negotiations on Singapore issues.[37] It is interesting to note that China, as the Presidency of the 2016 G20 Summit, initiated the negotiations on the *Principles* while it had been opposed to such negotiations on multilateral investment rules some twenty years ago when the United States initiated the negotiations on the APEC non-binding investment principles in 1994 following the establishment of the APEC Committee on Trade and Investment (CTI).

The objective of the *G20 Principles* reflects the most recent development in the discourse of multilateral investment rules, as below:[38]

35) *See* Berger, Alex, "Do we really need a multilateral investment agreement?" Briefing Paper 9/2013, German Development Institute.

36) *See* Koeth (2016).

37) UNCTAD (2017b), World Investment Report.

38) Annex III: G20 Guiding Principles for Global Investment Policymaking, 2016 G20 Hangzhou Summit Leader's Communique.

(ⅰ) Fostering an open, transparent and conducive global policy environment,
(ⅱ) Promoting coherence in national and international investment policymaking, and
(ⅲ) Promoting inclusive economic growth and sustainable development

On these grounds, explicit recognitions are given to the critical role of investment in the global economy, the value of openness, non-discrimination, transparency, and predictability in investment policymaking, the right to regulate for legitimate public policy purposes as well as effectiveness to maximize economic benefits. As a prelude for further discussions in this regard, one of the key successes of *the G20 Principles* includes "a delicate balance between the rights and obligations of firms and States, between liberalization and regulation, and between the strategic interests of host and home countries."[39] As a non-binding instrument, *the G20 Principles* can serve as a starting reference for further reviews and discussions for negotiating multilateral investment treaties.

2. The Investor-State Dispute Settlement (ISDS) System

2.1 Recent trends in ISDS cases

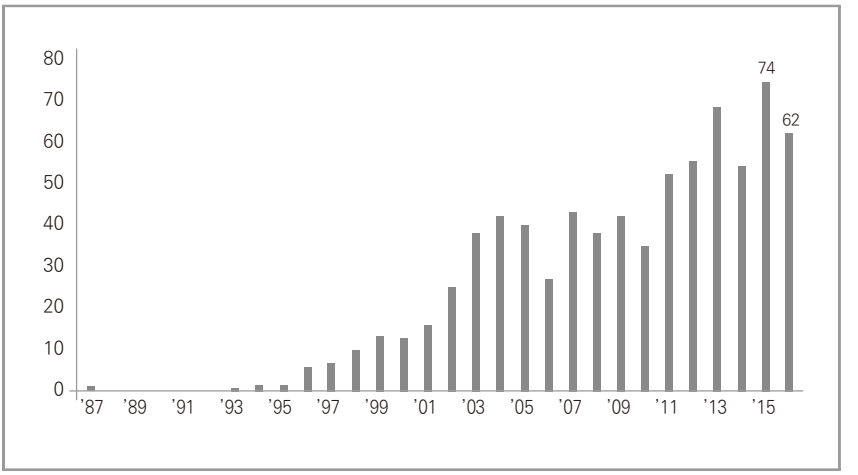
The rate of treaty-based ISDS cases by ad hoc arbitral tribunals has continued to increase with an average of 49 cases initiated per year from 2006 to 2015.[40] In 2015, the number of new cases initiated reached a record-high 74

39) UNCTAD (2017b), World Investment Report.
40) *Ibid.*

and that of 2016 was 62, both over the average for the past ten years (*see Figure 2.1*).

Figure 2.1. Annual Number of Treaty-Based ISDS Cases, 1987-2016

(Unit: Number)



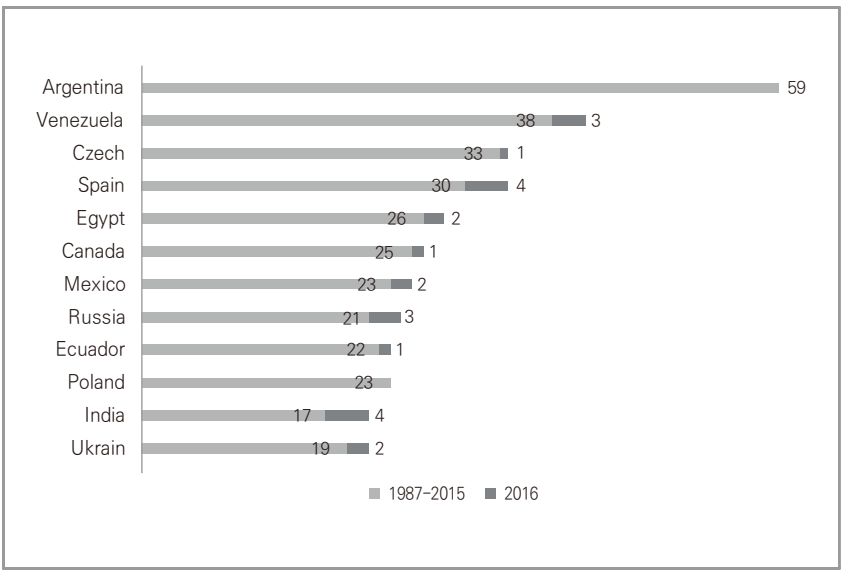
Source: UNCTAD (2017b), p. 115.

Considering that only publicly known cases can be counted and that arbitrations can be dealt in confidential manner in many instances, the actual number of ISDS cases can be fairly higher than this. As of January 2017 the cumulative number of known ISDS cases reached 767. Overall, 109 countries have been respondents to at least one publicly known ISDS case.[41] While developing countries are most frequent respondents, the relative share of cases against developed countries increased at 45 percent in 2015 and then lowered at 29 percent in 2016. Among developed countries, Spain and Canada are included in the top 10 most frequent respondent states of ISDS cases from 1987 to 2016 (*see Figure 2.2*).

41) *Ibid.*

Figure 2.2. Most Frequent Respondent States, 1987-2016

(Unit: Number)



Note: The figures represent the number of known ISDS cases.

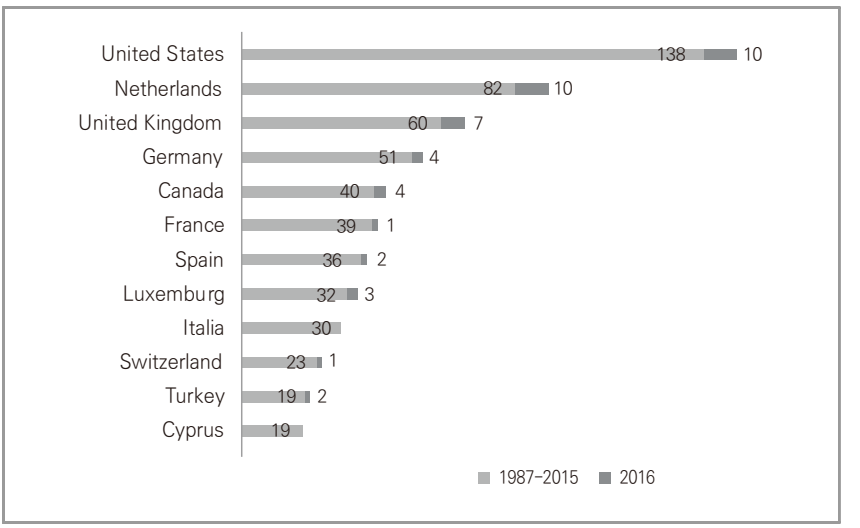
Source: UNCTAD, ISDS Navigator, http://investmentpolicyhub.unctad.org/ISDS (accessed on 2017. 8. 2).

Investors from developed countries are dominant claimants in ISDS cases while investors from developing and transition economies have also filed a few cases each year. In 2016, investors from the Netherlands and the United States were the most active claimants with 10 new cases, followed by investors from the United Kingdom with seven new cases.[42] Among developing countries and transition economies, investors from the Russian Federation, Turkey, Ukraine and the United Arab Emirates filed two cases in 2016, respectively.

42) *Ibid*., p. 116.

Figure 2.3. Most Frequent Home States of Claimants, 1987-2016

(Unit: Number)



Note: The figures represent the number of known ISDS cases.

Source: UNCTAD, ISDS Navigator, http://investmentpolicyhub.unctad.org/ISDS (accessed on 2017. 8. 2).

Among the international investment treaties (IIAs), the most frequently invoked treaties are the Energy Charter Treaty (99 known cases) and NAFTA[43] (59 known cases), which comprise 20 percent of all known cases. In 2016, about two thirds of investment arbitrations were under BIT's which were mostly concluded back in the 1980s and 1990s.[44] Still, the most frequently invoked IIAs in 2016 included the Energy Charter Treaty (10 cases), NAFTA and the Russian Federation-Ukraine BIT (3 cases each).[45]

While the State measures challenged by investors vary case by case and information on the causes of dispute is limited, the most frequently cited provision for alleged breaches of IIAs from 1987 to 2016 in known ISDS cases

43) The North American Free Trade Agreement.

