Adapting an Efficient Mechanism for Resolving International Investment Disputes to a New Era. Vienna Investment Arbitration and Mediation Rules

Associate scientific researcher **Cristina Elena POPA (TACHE)**[1]

Abstract

The neutrality of the tribunal that is to settle a dispute concerning international investment is the first criterion to be established from the outset and the first thing taken into account by the party that chooses a tribunal to settle its case. It is true that we live in an era in which we observe the efforts to establish and operate the European Union Multilateral Investment Court (MIC), but one of the many questions[2] *that both states and especially investors ask every time is about neutrality and efficiency because only these proven qualities will attract and really determine the parties from the start to choose a certain court. On the other hand, the traditional VIAC established by the Austrian Federal Economic Chamber in 1975 has continuously remained an independent and neutral institution for the administration of commercial disputes. Recently, VIAC expanded its portfolio to include investment dispute management, welcoming efforts in the light of international developments (the landscape created by the global crisis generated by Covid - 19, Austria's special role as a neutral place for dispute resolution, and Vienna in particular. As a hub for international trade and negotiations, issues that are set out in detail in the VIAC documents, as shown, with its historically established position in Central and Eastern Europe, ICSID as well as the face of future MIC. The method used to create this material was a comparative analysis materialized in logical deductions looking for the ideological and practical apex of a hypothetical system for resolving investment disputes.*

Keywords: *Investment Courts, international investment arbitration, investment rules, pandemic crisis, international investment law.*

JEL Classification: D25, F21, K23

1. Foreword

Investment treaties contain specific clauses according to which dispute

[1] Cristina Elena Popa (Tache) – associate scientific researcher at the Institute of Legal Research of the Romanian Academy, cristinapopatache@gmail.com.

[2] See *U.S. officials raise concerns over proposed MIC in talks with the United Kingdom, documents say*, article published by IISD (International Institute for Sustainable Development), December 17, 2019. According with this, *one of the issues raised in these documents is that of investment dispute resolution. In recent years, the European Commission has been advocating for a MIC, while looking to garner support from other countries. Brussels has negotiated investment court systems (ICS) in its recent trade and investment agreements, in place of the ISDS mechanism used previously, which would serve as precursors for this eventual court. The EU has also proposed the MIC in the context of the UNCITRAL Working Group III process on ISDS reform. According to the documents, the Office of the U.S. Trade Representative (USTR) has expressed concern over the proposed MIC and said that it would not be able to support such an approach in its talks with London. Should the United Kingdom support the proposed court, it could put a future trade and investment deal in jeopardy, the documents say. Washington also reportedly said that the changes to ISDS in the modernized NAFTA, now known as the USMCA, were not necessarily indicators of its stance in future talks, given the particularities of each negotiating context.*

resolution is usually based on one or more of the existing ISDS systems[3], of which, according to EU statistics, the most frequently used are mainly based on arbitrators' decisions, do not provide for appeal and are based on conventional or ad hoc rules. Globally macro viewing, as is well known, the main ISDS systems are organized by: United Nations Commission on International Trade Law – UNCITRAL; World Bank International Center for the Settlement of Investment Disputes – ICSID; International Chamber of Commerce – ICC. It is worth mentioning that arbitration requires tools such as BITs, the most accurate legal knowledge of these tools (specialists able to use them) but also a significant volume of foreign direct investment invested in host countries[4].

In fact, on the European continent there are several courts with high potential for resolving investment disputes: Vienna International Arbitral Center (VIAC), one of Europe's leading arbitration institutions - very welcome in the tribunals club for investment resolution after the recent adoption of the new rules on investment arbitration, the London International Court of Arbitration (LCIA) or the Chamber of Arbitration Institute Stockholm (SCC), CRCICA (Cairo Regional Center for International Commercial Arbitration), PCA (Permanent Court of Arbitration), Hong Kong International Arbitration Centre (HKIAC) or MCCI (Moscow Chamber of Commerce and Industry).