44) UNCTAD (2017a).

45) *Ibid.*

was the provision of minimum standard of treatment (384 cases), followed by indirect expropriation (346 cases), full protection and security (200 cases), and discriminatory measures (166 cases) (*see Table 2.1*). For concluded cases, the most frequently found breaches of IIA provisions also include the provisions of the minimum standard of treatment (98 cases), indirect expropriation (49 cases), discriminatory measures (24 cases), and direct expropriation (22 cases) *(see Table 2.2)*.

Table 2.1. Breach of IIA Provisions Alleged, 1987-2016

IIA Provisions	Number of Cases
Fair and equitable treatment / Minimum standard of treatment, including denial of justice claims	384
Indirect expropriation	346
Full protection and security, or similar	200
Arbitrary, unreasonable and/or discriminatory measures	166
Umbrella clause	109
National treatment	108
Direct expropriation	87
Most-favored nation treatment	84
Transfer of funds	28
Performance requirements	13
Customary rules of international law	11
Losses sustained due to insurrection, war, or similar events	2
Others	50

Source: UNCTAD, ISDS Navigator (accessed on 2017. 8. 2).

Table 2.2. Breach of IIA Provisions Found, 1987-2016

IIA Provisions	Number of Cases
Fair and equitable treatment / Minimum standard of treatment, including denial of justice claims	98
Indirect expropriation	49
Arbitrary, unreasonable and/or discriminatory measures	24
Direct expropriation	22
Full protection and security, or similar	19
Umbrella Clause	14
National treatment	8
Performance requirements	4
Transfer of funds	2
Most-favored nation treatment	2
Losses sustained due to insurrection, war, or similar events	1
Customary rules of international law	1
Other	10

Source: UNCTAD, ISDS Navigator (accessed on 2017. 8. 2).

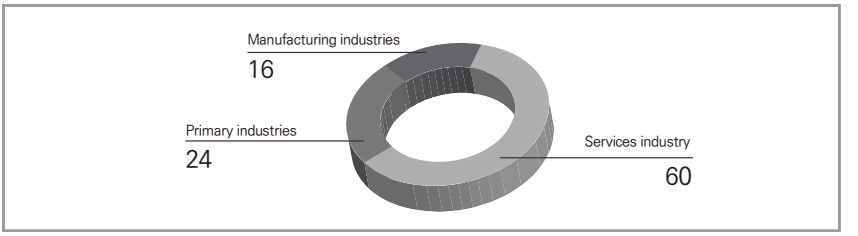
In terms of economic sectors involved in disputes, about 60 percent of cases were related to activities in the services sector,[46] followed by primary industries for 24 percent and manufacturing industries for 16 percent in 2016 in line with the overall trend in ISDS cases.[47]

46) Among the services sector, activities related to the supply of electricity and gas brought the largest number of disputes (11 cases) in 2016, followed by construction (6 cases), information and communication (6 cases), financial and insurance services (4 cases), real estate (3 cases), transportation and storage (2 cases), entertainment and recreation (2 cases), accommodation and food service (1 case) and administrative and support service (1 case). UNCTAD (2017b).

47) *Ibid.*

Figure 2.4. Economic Sectors involved in Disputes, 2016

(Unit: %)

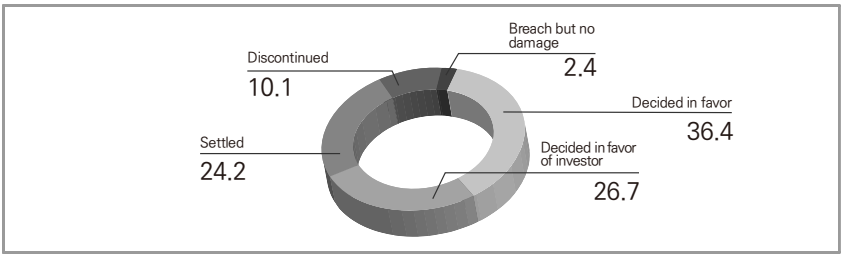


Source: UNCTAD (2017b), World Investment Report.

The results of concluded cases from 1987 to 2016[48] indicate that State parties have been more successful than investors on average – about 36 percent of concluded cases were decided in favor of the State as cases were dismissed either on jurisdictional grounds or merits and about 27 percent of cases were decided in favor of the investor with an award of monetary compensation (*see Figure 2.5*).[49] However, investors won more of the cases on the merits as cases decided in favor of investor accounted for 59 percent while that of State was 41 percent.

Figure 2.5. Results of Concluded Cases, 1987-2016

(Unit: %)



Note: *Breach but no damage* means that a case is decided in favor of neither party (liability found but no damages awarded).

Source: UNCTAD, ISDS Navigator. As of 1 January 2017 (accessed on 2017. 8. 2).

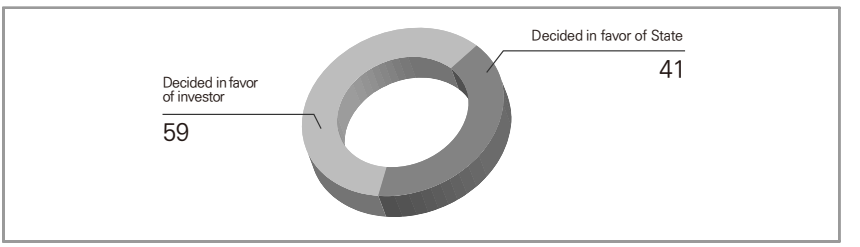
48) Total number of ISDS proceedings concluded by the end of 2016 was 495.

49) UNCTAD (2017b), p. 116.

Even though it is difficult to estimate the general amount of monetary claims and awards, the average amount of awards for known cases was $545 million, with the median $20 million excluding interest or legal costs. In original claims, the average amount claimed was $1.4 billion with the median $100 million, and successful claimants were awarded about 40 percent of the amounts they claimed on average.[50]

Figure 2.6. Results of Decisions on the Merits, 1987-2016

(Unit: %)



Note: excluding cases (i) dismissed by tribunals for lack of jurisdiction, (ii) settled, (iii) discontinued for reasons other than settlement or for unknown reasons, (iv) decided in favor of neither party (liability found but no damages awarded).

Source: UNCTAD, ISDS Navigator (accessed on 2017. 8. 2).

2.2 Reform issues in ISDS

As the number of ISDS cases has amplified in the past 10 to 15 years (*see Figure 2.1*) and more countries have the experience of responding to investor claims as respondents, the validity of the ISDS mechanism in resolving disputes between investors and States became subject to extensive debates among stakeholders including governments, investors, civil society groups and academics. At the core of the criticism against the ISDS system was that private investors were allowed to challenge the conduct of sovereign States directly and the participation of the public is limited in general despite the

50) *Ibid.*

overarching influence of such decisions to the public policy. While the system of ISDS was designed to give assurance to investors that investment disputes arising between them and host States would be heard by a depoliticized tribunal and judged based on applicable investment treaties rather than domestic laws of the host State, the unique features of ISDS, such as creating a forum outside of domestic legal sphere, allowing Parties to appoint their adjudicators and finality of decisions made by the arbitral tribunal, have been subject to criticism for limiting the regulatory space of the government and excluding the public from important decisions.[51] In addition, the exclusive amount of claims in some ISDS cases, ranging from hundreds of millions to billions of dollars, and the high cost of arbitration are considered to seriously affect the public finance of respondent States.[52]

Intergovernmental and institutional discussions on the ISDS system have heightened around 2010 while many academics and practitioners have analyzed the pros and cons of the system even before then. In 2011, the OECD Freedom of Investment (FOI) Roundtable 15 discussed the ISDS system and continued the dialogue in the subsequent years, providing a global venue for formulating ideas on a mutually beneficial approach to ISDS reform in the international investment policymaking community.[53] Based on diverse and heightened demands for ISDS reform, the United Nations Conference on Trade and Development (UNCTAD) published a roadmap for ISDS reform in 2013 which included key areas of and suggestive approaches to reform as a way of facilitating collective policy responses to the issue.[54]

51) *See* UNCTAD, *Reform of Investor-State Dispute Settlement: in search of a roadmap*, IIA Issues note No.2, June 2013.

52) *See* Gaukrodger, D. and K. Gordon (2012). "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community," OECD Working Papers on International Investment, 2012/03, OECD Publishing, Paris, p. 7.

53) *See* Gaukrodger, D. and K. Gordon (2012).

54) *See* UNCTAD (2013).

Especially, the strong emphasis on sustainable development as a common policy objective in international investment policymaking arena in the past few years has had significant influence on the reform dialogue.[55]

In the discourse of ISDS reform, some of the most deficient aspects of the ISDS system include the lack of legitimacy and transparency, inconsistency in arbitral decisions, no recourse for erroneous decisions, and the high cost of arbitration.

(1) Legitimacy

One of the key criticisms associated with the current ISDS system is that the dispute settlement system lacks legitimacy as an international investment regime as decisions are made by ad hoc tribunals appointed by disputing parties individually despite the significant impact of such decisions to the public.[56] Since some high profile ISDS cases challenged the public policy measures of the State in sensitive areas such as health, environment and safety and the decisions of tribunals can have significant impacts on public finances and negatively affect the interests of domestic stakeholders, many have criticized the system as illegitimate as a system of resolving disputes between investors and sovereign States. In this regard, the most serious criticism leveled against ISDS is that it allegedly restrains the host State's right to regulate in order to achieve legitimate public policy objectives.

In principle, the dispute resolution mechanism between investors and States has its origin from the structure of commercial arbitration between

55) *See* UNCTAD (2017b), p. 119. Also *see*, UNCTAD (2015), Investment Policy Framework for Sustainable Development.

56) *See* European Commission and Government of Canada, Informal ministerial meeting, World Economic Forum, Davos, Switzerland, 20 January 2017.

private entities.[57] In the commercial world, parties have recourse to arbitration when they prefer to resolve disputes over particular obligations based on a contract in confidentiality and to be judged by ad hoc arbitrators appointed by each party considered as most appropriate to the case. While outcomes of such commercial arbitrations influence the disputing parties alone and the process of arbitration may prove to be more practical and flexible than the process of resolving disputes through domestic litigations in certain cases, this private and ad hoc nature of arbitration does not necessarily provide sufficient legitimacy when it comes to disputes between private investors and States as the decision has a widespread and irrevocable impact on the public sphere of the host State. In terms of objectivity and fairness of decisions made in ISDS cases, the system of a party selecting adjudicators renders an intrinsic risk of partiality, not because privately selected arbitrators are less judicial or ethical, but because they have not been entrusted as adjudicators for matters related to public interest through an open and public process. Likewise, the possibility of conflict of interests on the part of arbitrators, as they can act as an arbitrator or a counsel at times, can be hardly legitimatized for a mechanism of resolving disputes containing significant public implications. In a broader sense, the criticism on the lack of legitimacy of the current ISDS system is fundamentally based on the lack of constitutional principles such as transparency, consistency, correctness, and objectivity in the procedure of dispute settlement as well as in substantial concepts in investment protection.[58]

57) *Ibid.*

58) *See* Schill, Stephen W., *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward,* E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015. www.e15initiative.org/(citation as suggested by the publisher).

(2) Transparency

Basically, ISDS cases can be kept confidential if both disputing parties so wish. At times, the fact that parties can keep their disputes in secrecy has been considered as an advantage of ISDS since investors may prefer not to reveal that they are in a dispute in order to avoid negative public image or to protect confidential business information. From the perspective of State parties, some proponents of ISDS argue that the State party also has interests in concealing details of proceedings as they could undermine the position or authority of the State as a sovereign entity when losing the case. Considering the impact of ISDS decisions to the public, however, the exclusion of a broad range of stakeholders who can be virtually affected by the tribunal's decision in the process of dispute settlement has been largely criticized as one of the key factors undermining the legitimacy of the ISDS system. The advantage of confidentiality in commercial arbitration has found weaker grounds in treaty-based arbitrations as disputes are often related to the State parties' public policy measures, affecting the public interests.

Normally, transparency in ISDS is linked to three aspects of arbitration process – (i) the public access to information to disputes, (ii) the opening of hearings to the public, and (iii) the ability of third parties to participate as *amici curiae* ("friends of the court") in disputes.[59] In practice, the level of openness to the public may vary by arbitral institutions and investment treaties while the overall trend in transparency rules has moved towards allowing more public access to information, with certain reservations. Among the arbitral institutions, the International Centre for Settlement of Investment Dispute (ICSID)[60] maintains the highest level of transparency through its

59) *See* UNCTAD (2014), Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II, United Nations. New York and Geneva, pp. 121-127.

60) ICSID is an institution of the World Bank Group dedicated to the resolution of interna-

public registry where the public can access information on disputes administered by ICSID, including the economic sector related to the dispute, the names of the arbitrators and the counsel representing the disputing parties, except that the award remains confidential unless both disputing parties consent to disclose.[61] Should both disputing parties not agree to disclose the proceedings, the opinion of the tribunal must be published at least partially.[62]

Some BITs, such as Article 29 of the BIT between the United States and Uruguay (2005), include provisions requiring the disputing parties to disclose certain documents to the public, while the disputing parties are not obliged to disclose all negotiations or any information regarded as confidential by the tribunal.[63] Access to hearings is critical for civil society groups and other stakeholders of ISDS cases as it provides a ground for their intervention by influencing their domestic authorities or business entities in disputes among others. The ICSID Arbitration Rules permit a tribunal to hold open hearings if neither party objects, provided that procedures for the protection of proprietary or privileged information is established.[64] Despite the overall progress in transparency rules in arbitral institutions and investment treaties, a large portion of ISDS proceedings, except cases administered under the auspice of ICSID, can still be kept in confidential if both disputing parties agree so and the fact that a dispute contains matters of public interests does not count in determining whether a case should be open to the public or not.[65]

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tional investment disputes.

61) *See* UNCTAD (2014), p. 121.

62) *See* BDI (2015), *International Investment Agreements and Investor-State Dispute Settlement: Fears, Facts, Faultlines.*

63) *Ibid.*

64) *ICSID Convention Arbitration Rule 32(2).*

65) *See* UNCTAD (2013).

(3) Inconsistency in arbitral decisions

Among the over 3,200 IIAs to date, the vast majority of the existing treaties contain almost identical concepts such as national treatment, most-favored nation treatment, protection against expropriation, and fair and equitable treatment.[66] However, there has been criticism that interpretations on such similar provisions have been inconsistent, if not contradictory, depending on the perspective of arbitrators in each ad hoc tribunal. While treaty provisions are drafted and negotiated by State parties of international investment agreements, the current practice of ISDS that interpretation on such provisions are subject to the discretion of ad hoc tribunal poses inherent contradiction of the ISDS system as a public international investment regime. Regardless of the judicial quality of arbitrators, the discrepancy between the intention of parties in drafting the IIAs and interpretation of arbitrators in each case can possibly lead to misconstruction of important concepts at times.[67] Furthermore, the inconsistency in the interpretation of key concepts such as the fair and equitable treatment (FET) is problematic as it gives little clue for the outcome of future cases, limiting the confidence of governments on public policy decisions as well as that of investors. Overtime, the various interpretations given by governments, arbitrators, and experts on the meaning of the FET and its scope of application in each case have been subject to criticism as a source of arbitrariness and partiality of decisions.[68] Recently, governments in drafting and revising treaties tend to limit FET provisions "to the minimum standard of treatment under customary international law"[69] and clarify the category of applying the provision.

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66) European Commission and Government of Canada (2017).

67) UNCTAD (2014), pp. 138-143.

68) *See* OECD(2004), "Fair and Equitable Treatment Standards in International Investment Law," OECD Working Papers on International Investment, 2004/03, OECD Publishing.

69) *See* OECD (2017), Key Issues on International Investment Agreements.

Consequently, the lack of predictability and certainty in arbitral decisions have been criticized as a source of increasing frequency and high cost of ISDS cases as well as diminishing the legitimacy of arbitral decisions compared to that of domestic or international courts. As a remedy, recently concluded IIAs often specify that the State parties shall provide joint interpretation to key concepts. In 2013, Colombia and Singapore clarified several provisions, such as fair and equitable treatment (FET) and most favored nation (MFN), of their BIT. The Trans-Pacific Partnership (TPP) also adopted the "Drafters' Note on Interpretation of 'In Like Circumstances' " regarding provisions on national treatment (NT) and MFN.[70] In the CETA, Article 8.31.3 states that:

> *Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on a Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date. (*bold added)*

This adoption of joint party interpretations is meant to offer a degree of clarity for investors, host States and arbitrators on the content of treaty provisions, and also to narrow the scope of interpretive discretion of tribunals.[71] Moreover, the explicit notion on the binding effect of a joint interpretation may improve the legality of interpretation by tribunals[72] and also provide clear and reliable reference to future cases with similar issues.

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70) *See* UNCTAD (2017a), *Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties*, IIA Issue Note, Issue 2, June.

71) *Ibid.*

72) *Ibid.*

However, the complex network of over 3,200 IIAs and the ambiguity of provisions in the majority of old-generation treaties require more fundamental and systematic overhaul beyond the above-mentioned handful of cases. A more ambitious approach to this problem leads to the discussion of establishing a multilateral permanent dispute settlement system championing by the European Union and Canada for the purpose of building a coherent body of case-law.[73]

(4) No recourse for erroneous decisions

The absence of review mechanism in the existing ISDS system constitutes another critical area of reform as there is no recourse against erroneous decisions. In principle, it is problematic that the decisions of arbitrators on critical legal matters cannot be reexamined despite its importance as a body of international law and significant impact to both disputing parties. Moreover, this lack of stable review mechanism contributes to the lower level of predictability and consistency of the ISDS system, undermining its legitimacy after all.