Across the EU, there are negotiations for the establishment of a Multilateral Investment Court (MIC), which means that, taking into account the directives, the EU Council states that the MIC will eventually replace the systems of bilateral investment courts included in trade and investment agreements. From this point of view, it seems that for a large part of the investors but also of the specialists this plan can be too ambitious at the moment, despite the fact that EU Member States are still parties to almost half of the total number of international investment agreements currently in force worldwide. Almost all of these agreements include a dispute settlement mechanism and reaching a single point is a goal that can be agreed by Member States, but international investors will certainly look for alternatives to better protect their treatment standards[5] in a framework as traditional and neutral as possible (impartial).

It should also be borne in mind that all this is taking place on the background of: the crisis caused by Covid-19; the final negotiations within the OECD for a multilateral treaty on multinational taxation; and the signing in May 2020 of an Agreement on the termination of bilateral investment treaties between the Member States of the European Union on the treatment and protection of investments between Member States. E.g. in the other part of the world not too long ago: Asia-Pacific, *the regulation of international investment in Asia-Pacific as a field of law has experienced major developments, particularly within the last decade. Currently, a large number of bilateral investment treaties and preferential trade agreements form the core of the Asian "noodle bowl" of investment treaties. The recent rise in multilateral agreements that have a wider*

[3] Investor-state dispute settlement (ISDS) or investment court system (ICS) is a system through which investors can sue countries for alleged discriminatory practices. ISDS is an instrument of public international law.

[4] See Julien Chaisse, *The Shifting Tectonics of International Investment Law — Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region*, in The Geo. Wash. Int'lL. Rev. Vol. 47, 2015, p. 563.

[5] Cristina Elena Popa Tache, *Legal treatment standards for international investments. Heuristic aspects*, Ed. Adjuris-International Academic Publisher, Bucharest, Paris, Calgary, 2021, pp. 12 and the following.

regulatory scope are likely to both produce significant economic effects in Asia-Pacific economies and disseminate basic foreign investment protection principles to most Asia-Pacific countries[6].

2. Holistic presentation of the movements in the establishment and modification of the main European mechanisms for resolving investment disputes

The discussions[7] in the context of which a reorganization of the investment protection regime by introducing a two-tier judicial system or a multilateral appeal body could offer advantages over the current system. However only approaches as a whole the landscape of resolving disputes in the field of international investments on the background of the initiatives for the establishment and functioning of the MIC with the two options of a two-tier MIC and a MIAM (Multilateral Investment Appellate Mechanism), a way of analysis that highlights the logical importance of a serious and efficient regulation at the level of existing tribunals.

Analysing the existing documents so far, the result is that there could be a potential limitation of investors' rights by preventing the interpretation of individual standards by investors, with too much emphasis on reducing host state spending. On the other hand, it envisages the opening of new cases for investments that will have as object an excessive limitation of the way in which the protection standards will be applied and respected by the states. In this situation of feeling an inadequate protection, investors will resort to methods of resolving disputes to which they are in fact entitled under international customary law and will raise the shield of concluding solid contracts that will allow them to invest in the best possible conditions and with diminished risks. These refuges of international investors will mainly consist of their determination to use different arbitration clauses by placing their investments and therefore, seeking appropriate protection, in states that have a higher level of protection and where there are Investment Treaties to confers this.

Cases under BIT versus cases under Treaties with Investment Provisions (based on UNCTAD Investment Policy Hub):

The most likely scenario is the one that is taken care of "That means that all participants will be required to adjust their expectations if the system is to flourish. The

[6] Julien Chaisse, *The Shifting Tectonics of International Investment Law - Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region,* in The Geo. Wash. Int'lL. Rev. Vol.47, 2015, p. 563.

[7] See Bungenberg Marc, Reinisch, *From bilateral arbitral tribunals and investment courts to a multilateral investment court: Options regarding the institutionalization of investor-state dispute settlement*, European Yearbook of International Economic Law, August (2020) ISBN 978-3-662-59732-3, Springer Open, Berlin, http://dx.doi.org/10.1007/978-3-662-59732-3, p. 17.

United States is attempting to more clearly define the scope of protections accorded to investors through changes to its Model BIT. In doing so, it has arguably narrowed the scope of protections available to investors. Investors, in turn, may be required to adjust their expectations in such a way that will allow them to operate in the changing legal environment[8]".