The existing review mechanism consists of the set-aside in national courts at the seat of arbitration of non-ICSID Convention awards and the annulment of ICSID Convention awards.[74] The general conditions which are set-aside include the tribunal's violation of due process and legality and awards are subject to challenge if there were irregularities in the constitution of the tribunal, if there were serious procedural irregularities implicating the fairness of the procedure or if the tribunal exceeded its jurisdiction or failed to honor the treaty.[75] Similarly, the ICSID annulment process operates

73) *See* European Commission and Government of Canada (2017).

74) UNCTAD (2014), p. 151.

75) UNCTAD (2014), pp. 151-153.

within narrow jurisdictional grounds and limits the case of annulment to (i) improper constitution of the tribunal, (ii) manifest excess of power by the tribunal, (iii) corruption on the part of a member of the tribunal, (iv) serious departure from a fundamental rule of procedure, or (v) award failed to state the reasons on which it is base.[76] Furthermore, the ad hoc basis of the annulment committee for a particular case cannot provide consistency and predictability of the system. Overall, the ad hoc basis of review process and also the composition of review committee in case of ICSID convention are different from the systemic structure of domestic courts or international legal institutions such as the WTO Appellate Body. The existing review mechanisms are less like an appeals facility that provides authoritative supervision of the system and clarification on conflicting issues of law but, rather, narrowly focused on the validity of the tribunal and its exercise of relevant laws. As a way of improving the consistency and the correctness of arbitral awards of first level tribunals, the establishment of a permanent appeal facility has been considered as an option. This idea was initiated as early as in 2004 when the ICSID Secretariat discussed the possibility of creating an appeals facility, but failed to gather sufficient support from States at that time.[77] Since then, many countries have supported the necessity of establishing a permanent appeal facility similar to the operation of the WTO Appellate Body and recognized the possibility of establishing an appeals mechanism in relevant IIAs.[78] As one of the key features of the EU's new investment court system, an appeals facility, constituted of highly qualified permanent members appointed by States, would possibly contribute to enhance the legitimacy of the ISDS system by improving the consistency and correctness of arbitral awards.

76) Article 52(2) of the ICSID Convention.

77) *See* UNCTAD (2013). Also *see* ICSID (2004), "Possible Features of an ICSID Appeals Facility," Discussion paper, 22 October.

78) *Ibid.* For example, the Dominican Republic-Central America-US FTA (CAFTA) (2004) required the establishment of a negotiating group to develop an appellate body. However, the negotiations regarding the issue have not been announced.

Here again, the efficiency and legitimacy of such a mechanism cannot be fully realized in the currently dispersed and fragmented investment system constituted of more than 3,200 IIAs. This recognition has led the discussion on the establishment of a permanent multilateral investment court championed by the European Union and Canada in recent years.

(5) High cost of arbitration

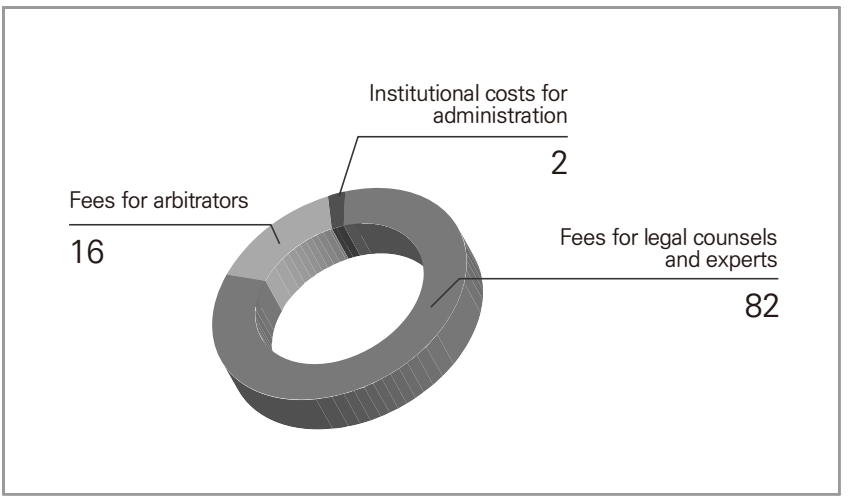
The costs of arbitrations are expensive and the amount contributed to an arbitral case has increased due to the increasing complexity of disputes in recent years. Normally, the costs of an arbitration case are composed of the fees and expenses of the tribunal and the costs of legal counsel and any expert or factual witnesses.[79] On average, about 82 percent of the total costs of a case accounts for the fees and expenses for legal counsels and experts by each party, fees for arbitrators account for 16 percent of costs, and the remaining 2 percent is institutional costs paid to organizations such as ICSID, the Permanent Court of Arbitration (PCA), or the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), for administration and secretariat services for arbitration.[80]

79) *See* Hodgson, Matthew (2015), "Costs in Investment Treaty Arbitration: The Case for Reform," *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century*, Jean E. Kalicki and Anna Joubin-Bret (ed.), Brill Nijhof in Leiden and Boston.

80) *See* Gaukrodger and Gordon (2012), p. 19.

Figure 2.7. Composition of Costs in Arbitration

(Unit: %)



Source: Gaukrodger and Gordon (2012), p. 19.

According to an OECD survey on the costs of 143 ISDS publicly available awards, addressing jurisdiction, the merits and other issues, as of August 2011, the legal and arbitration costs of disputing parties average over USD 8 million and costs exceeded USD 30 million in some cases.[81] In Abaclat v. Republic of Argentine (2011), the claimant had reportedly spent about USD 27 million and Argentina had spent about USD 12 million even though the case addressed only jurisdiction and not the merits.[82] Undoubtedly, this is a burden on public finance, especially for poorer countries. Even in the case of winning, it is not common that the tribunal decides to make the claimant pay the cost of the other disputing party.

81) *Ibid.*

82) *See* Abaclat v. Republic of Argentina, Decision on Jurisdiction and Admissibility, ICSID (4 August 2011).

Overall, the problems associated with the current ISDS system including lack of legitimacy, transparency, consistency, review mechanism and high costs of arbitration present that reform is warranted in order to regain the legitimacy of the investor-State dispute settlement mechanism and also achieve efficiency in regard to the use of public finance in dispute settlements. In terms of the approach to the reform of the ISDS system, however, countries have different preferences and approaches with respect to their legal systems or experiences in investment arbitrations. Mostly, the EU proposes to overhaul the structure of the system by establishing a permanent investment court in place of ad hoc tribunals. On the other hand, the US has promoted the idea of reforming the substances of investment treaties by means of providing greater precision and clarity in defining obligations and articulating the procedure of arbitration including measures to ensure greater transparency and the coherence of investor-State arbitration.[83] As it is beyond the scope of this paper to compare the diverse approaches to the ISDS reform, the following chapter will focus on analyzing the key aspects of the EU's new investment court system to see whether the problems of the existing ISDS system have been adequately addressed under the new mechanism. For the purpose of understanding the EU's approach to the ISDS reform and the main features of the new system in practice, it will be necessary to review the substantive and procedural features of the ICS provided in the CETA.

83) *See* Karin L. Kizer and Jeremy Sharpe (2015), "Reform of Investor-State Dispute Settlement: The U.S. Experience," *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st century*, Kalicki, Jean E and Joubin-Bret, Anna (ed.) Brill, Leiden, pp. 172-182.

3. Main Features of the EU's Investment Court System

3.1 Key aspects of the ICS

Permanent court in place of ad hoc arbitral tribunal

The EU's introduction of the investment court system (ICS), first in its TTIP proposal text and then in the finalized texts of the CETA and the EU-Vietnam FTA, presents a domestic and international court-like dispute settlement system. Indeed, by using the notion of *court* in naming the revisited investor-state dispute settlement mechanism, the EU made it clear that the new system would incorporate key features of domestic and international courts in general, except that the new system would still be bound to the existing rules of arbitration such as the ICSID Convention, the ICSID Additional Facility Rules, and the UNCITRAL Arbitration Rules. Countering the criticism against the *ad hoc* arbitration system under the traditional ISDS mechanism, the ICS establishes a first instance Tribunal and an Appellate Tribunal to improve the legitimacy and predictability of the new system. The establishment of this two-tiered dispute settlement system comparable to domestic and international courts strengthens the "public" feature of the dispute settlement mechanism. In line with this, the appointment of the Members of the Tribunal and Appellate Tribunal by the Parties also reflects an imperative change from the existing practice of unilateral nomination of arbitrators by the disputing parties.

Other reformed features in procedure

If the above-mentioned new features of the ICS, i.e. the establishment of a permanent tribunal with an appellate tribunal, are devised to tackle the prob-

lems associated with the traditional ISDS system such as legitimacy, consistency, and legal correctness, there are also specific provisions provided to improve the transparency of the arbitration procedure and to reduce the cost of arbitration. For transparency, the ICS in the CETA and the EU-Vietnam FTA adopt the UNCITRAL Rules on Transparency in treaty-based investor-State arbitration, which provides the most updated and extensive scope of transparency in the procedure of arbitration.

With the objective of saving time and cost, the Tribunal can dismiss a frivolous claim at an early stage, provided it is manifestly without legal merit and/or the facts would not support a case as a matter of law.[84] In order to prevent delays and increase in costs, the Tribunal shall render a final award within a limited time period: for the CETA, a final award shall be rendered within 24 months of submission of a claim; and the EU-Vietnam FTA provides that any appeal should not exceed six months, with the exception of extension up to nine months, so that the entire process shall be completed within three years.[85] Finally, the disputing parties may agree that the case be decided by a sole member of the Tribunal if the claimant is a small or medium sized enterprise or the compensation or damages claimed are relatively low.[86]

3.2 ICS in the CETA

As a representative example of the EU's new investment court system, the Investment Chapter in the CETA (Chapter Eight) contains most up-to-date reform features of the investor-state dispute settlement mechanism, includ-

84) *See* Dechert LLP (2016), "The EU Succeeds in establishing a permanent investment court in its trade treaties with Canada and Vietnam," A legal update from Dechert's International Arbitration Group, March.

85) *Ibid.*

86) CETA, Article 8.27.9.

ing precise definitions and criteria of investment protection and explicit notions of States' right to regulate. By adopting more precise and modern provisions on investment protection standards, it aims to reduce the ambiguities that could possibility lead to abuses of the system.[87] While the CETA still incorporates the system of arbitration in principle and keeps the possibility of challenging the host government directly by investors in case of an alleged breach of the treaty, it provides many detailed rules and instructions to the adjudicators in judging the validity of a claim in order to securing the policy space for the government and limit the discretion of adjudicators. In terms of the procedure, the CETA establishes a permanent tribunal with publicly appointed members and an appeal tribunal in order to correct any errors and ensure the consistency of the decisions of the first instance tribunal.[88] Considering the criticism on the *ad hoc* nature of tribunals and the resulting conflict of interests on the part of adjudicators, the permanent court system is aimed at ensuring legitimacy and consistency in both the composition of tribunals and their decisions on disputes over time.

(1) Substantive features

Strengthened State's right to regulate

As the concern of restricting the Parties' right to regulate has been one of the most critical issues regarding the legitimacy of the ISDS system, the CETA clearly stipulates that the EU and Canada preserve "their right to regulate within their territories to achieve legitimate public policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of

87) *See* European Commission, *Investment provisions in the EU-Canada free trade agreement (CETA)*, February 2016.

88) *See* Council of the European Union, *Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States*, 27 October 2016, Brussels.

cultural diversity."[89] To be precise on what would constitute the right to regulate with regard to investment, the CETA clarifies that the fact that a regulatory action negatively affects an investment or the expected profits of investors without any specific commitment under law or contract does not amount to a breach of the treaty. In addition, it also clarifies that the decision of government to not to issue, renew or maintain a subsidy does not constitute a breach of the treaty (*Article 8.9 Investment and regulatory measures*).

Investment protection standards

Along with this clarification regarding the application of the right to regulate, the standard of treatment of investors and investment, the ambiguity of which usually gives rise to claims, are specified to limit the chances of raising claims against the public policy measures of the State, including the Articles on fair and equitable treatment, indirect expropriation, and most-favored nation treatment.

In order to provide a clear and specific category of applying the standard of fair and equitable treatment (FET), the CETA indicates that a breach of the fair and equitable treatment obligation can only arise when there is (i) denial of justice in criminal, civil or administrative proceedings; (ii) a fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (iii) manifest arbitrariness; (iv) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or (v) abusive treatment of investors, such as coercion, duress and harassment (*Article 8.10 Treatment of investors and covered investments*).[90] With these comparably concrete standards of investor and investment protection, the CETA intends to limit the discretion of adjudicators and leaves the right of revisiting the standards to the governments

89) CETA, Article 8.9.1.

90) *See* European Commission, *Investment provisions in the EU-Canada free trade agreement (CETA)*, February 2016.

rather than arbitrators or relevant international institutions.

As to the issue of expropriation (*Article 8.12 Expropriation*), State measures for a public purpose; under due process of law; in a non-discriminatory manner; and on payment of prompt, adequate and effective compensation are not equivalent to nationalization or expropriation. Considering the standard of indirect expropriation, the CETA also makes a detailed explanation on the category of indirect expropriation with the purpose of avoiding claims against legitimate public policy measures.[91] For example, legitimate public policy measures for protecting health, safety or the environment do not constitute indirect expropriation except measures manifestly excessive in light of their objective and when the investor is substantially deprived of the fundamental property rights of its investment.[92]Furthermore, in order to prevent abuse of the dispute settlement mechanism, the CETA clearly states that it does not protect so-called "shell" or "mailbox" companies and states that the investor should have established real business operations in the territory of a contracting Party. Also, the respondent is entitled to file an objection that a claim is manifestly without legal merit no later than 30 days after the constitution of the division of the tribunal.[93]

Overall, the provisions on investment protection in the CETA incorporate many of the reform features in recent IIAs including the explicit stipulation of the right to regulate of treaty Parties and the restrictive measures against abusive or frivolous claims.

(2) Procedural features

Considering the problems associated with the traditional ISDS system that an ad hoc tribunal lacks the legitimacy in terms of the neutrality or publicity

91) *Ibid.*

92) *Ibid.*

93) CETA, Article 8.32 Claims manifestly without legal merit.

of the adjudicators, the CETA establishes a permanent investment tribunal with publicly appointed adjudicators. As a way of improving the consistency of decisions and also correcting errors, an Appellate Tribunal is established to review awards for the first time in IIAs.

Composition of the Tribunal

In the CETA, a Tribunal is composed of 15 members nominated by each Party, the European Union and Canada, through the CETA Joint Committee. As a way of securing impartiality, five of the members of the tribunal shall be nationals of a Member State of the EU, another five shall be nationals of Canada, and the remaining five members shall be nationals of third countries.[94] The Tribunal will hear cases in divisions consisting of three members of the tribunal, composed of a national of an EU Member State, a national of Canada and a national of third country who shall chair the division.

Table 3.1. Composition of the Members of the Tribunal

Tribunal	
Members of the Tribunal	Division to hear a case
- 5 nationals of EU Member States - 5 nationals of Canada - 5 nationals of third countries	- 1 national of EU Member States - 1 national of Canada - 1 national of a third country (Chair)

Source: CETA, Article 8. 27.

An appellate mechanism

For the first time in international investment agreements, the CETA establishes an Appeal mechanism to review awards rendered by the Tribunal of the first instance to ensure legal correctness. Comparable to an appeal mechanism of a domestic legal system, the Appellate Tribunal may uphold,

94) CETA, Article 8.27 Constitution of the Tribunal.

modify or reverse a Tribunal's award if there are (i) errors in the application or interpretation of applicable law, (ii) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law, and based on (iii) grounds set out in Article 52(1) (a) through (e) of ICSID Convention.[95] To ensure the highest professional and ethical standards of the Appellate Tribunal, the Members of the Appellate Tribunal are required to possess the same qualifications as for the International Court of Justice and high standard of ethics.[96] The number of Members of the Appellate Tribunal is to be decided by the CETA Joint Committee[97] and three Members of the Appellate Tribunal shall be randomly appointed to form a division.[98] In the EU's formal proposal text for the investment chapter in TTIP, the EU suggested to appoint six judges for an Appeals Tribunal, consisted of two EU nationals, two US national and two nationals of other countries.[99]

The quality of tribunal members and the high standards of ethics

In regard to the qualification of the members of tribunal, the CETA requires the members to possess qualifications for appointment of judicial offices in their respective countries, or be jurists of recognized competence, preferably have demonstrated expertise in public international law, international investment law, and resolution of disputes arising under international investment or trade agreements.[100] The members of the tribunal are paid a

95) CETA, Article 8.28.2.

96) European Commission (2016), *Investment provisions in the EU-Canada free trade agreement (CETA)*, February.

97) CETA, Article 8.28.7.

98) CETA, Article 8.28.5.

99) European Commission (2015), The EU's proposal for Investment Protection and Resoluti on of Investment Disputes, tabled for discussion with the US and made public on 12 Nove mber 2015, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (accessed on 2017. 8. 9).