All this because the mechanism for resolving investment disputes directly affects the protection conferred by the weaker or stronger regulation of the legal treatment standards granted to investments. These standards are the direct expression of the principles that govern international investment law and which, like them, go in the direction of reconciliation. Just as the affirmation, denial or reaffirmation[9] of specific legal principles is discussed, so too will the relaunch, reform, contestation, consolidation or reconciliation[10] of treatment standards be discussed, depending on the anatomy of the investment treaty system, being gainful to take into account at every moment of dissection through research that the international law of foreign investments consists of the norms of general international law, of the general standards of international economic law, as well as of distinct norms specific to its field[11]. As other areas such as geopolitics can be explored and investigated by retrosociology, a "screening" of the emergence and evolution of investment protection principles and standards can be performed, a process based, as in the case of geopolitics, for example, on the idea of "remnants, repetition of states and mechanisms that they make possible the epistemological phenomenon of retrotheories, that is, of the return of theoretical ideas from past epochs in updated empirical fields"[12].

Of course, diplomatic protection could be reactivated given that international investment law remains heavily politicized. How investors will proceed: they will conclude well-negotiated investment contracts between themselves and the host states, and last but not least, they will pursue an increased investment guarantee. Why? Because any type of foreign investment comes with the measure of its guarantees, as part of its protection. Protection norms mean all the norms of domestic or international law that prevent or sanction the interventions of public authorities on international investments. Investment guarantee mechanism means the set of operations that transfer the financial consequences arising from certain political risks from the investor to the specialized body of domestic or international law[13].

According to the rapporteur Bernd Lange (taken over in *Legislative train schedule. A balanced and progressive trade policy to harness globalization, on the part*

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[8] Christopher M. Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*, 29 U. Pa. J. Int'l L. 725-762 (2008). Available at: https://scholarship.law.upenn.edu/jil/vol29/iss3/5 accessed in 02.07.2021, p. 761.

[9] See generally for an approach to the notion of relaunch see V. S. Bădescu, *Is it possible to relaunch the application of the general principles of law and equity in the legal order of the European Union?/Este posibilă o relansare a aplicării principiilor generale ale dreptului și ale echității în ordinea juridică a Uniunii Europene?*, "Acta Universitatis George Bacovia", vol. III, no. 1/2014.

[10] For an overview of reconciling the policies and principles of international investment law, see S.P. Subedi, *International Investment Law: Reconciling Policy and Principle*, Bloomsbury Publishing, 2016.

[11] R. Dolzer, C. Schreuer, *Principles of International Investment Law,* Oxford University Press (OUP), Second edition, 2012, Cap. I, p. 2.

[12]See, I. Bădescu, L. Dumitrescu and V. Dumitraşcu, *Geopolitics of the New Imperialism*/Geopolitica noului imperialism, Ed. Mica Valahie, 2010, p. 12.

[13] D. Carreau, P. Juillard, *Droit international economique,* 3'e édition Ed. Dalloz Paris 2007, p. 459.

of the EU, at the level of investment policy), the European Commission aims to establish a system of multilateral investment courts that respond to the concerns of stakeholders to restore confidence in international investment agreements. Concerns include the complexity and unpredictability of ISDS decisions, lengthy and costly procedures that discourage smaller respondent countries, and the impartiality of arbitrators. It is noteworthy that the MIC seeks to provide a legal framework for resolving investor-state disputes and will not touch on the substantive laws underlying investment agreements.

It is true that so far it has not been possible to unify the arbitration practice in this field at global level, also there still are many discussions regarding the finality (timeline), efficiency, costs, re-politicisation and enforceability, but there are not enough guarantees that a new court will succeed in this ambitious approach.

The current European system is as follows: through the preliminary reference mechanism under Article 267 of the Treaty on the Functioning of the European Union (TFEU), EU member state courts consult the ECJ on how EU law operates and are then the procedure required to follow the indications given by the ECJ. Practitioners[14] consider that the preliminary system ensures that EU law operates effectively and uniformly throughout the Union and preserves the essential characteristics of the EU legal order - independent source of law: the EU Treaties that operates completely independently from both international and domestic law. In this context, the ECJ plays the role to preserve the power of EU member state courts to make preliminary references.

Finally, it should be mentioned that the introduction of the ICS (Investment Court System) has raised tensions within the EU concerning the compatibility of the ICS with the principle of autonomy of the EU legal order, which will be ultimately decided by the CJEU. Following the Achmea case[15], this will be another controversial decision that will certainly shape the future of the EU's investment policy and the subsequent implementation of a multilateral investment court system of global scale[16].

The life after *Achmea* case, Slovakia enjoyed a huge victory following the signing in May 2020 of an Agreement on the termination of bilateral investment treaties between the Member States of the European Union on the treatment and protection of investments between Member States. What is being discussed is that this agreement also ended the sunset clauses that protected investors after a period of time since the end of any BIT. *Austria, Finland, Ireland and Sweden are outside the Termination Agreement, so investment arbitration will remain unaffected in around 32 intra-EU BITs.* They may be joined by some Member States which do not comply with the ratification requirements of national law for the termination agreement. The signing of this agreement began to generate a doctrinal series of debates among specialists[17].

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[14] Laurens Ankersmit, *Achmea: The Beginning of the End for ISDS in and with Europe?*, article published by IISD in Investment Treaty News, 2018.

[15] In Case C-284/16 *Achmea*, the European Court of Justice (ECJ) found an arbitration clause in an international investment agreement (IIA) between two European Union (EU) member states incompatible with EU law. See Case 284/16 Slovak Republic v. Achmea EU:C:2018:158. Retrieved from: http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0284&lang1=en&type=TXT&ancre, accessed on 02.07.2021.

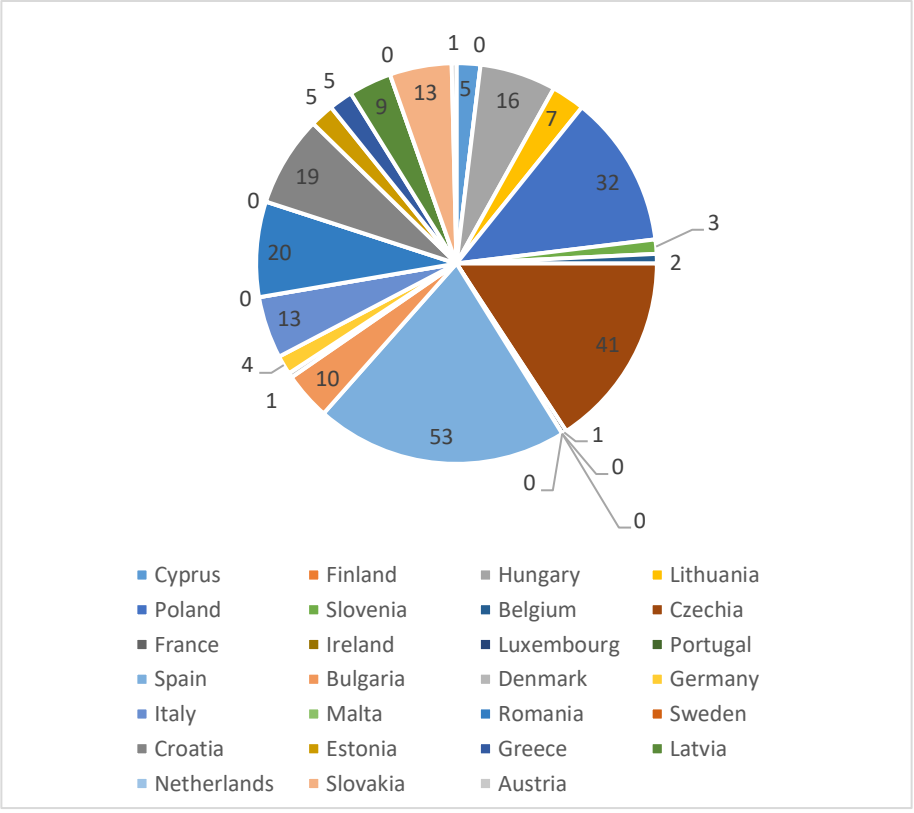
[16] See Juan Pablo Charris-Benedetti, *The proposed Investment Court System: does it really solve the problems?*, in Rev. Derecho Estado no.42 Bogotá Jan./Apr. 2019, Ed. Universidad Externado de Colombia, https://doi.org/10.18601/01229893.n42.04.