100) *Ibid.*

monthly retainer fee to ensure their availability and the Parties pay the fees through an account managed by the ICSID Secretariat.[101] While the disputing parties pay for the tribunal in ISDS, the Parties in the CETA are to finance the operation of the tribunal so that there is no conflict of interests between adjudicators and disputing parties. In the same vein, it is notable that members of the first instance tribunal and the appellate tribunal are prohibited from acting as counsel or experts/witnesses in any other investment disputes during their appointment.[102]

Nonetheless, it should be noted that the appointment by States would possibly politicize the process of appointment and that the adjudicators might tend to uphold decisions favoring the State party, undermining the balance between the claimant and the respondent. Moreover, it is necessary to provide adequate compensation to the members of the Tribunal for ensuring the quality of the adjudicators. While the EU in its earlier TTIP proposal has suggested approximately one-third of the retainer fee for WTO Appellate Body members (around 2,000 EUR per month) for the members of the Tribunal and one similar to the retainer fee for WTO Appellate Body members (around 7,000 EUR per month) for the members of the Appellate Tribunal, the CETA only provides that the retainer fee for the members of the Tribunal and the Appellate Tribunal are to be determined by the CETA Joint Committee. Considering the criticism to the TTIP proposal that the suggested retainer fee for the members of the Tribunal is too low to maintain high-credential adjudicators and the importance of the quality of the adjudicator in such system, it is essential that the level of compensation should be realistic and comparable to other international courts.

Overall, opponents to the ICS urge that the court-like system will make

101) *Ibid.*

102) *See* Fietta, Volterra (2016), "CETA to establish permanent tribunal and appellate tribunal for investor-State disputes," Lexology, 14 June.

the dispute settlement process rigid and less flexible, disadvantaging investors. In this regard, it is necessary to consider whether the new system with strengthened public policy objectives would be achieved in the expense of flexibility and privacy of disputing parties, and if the re-balanced position between the investor and State would be effective in redressing the problems revealed in recent ISDS cases. In this term, it is noteworthy that the purpose of the ISDS at its inception and that of today would be not identical – even though the purpose of protecting investors and their property rights still prevails, more emphasis and concerns are on public policy domain and the balance between protecting foreign investments from the discriminatory decisions of the host State and the discretionary power of private arbitrators whose decisions have direct impact on the interest of public policy. While the EU's new investment court system would not completely solve the overall problems associated with the existing ISDS system and also the incorporation of the new ICS in bilateral investment treaties would possibly increase the fragmentation of IIAs in the absence of a consolidated international investment agreement, it is notable that the new system reflects the changes in the practice of foreign investments in the past few decades and responds to the requests for a more balanced position between the investor and the State and strengthened principles of democracy in the procedure of solving disputes in relation with the legitimate interests of public policy.

4. Potentiality and Constraints of Establishing a Multilateral Investment Dispute Settlement Mechanism

4.1 Opportunities and obstacles

As briefly mentioned earlier, there have been many obstacles to reach multilaterally agreed rules on investment, including the failure of negotiations for the Multilateral Agreement on Investment (MAI) in the 1990s. While validating the impact of international investment agreements on facilitating foreign direct investment (FDI) is beyond the scope of this research, the rising anti-globalization movement in the mid-1990s and the strong opposition to major trade and investment agreements by civil societies in both advanced and developing economies have provided little incentive for further intergovernmental efforts on reaching a multilateral agreement on investment. Contrary to the progress on governing rules on trade related issues based on the World Trade Organization (WTO), the idea of establishing global standards and binding rules on investment at the multilateral level has attracted little attention of both developed and developing countries until recently, if not considered impossible at all. As a result, rather than striving to reach a consensus at the multilateral level, countries have concluded a large number of bilateral investment treaties (BITs) or treaties with investment provisions (TIPs) from the late 1990s to early 2000s.

New momentum for multilateral agreement

Recently, contrary to the motivation of negotiating an investment agreement back in 1990s, the increasing scrutiny and criticism against investment arbitration system in dispute settlement between investors and States that al-

legedly allow excessive authority to private arbitrators and reduce the right of State parties to regulate on key policy arenas have provided a new and high momentum for refreshing discussions on harmonizing international investment regimes. This new focus and trend towards harmonization of international investment agreements at multilateral level is also closely linked to the adoption and implementation of the UN Sustainable Development Goals (SDGs), as investment facilitation is necessary to fill the SDG investment gap[103] and systematic reform of the global IIA regime is considered as one of the key factors for achieving the sustainable and inclusive investment policy objectives.[104] Indeed, investment policy framework is considered as an essential element for achieving sustainable development in many countries and the fragmentation in on-going IIA reforms is perceived as a source of increasing systemic risks in facilitating investment.[105] A recent analysis of UNCTAD points out the overlaps between treaties in the context of mega-regional investment treaties and the complex network of FTAs as a source of inconsistency and fragmentation of IIAs.[106]

At the practical level, multilateral discussions among interested States and international institutions have been focused on the establishment of a multilateral investment dispute settlement mechanism which may contain core features of existing multilateral dispute settlement institutions such as the WTO Dispute Settlement System and the International Court of Justice. While negotiating an investor-State dispute settlement mechanism in the absence of established rules and principles on investment would not necessarily

103) The annual investment gap is estimated to $2.5 trillion. UNCTAD (2015).

104) *See* Rosert, Diana (2016), "Sustainable development-oriented IIA reform: the UNCTAD Roadmap and the UNCTAD Policy Framework," presentation at the Regional Seminar on IIAs and Sustainable Development, and 6th Meeting of the Asia-Pacific FDI Network, UNCTAD, 1 December.

105) *See* UNCTAD (2015), Investment Policy Framework for Sustainable Development.

106) *See* UNCTAD (2017a), *Phase 2 of IIA Reform: Modernizing the existing stock of old-generation treaties*, IIA issues note, Issue 2, June.

provide fertile ground for negotiation, having the issue of establishing a multilateral dispute settlement mechanism as a starting point for multilateral discussion on a prospective multilateral agreement on investment (or, Multilateral Investment Agreement as referred in recent literature[107]) could possibly expedite the process of negotiation, as the system of resolving disputes between States and investors is potentially one of the most difficult issues and will ultimately necessitate an agreement on core definitions and concepts on investment and investor protection.

Above all factors, the explicit determination of the EU and Canada in the recently concluded CETA, stipulating the intention and prospect of establishing a multilateral investment tribunal and appellate mechanism, has promoted broad discussion on the possibility of establishing a multilateral investment dispute settlement system and the need for a coordinated and multilateral approach to IIA reform. In the CETA, EU and Canada agreed on the pursuit of establishing a multilateral investment tribunal and appellate mechanism with other trading partners. Furthermore, the multilateral investment tribunal will replace the investment court system (ICS) in the CETA, as it is stated that *"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.*"[108] While the provisions in the CETA provide only limited information on the composition and rules of the envisaged multilateral investment tribunal, it is clearly a significant step forward from the practice of investment dispute settlement in the existing international investment treaties to date.[109]

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107) *See* Aslund (2013).

108) CETA, Article 8.29 Establishment of a multilateral investment tribunal and appellate mechanism.

109) *See* Kaufmann-Kohler, Gabrielle and Michele Potesta (2016), *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap*, CIDS-Geneva Center for International Dispute Settlement, 3 June.

Recent Progress

The EU and Canada have vigorously promoted the idea of establishing a multilateral investment tribunal as an alternative to the much criticized ISDS system in bilateral investment agreements, and embarked on informal discussions with other States and international institutions including the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Commission on International Trade Law (UNCITRAL). Following the informal discussion jointly initiated by the EU and Canada in July at the margin of the UNCTAD Conference in Nairobi, the EU and Canada published a discussion paper in December 2016 for an expert meeting held in Geneva, Switzerland, outlining the rationale of the initiative and diagnosing issues relating to the functioning of the multilateral system.[110] As a more fundamental and ambitious response to the criticism to the existing ISDS system in terms of legitimacy, transparency, inconsistency, and correctness, it proposed to establish a multilateral investment dispute settlement system with two-tiered permanent tribunals and publicly appointed adjudicators who have high qualifications and credentials and devoted as full-time to the dispute resolution.[111] At the following informal ministerial meeting at the World Economic Forum held in Davos, in January 2017, the EU and Canada presented a subsequent discussion paper where they emphasized that the reform of the ISDS system should be addressed multilaterally in order to *"guarantee a fully inclusive approach that takes into account the positions and experiences of all countries with a view of building a truly global consensus on the best possible regime for the resolution of international investment disputes."*[112] In practice,

110) *See* European Commission and the Government of Canada, Discussion Paper, *Establishme nt of a multilateral investment dispute settlement system*, Expert meeting, 12, 14 December 2016, Geneva (Switzerland), document accessible at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1691(accessed on 2017. 8. 9).