[17] See Charbel A. Moarbes, *Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Unionin* in „International Legal Materials", Volume 60, Issue 1, Ed. Cambridge University Press, February 2021, pp. 99-137, DOI: https://doi.org/10.1017/ilm.2020.65.

The most important thing to keep in mind is that international investors should not be discouraged from placing their investments in countries where they consider that they do not have adequate protection. They will seek to transfer the protection they enjoy in modern BITs, in well-negotiated contractual clauses with governments, which will increase and clearly emphasize the responsibility of states in case of non-compliance with these administrative contracts, the responsibility that will follow after concluding these contracts is a well-defined administrative one.

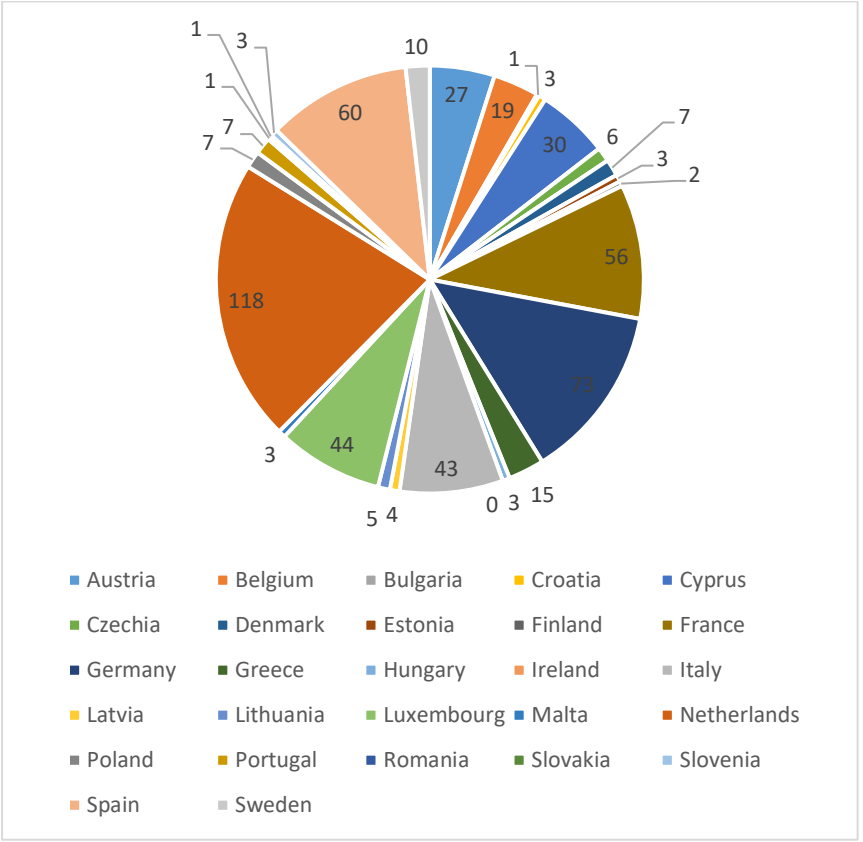
Under these conditions, the role of specialized tribunals becomes very important. They will analyze and decide not only on the manner in which the clauses of state contracts have been applied but will also conclude on the manner in which enforcing international customary law is its application by national and international courts and tribunals, for example the trial of an individual responsible for a violation.

Figure 1. EU members number of cases as respondent states (UNCTAD Investment Policy Hub[18]):



[18] The information in the diagrams presented in this paper was created by extracting statistical data from the official page of UNCTAD, available here: https://investmentpolicy.unctad.org/investment-dispute-settlement, accessed on 12.07.2021.

Figure 2. EU members number of cases as home state of claimant (UNCTAD Investment Policy Hub[19]):



For these reasons, it is concluded that updating and improving the rules of the best existing courts could prove over time that it is the best and most effective solution, at least as a first instance, especially because of there has been a trend towards multilateral treaties that include certain investment provisions, an increasing regionalization of negotiations, which will probably change the current investment regulation, thus emphasizing the changeable nature of the international investment regime in a constant flow of evolution, without a predetermined trajectory, having a pronounced dynamic character. The recent rise of Regional Trade Agreements and Preferential Trade Arrangements will lead research on these new plurilateral instruments, which remain largely ambiguous in future anatomies, life and economic and legal effects[20], which will emphasize not only the importance of administrative contracts but also the rules of customary international law in which those whose rights have been charged will seek remedies.

[19] See supra note 17.
[20] Julien Chaisse, *op. cit.*, p. 621.

3. Highlighting the welcome regulation of VIAC Rules of Investment Arbitration and Mediation 2021

According with VIAC[21] on 1 July 2021, a new version of the VIAC Rules of Arbitration and Mediation as well as a complete new set of VIAC's Investment Arbitration and Mediation Rules 2021 (VRI and VRMI) will enter into force. They are applicable to all proceedings commenced after 30 June 2021. With the adoption of the Vienna Investment Arbitration Rules, VIAC is now able to offer a set of specialized arbitral rules to accommodate the unique features of investment arbitration, including the involvement of sovereign parties and the implication of issues of public interest and public policy.

Having in mind these rules, in order to allow for submissions by "Non-Disputing Parties" as well as "Non-Disputing Treaty Parties", which are typical and necessary in investment proceedings initiated on the basis of a treaty or statute, a respective provision was included in Article 14a VRI. The scope of Article 14 on the joinder of third parties, however, was limited to arbitration proceedings for disputes based on a contract.

In general, these new rules regulate: definition of the scope of application of the VIAC Rules (Art. 1), provision on the waiver of immunity which is of importance in investment proceedings (Art. 4), new definitions for "Third-Party Funding", "Non-Disputing Parties", and "Non-Disputing Treaty Parties" due to corresponding provisions in the rules (Article 13a, Article 14a VRI), the nationality of the parties (Article 7 para 2.2 VRI) as well as the instrument of consent to submit a dispute to arbitration under the VRI (Article 7 para 2.7 VRI), un electronic case management system, the dispute shall in principle be decided by a panel of three arbitrators; only where the amount in dispute does not exceed EUR 10 million the dispute shall be decided by a sole arbitrator, a special feature for the appointment of the chairperson by the Board, the nationality of the arbitrators should be different from the nationality of the parties, unless the parties have agreed otherwise (Article 17 para 8 VRI), the objection due to lack of jurisdiction is to be raised following the constitution of the arbitral tribunal, but no later than with the first pleading on the merits (Article 24 para 1 VRI), in the absence of an agreement by the parties the place of arbitration in investment proceedings is determined by the arbitral tribunal; there is no fall-back provision that provides for Vienna as the place of arbitration as foreseen in the commercial rules (Article 25 para 1 VRI), a welcome provision is that in the absence of an agreement by the parties, the arbitral tribunal shall apply the applicable law or rules of law which it considers appropriate, including any relevant treaties, relevant national laws of any State, any relevant international custom and general principles of law (Article 28 para 2 VRI), a videoconferencing technology, is also very important clausa according to which Article 32 para 2 VRI sets a time limit for the rendering of the award. Accordingly, an award must be rendered no later than six months after the last hearing concerning matters to be decided in an award or the filing of the last authorized submission concerning such matters, whatever is the later. The Secretary General may extend the time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative.

Another useful provision is in Article 41 of the VRI which stipulates that the

[21] Available here: https://www.viac.eu/en/arbitration/rules-for-arbitration-and-mediation, accessed on 03. 07.2021.

publication of certain limited information on arbitration (it may do so in the public interest) and anonymized summaries of awards by VIAC. This is without prejudice to the agreement of the parties on the UNCITRAL Transparency Rules. It should also be added that in fixing the advance on costs as well as the arbitrators' fees, the VIAC Secretary General has more flexibility to address the greater complexity of cases in investment proceedings (Articles 42 and 44 VRI). Also, Annexes 4 and 5 to the VRI and VRMI contain detailed rules for cases in which VIAC is requested to act as appointing or administering authority in ad hoc proceedings. In addition to the rules for investment arbitration, the new rules also contain separate provisions for the conduct of mediation in investment disputes in order to promote this area as well and to offer another possibility for resolving disputes. Arb-Med-Arb combinations also have provisions designed to support the amicable settlement of the case.