111) *Ibid.*

112) *See* European Commission and Government of Canada, *The case for creating a multilateral investment dispute settlement mechanism*, Informal ministerial meeting, World Economic Forum,

the establishment of a multilateral investment court (MIC) can be an effective way of replacing old and outdated investment treaties with improved and innovated provisions without renegotiating individual IIAs separately.[113] From the EU's perspective, it is more beneficial and effective to move towards the creation of MIC when considering the limitations of replacing a large number of BITs that EU Member States have concluded over the past decades. Considering the early stage of formulating consensus on the need of establishing a multilateral investment court system, the EU leaves the specifics of the new system to be discussed among stakeholders, except presenting strong determination on key principles. In a speech delivered at the stakeholder meeting held in February 2017, the European Trade Commissioner Cecilia Malmström stated that the new system will be a permanent multilateral system for dispute resolution and build on principles of international dispute settlement systems as well as domestic courts.[114] As its leading principles, Malmström emphasized that the new system should be *effective, transparent, and value-based* just as it has been applied in general trade policy.[115]

While it is too early to assess the possibility of establishing a multilateral investment court as the EU has promoted, and unclear whether a consensus on the need for this has been formulated among states which is strong enough to start any negotiation in the coming years, there is also some areas where it would be easier to reach a consensus among states as a proper process of reforming the existing IIAs such as the improved rules on transparency and the creation of an appellate mechanism. In the case of the

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20 January 2017, Davos, Switzerland.

113) *See* O'Connor, Bernard and Isabella Aquilini (2017), *The Multilateral Investment Court*, Nctm Studio Legale, Lexology, 3 February.

114) European Commission, "Reforming investment dispute settlement," Speech by Cecilia Malmström European, Commissioner for Trade, Stakeholder event, Brussels, 27 February 2017.

115) *Ibid.*

Korea-US FTA, for example, the Parties agreed to consider whether to establish a bilateral appellate body or similar mechanism to review awards within three years after the Agreement enters into force.[116] Moreover, Article 11.20.12 leaves the possibility of reaching a multilateral agreement on establishing an appellate body for the purpose of reviewing awards rendered by tribunals as such:

> *If a separate, multilateral agreement enters into force between Parties that establishes an appellate body for the purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 11.26 in arbitrations commenced after the multilateral agreement enters into force between the Parties.(Article 11.20.12)*

While there has not been any progress in this regard yet, the already agreed intention of creating an appellate body as such can be used as a stepping stone for developing further discussions in the context of multilateral reform of dispute settlement system. So far, as a more accessible and promising approach towards a multilateral reform, the Mauritius Convention negotiated in the UNCITRAL on transparency rules or the Multilateral Convention to Implement Tax Treaty Related Measures negotiated in the OECD for updating the multitude of existing double-taxation treaties have provided effective ways for governments to negotiate multilateral agreements in the course of reforming the outdated or old treaties.[117]

116) Annex 11-D (Possibility of a Bilateral Appellate Mechanism) of the Korea-US FTA.

117) European Commission and Government of Canada, 20 January 2017.

4.2 The Mauritius Convention on Transparency as a benchmark for a possible multilateral investment tribunal

The Mauritius Convention on Transparency

On 10 December 2014, the General Assembly of the United Nations adopted the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration ("The Mauritius Convention on Transparency") by recognizing that "rules on transparency in treaty-based investor-State arbitration would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance."[118)]

At first, the UNCITRAL adopted the Rules on Transparency in Treaty-based Investor-State Arbitration by consensus in July 2013, which introduced significantly improved rules on transparency in arbitration procedure such as publicity of arbitral proceedings, public disclosure of awards and other documents, opening hearing, and authorizing third party submission.[119)] In principle, the Transparency Rules were to apply to arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to treaties concluded on or after 1 April 2014, the effective date of the Rules, and applicable to UNCITRAL arbitrations started under treaties concluded be-

118) Resolution adopted by the General Assembly on 16 December 2013, [on the report of the Sixth Committee (A/68/462)], 68/109. United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013).

119) UNCITRAL Secretariat (2016), *The Mauritius Convention on Transparency – A Model for Further Reforms of Investor-State Dispute Settlement*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, www.e15initiative.org/(citation suggested by the publisher).

fore 1 April 2014 only when the Parties to the treaties or the disputes have agreed to do so.[120]

The UNCITRAL Rules on Transparency, the first arbitration rules set on transparency throughout the procedure of investor-State arbitration, mandates the most recent improvements in transparency rules such as:[121]

- the publication of information at the commence of arbitral proceedings (Article 2)
- publication of all related documents, such as the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defense and any further written statements by disputing Parties, any written submissions by the non-disputing Party to the treaty and by third persons, transcript of hearings, and orders, decisions and awards of the arbitral tribunal (Article 3)
- allowance of submission by a third person (Article 4) and by a non-disputing Party to the treaty (Article 5)
- openness of hearing to the public unless there is a need to protect confidential information (Article 6), while incorporating exceptions for the application of the transparency rules with regard to the (i) confidential and protected information and (ii) integrity of arbitral process (Article 7)

In addition, the Rules provide that the repository of published information pursuant to the above Articles shall be the Secretary-General of the United Nations or an institution named by the UNCITRAL (Article 8).

In consideration of the fact that most of the existing IIAs have been concluded well prior to 2014 and to ensure the extensive outreach of the Rules thereof, however, the General Assembly of the UN passed a resolution on the adoption of the Mauritius Convention as an extension of the new Rules

120) Kaufmann-Kohler and Potesta (2016), p. 27.

121) UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2013).

to the existing treaties, allowing interested States to "opt-in" to the Convention so that the UNCITRAL Rules on Transparency would be applicable to the treaties they have concluded before the effective date of the Convention. With the expectation of opening a new avenue of establishing a multilateral legal framework for investment and as an effective way of promoting the protection of investments and investors under the great number of existing treaties, the Convention presents a flexible and innovative approach for the reform of investor-State arbitration system while the merit of flexibility itself brings some doubts on the possibility of reaching a meaningful multilateral mechanism for dispute settlement in the years ahead.

The Mauritius Convention as an accessible approach to a multilateral instrument

The Mauritius Convention on Transparency sets the rules on transparency in the procedure of investor-State arbitration with explicit recognition to "the need for provisions on transparency in the settlement of treaty-based investor-State arbitration to take account of the public interest involved in such arbitrations."[122] Considered as a starting point of negotiating a multilateral investment agreement including a multilateral dispute settlement mechanism with an appellate mechanism, the approach of negotiating the Mauritius Convention provides useful insights in terms of limiting the possibility of failure and enhancing the accessibility of States and interested stakeholders. One of the key merits of the Convention as a multilateral instrument includes its broad scope of application, comprising all existing bilateral, regional, and multilateral treaties.[123] Under the Convention, in combination with the UNCITRAL Rules on Arbitration, the Rules on Transparency is applicable to (i) any investor-State arbitration initiated under

122) United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (The Mauritius Convention), Preamble.

123) *Ibid.*, Article 1.

the UNCITRAL Arbitration Rules pursuant to a treaty concluded on or after 1 April 2014 unless the Parties to the treaty have agreed otherwise, or provided that both disputing parties have agreed to the application,[124] (ii) any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the Respondent and the home State of claimant are Parties to the Convention,[125] and (iii) if the respondent State is a Party to the Convention and a claimant to the dispute accepts the general application of the Rules.[126] In other words, the "Unilateral offer of application" provides a meaningful innovation as the disputing parties can apply the Rules even when the home State of the claimant is not a party to the Convention.[127] Moreover, as mentioned above, the opt-in system is considered as an effective mechanism for a multilateral treaty that would allow interested States to participate in it when they consider it appropriate, reducing the possibility of opposition to the Convention as a whole. Considering the difficulties and unsuccessful progress in multilateral negotiations in recent years as witnessed by the WTO,[128] it would be more realistic to invite interested parties to the common goals and leave the door open for late comers rather than risking the entire convention. Overall, the successful completion of consensus-based negotiations at the multilateral level and the effective application thereon would provide meaningful implications for further steps towards a multilateral agreement on investment.

124) UNCITRAL Rules on Transparency, Article 1.

125) The Mauritius Convention, Article 2(1).

126) The Mauritius Convention, Article 2(2).

127) Kaufmann-Kohler and Potesta (2016), p. 29.

128) *See* Levesque Celine (2016), "The European Commission proposal for an investment court system: out with the old, in with the new?" *Investor-State Arbitration Series*, Paper No.10, CIGI, September.