It is essential for all investment tribunals how they adapt to the requirements of public international law, because both the jurisprudence of investment arbitration tribunals (under the jurisdiction of the ILO) and the European Court (within the ECHR), on the latter, demonstrates that public international law can provide a valuable weapon both in protecting commercial arbitration agreements and for commercial arbitral awards handed down by national courts or courts of the States with which investors interfere[22]**.**

That is why it becomes practically important to raise the dispute at international level, in order to be subject to the rules of international law, giving the parties and especially the investor the opportunity to resort for a better protection of his rights to international arbitration[23].

4. Inferences

At this moment, it is difficult to predict the apex in the system for resolving investment disputes. At regional level, groups of states, most often formed in regional economic communities and recognizing the importance of investing and establishing a stable climate for them, have negotiated, developed and adopted treaties to harmonize their own economic legislation, but also to create a common jurisdictional framework for a peacefully manner settlement of disputes[24].

This article argues that the object of international investment relations, as well as the disputes arising from these relations, have imposed special solutions over time, including from the institutional point of view. In this matter, plays an important role, perhaps decisive, the predilection of the parties involved in the dispute who will choose that settlement court that traditionally has sufficient guarantees that the case will be resolved correctly, as soon as possible, at reasonable costs. Any approach and any

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[22] S. Fietta, J. Upcher, *Public International Law, Investment Treaties and Commercial Arbitration: an emerging system of complementarity?*, in „Arbitration International Journal" (2013) 29 (2): 187-222, first published online: 1 June 2013, Published by Kluwer Law International & London Court of International Arbitration, p. 187.

[23] For details, see: A.F. Lowenfeld, *International Economic Law*, Oxford University Press, 2003, pp. 486-488.

[24] See the Common Court of Justice and Arbitration (CCJA) within the Organization for the Harmonization of Business Law in Africa – OHADA; the Common Convention on Investments in the States of Customs and Economic Union of Central Africa – UDEAC; the Arab Investment Court (AIC) created following the Unified Agreement for the Investment of Arab Capital in the Arab States and ICSID.

changes in the investment treaties should be based on the recognition that an investment agreement is fundamentally structured on good governance, the protection of investors' rights and the obligations and rights of the host state and that liability is part of it essential side of this equation[25].

Provisions anticipating the adoption of the MIC have been included in new EU IIAs since CETA[26], so that they would adopt the new system if a reform were adopted by UNCITRAL. According to the EU, there is anticipation of the creation of the MIC but the time when it will actually start working is uncertain. It is planned that EU IIAs signed after the UNCITRAL reform would adopt the new system and be submitted to the European Parliament for its consent with the schedule envisages the finalisation of the reform in 2025.

For the time being, it is preferable to have investment arbitration courts such as VIAC, with tradition, trust for investors, neutral and with adapted rules.

The ultimate goal of the system of all courts invested in resolving an investment dispute should be, in addition to a proper resolution of cases, to promote international knowledge of reference legal texts and to facilitate the uniform interpretation and application of these texts.

Given these evolutionary movements in the field of international investment law, the emphasis to be placed in the near future on administrative contracts and customary international law, research is becoming increasingly important. Based on extensive research, rules which were found to be customary today. States will have to undertake studies to help clarify the content of customary international law on foreign investment, by definition a body of unwritten rules.

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[25] See Cristina Elena Popa (Tache), *Dreptul internațional al investițiilor. Coordonate*, Ed. Epublishers, 2019, p. 315.

[26] See Article 8.29 of the Canada-EU Comprehensive Economic and Trade Agreement (CETA); Establishment of a multilateral investment tribunal and appellate mechanism. *The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.*

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