5. Conclusion

The EU's proposal of the Investment Court System during the TTIP negotiation has well represented the cumulative resentment of the public, governments, civil societies as well as academics to the existing ISDS mechanism. As discussed in Chapter 2, the lack of legitimacy, transparency, consistency, and the absence of a review mechanism as well as the burden to public finance in the existing system have been criticized as undermining the sovereignty of the State and its right to regulate for legitimate policy objectives such as the environment, health, and safety. While the practice of dispute settlement between investor and State through arbitration in the past decades have provided flexible and depoliticized grounds for dispute settlement, the increasing demand for improved safeguards against excessive and abusive claims should be adequately addressed in consideration of the democratic principles and the objectives of sustainable development goals. It is also noteworthy that the function of the traditional ISDS system, devised as a preferential instrument for foreign investors, has evolved over time as the distinction between capital-exporting and capital-importing countries became blurred and attention has focused more on the equality and balance of power among domestic and foreign businesses as well as between investors and the host States.

In this vein, the establishment of a permanent tribunal and an appellate tribunal instead of the ad hoc arbitral tribunal, and the public appointment of the members of the tribunal with a fixed-term rather than arbitrators nominated by the disputing parties on ad hoc basis, are indicative of the shifting paradigm in the discourse of international investment law. While the ICS is to replace the tradition ISDS system in bilateral investment treaties, the ultimate objective of improving legitimacy and consistency of the dispute settlement system cannot be achieved without the prospect of establishing a multilateral dispute settlement mechanism with consolidated and harmonized

standards of investment rules. For this reason, the CETA and the EU-Vietnam FTA include provisions on the establishment of a multilateral investment tribunal and appellate mechanism which would replace the bilateral ICS.

In retrospect, the massive public demonstration and opposition to the inclusion of ISDS provisions in the Korea-US FTA has required the Korean government to review the system thoroughly and reform it with adequate changes in due course. While it is still too early to envisage the overall benefits of the ICS as an alternative to the existing ISDS system, since there has not been a single case brought under this mechanism yet, it should be worthwhile to consider the core features presented in the new system, such as providing clear definitions on key provisions and limiting the scope of discretionary interpretation at the stage of treaty drafting and also in the process of revising old treaties. At the same time, the pros and cons of establishing a permanent court and appointing adjudicators by treaty Parties should be thoroughly examined from the perspective of law, politics, and economics in order to meet the standards of democratic principles and rule of law in procedures to resolve disputes between States and investors.

While the EU and Canada have rigorously promoted the idea of establishing a multilateral investment tribunal, the process of reaching a consensus would take a considerable amount of time. Moreover, it is important to have a proper approach to multilateral negotiations considering the failure of negotiating the multilateral agreement on investment (MAI) in late 1990s. While the key factors attributed to the failure of MAI have been removed due to the rise of emerging economies and the two-way flow of FDI between developed and developing countries, the diverse positions on the investment dispute settlement mechanism among countries with different reasons and purposes still make it hard to reach a comprehensive agreement. Indeed, countries such as India, Brazil and the Republic of South Africa have attempted to revise their existing BITs in the direction of reinforcing the

State's right to regulate, while others including the US prefer to maintain the existing ISDS mechanism accompanied by technical reforms such as providing clarification on key provisions. It is noteworthy that the impact of foreign investment on the economy of developing countries is far more significant than that of trade, and thus negotiations on the standard of investment rules should take the diverse positions of such countries into consideration.

In this sense, the approach of the Mauritius Convention to adopt an opt-in mechanism would be useful as it reduces the risk of failure in negotiations while building a consensus among participants and allowing them to decide when to ratify the Convention in consideration of their domestic circumstances. While the specifics of the proposed multilateral investment tribunal are still open for discussion, except for key principles suggested by the EU and Canada, it could be more realistic to establish such a mechanism within the framework of existing international institutions such as the Permanent Court of Arbitration (PCA) or ICSID rather than starting from scratch considering the huge amount of cost and human resources to be dedicated.

Considering the extensive network of trade and investment agreements that Korea has concluded in the past decade, it is more than necessary for the Korean government to pay close attention to recent developments in this process and actively participate in the discussions on the possibility of establishing a multilateral investment court and the key principles of investment protection and facilitation in international fora.

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국문요약

유럽연합(EU)이 미국과의 TTIP 협상 과정에서 처음 제시한 뒤 캐나다와의 FTA에 최초로 도입한 새로운 투자법원제도(Investment Court System)는 기존 투자자-국가 간 분쟁해결(ISDS) 제도에 대한 시민사회, 정부, 학계, 그리고 일반 대중의 총체적 개선 요구를 대변하고 있다. 기존 ISDS 제도의 가장 큰 문제점으로는 정당성 및 투명성의 결여, 판결의 일관성 부족 및 재심 기능의 부재, 그리고 고액의 소송비용에 따른 국가 재정의 손실이 지적된다. 이는 국가의 정당한 정책 결정 권한을 제한할 뿐 아니라 그 결과에 직접 영향을 받게 되는 일반 시민들이 의사결정 과정에 참여할 수 있는 권리를 보장하지 않는다는 점에서 민주적 원칙에 위배된다는 지적이 지속적으로 제기되어왔다. 또한 과거 외국인투자자들에게 우호적인 투자 여건을 제공하기 위한 수단의 하나로 ISDS 제도가 사용되어왔던 반면, 최근 수년간 자본수출국과 자본수입국 간의 경계가 점차 모호해지면서 국내 투자자와 해외 투자자에 대한 형평성의 문제, 그리고 분쟁 당사자인 국가와 외국인투자자 간의 권리 및 책임의 균형에 대한 논의가 심화되면서 전 세계적으로 투자자-국가 간 분쟁해결(ISDS) 제도에 대한 구조적 개선 요구가 높아지고 있다.

이러한 관점에서 EU가 ISDS를 대체하기 위해 제시한 투자법원제도(ICS)는 임시적(ad hoc) 재판부 대신 2심 법원을 포함한 상설법원의 설립, 조약 당사국의 재판관 임명 및 높은 수준의 윤리적 기준 적용 등의 방법을 도입함으로써 투자자-국가 간 분쟁조정 체계의 정당성을 강화하고, 국내법원 및 국제 법원의 운영 방식을 적용함으로써 절차적 문제점들을 해결하고자 한다. 또한 주요 조항에 대한 해석 권한을 조약 당사국이 갖도록

하고, 투자자들의 제도 남용을 방지하기 위한 세부적 장치를 도입하고 있다. 비록 ICS의 도입만으로는 기존 ISDS 제도상의 문제점을 모두 해결할 수 없지만, 1960년대 이후 큰 변화 없이 유지되어온 투자자-국가 간 분쟁해결 제도에 새로운 패러다임의 등장이라는 점에서 주목할 필요가 있다.

EU는 ICS의 도입과 함께 궁극적으로는 다자간투자법원의 설립을 목표로 하고 있는데, 이는 현재 ISDS 제도가 3,200여 개의 양자협정에 기반함으로써 ISDS 대신 ICS를 도입하더라도 제도적 파편화에 따른 문제점이 상존한다는 점에서 바람직한 방향이라고 볼 수 있다. 그러나 투자규범에 관한 국가들의 상이한 입장과 다자간투자협정 논의에 수반되는 어려움을 고려할 때 동 논의가 단기간 내에 진전되는 것을 기대하기는 어렵다. 이러한 측면에서 UNCITRAL투명성협약의 보다 광범위한 적용을 위해 체결된 Mauritius Convention의 접근방식을 주목할 필요가 있다. Mauritius Convention은 opt-in 방식을 도입함으로써 회원국들이 국내적 상황을 감안하여 도입 시기를 결정할 수 있는 여지를 남기는 한편, 새로운 규범을 실제 분쟁조정 과정에 적용할 수 있도록 한다는 점에서 향후 다자간투자법원제도의 설립을 추진하는 데 유용하게 적용될 수 있을 것이다. 지난 10여 년간 우리나라가 체결해온 전 세계적인 FTA 네트워크를 감안할 때 최근 ISDS 제도의 개선을 위한 주요국들의 논의 현황에 대한 면밀한 분석과 함께 향후 다자간투자법원제도 설립을 위한 국제적 논의에 보다 적극적으로 참여할 필요가 있다.

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Policy References 17-06

The EU's Investment Court System and Prospects for a New Multilateral Investment Dispute Settlement System

YANG Hyoeun

The EU's proposal of the Investment Court System during the TTIP negotiation has well represented the cumulative resentment of the public, governments, civil societies as well as academics to the existing ISDS mechanism. The lack of legitimacy, transparency, consistency, and the absence of review mechanism as well as high burden to public finance in the existing system have been criticized as undermining the sovereignty of the State and its right to regulate for legitimate policy objectives such as the environment, health, and safety. Despite some of the merits of the existing ISDS mechanism, the increasing demand for improved safeguards against abusive claims and discretionary power of private adjudicators should be adequately addressed in consideration of the democratic principles and the objectives of sustainable development goals.

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