DISPUTE SETTLEMENT MECHANISMS IN INTERNATIONAL INVESTMENT AGREEMENTS:

IS THERE A NEW WAY TOWARDS THE FUTURE?
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DISPUTE SETTLEMENT MECHANISMS IN INTERNATIONAL INVESTMENT AGREEMENTS: IS THERE A NEW WAY TOWARDS THE FUTURE?

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# ABREVIATIONS

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<th>Abbreviation</th>
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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<tr>
<td>BIT</td>
<td>Bilateral Investment Agreement</td>
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<td>DOB</td>
<td>Denial of Benefit</td>
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<td>ENE</td>
<td>Early Neutral Evaluation</td>
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<td>ECT</td>
<td>Energy Charter Treaty</td>
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<td>FDI</td>
<td>Foreign Direct Investment</td>
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<td>FTA</td>
<td>Free Trade agreement MFN Most-favored-nation Treatment</td>
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<td>IAC</td>
<td>Investment Advisory Centre</td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>IIA</td>
<td>International Investment Agreement</td>
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<td>IIC</td>
<td>International Investment Court</td>
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<td>ISA</td>
<td>Investor-state Arbitration</td>
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<td>ISD</td>
<td>Investor-state dispute</td>
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<td>ISDS</td>
<td>Investor-state dispute settlement</td>
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<tr>
<td>MNC</td>
<td>Multinational Corporations</td>
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<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<tr>
<td>SCC</td>
<td>Stockholm Chamber of Commerce</td>
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<tr>
<td>TTIP</td>
<td>Transatlantic Trade and Investment Partnership</td>
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<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<tr>
<td>UNICTRAL</td>
<td>United Nations Commission on International Trade Law</td>
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INTRODUCTION

On July 8, 2013, the European Union and the United States begun to negotiate an international investment agreement\(^1\) (hereafter “IIA”) -the so-called Transatlantic Trade and Investment Partnership (hereafter “TTIP”)-, that would create “the world’s largest free trade area and cover almost half of the entire global economic output”\(^2\). The draft of this agreement includes a Chapter II regarding investor-state dispute settlement (hereafter “ISDS”) mechanisms, which determines the establishment of an Investment Court that will be entitled to know about the investment disputes arising between the nationals and the contracting states of the TTIP. In the case that the agreement was finally reached, the creation of this Court will involve a major innovation within the investor-state dispute settlement landscape.

Originally, ISDS system was created in an attempt to grant investors the right to bring directly a claim against its host state in case that, due to a government’s action -such as a reversal of a banking license or a change in the interpretation of a tax or environmental law-, their investments were negatively affected. As a result, these days IIAs offer investors numerous dispute resolution methods to solve their investment disputes. Those mechanisms include investor-state negotiation, mediation, consultation or local remedies. Notwithstanding the existence and availability of those mechanisms, investor-state arbitration (hereafter “ISA”) is the most used and, so far, the preferred method among investors\(^3\).

ISA has been traditionally regarded as a ISDS method that confers a neutral *fora* to foreign investors. Nonetheless, in the last years the following disadvantages of ISA’s current system have been perceived: (i) confidentiality of the awards and lack of transparency; (ii) huge costs of the process; (iii) the lack of expertise of the arbitrators; (iv) their lack of independency and impartiality; (v) the lack of a right balance between investors’ rights and host state legitimate policy changes; (vi) time delay until an arbitral award is rendered and; (vii) the fact that the award is binding without the possibility of appeal.

Besides the problems referred above, the issue of *treaty shopping* -understood as the conduct by which foreign investors deliberately “*shop*” at their convenience for home countries that have a more favorable IIAs with the host country where their investments are to be made\(^4\)- is also becoming an issue of growing importance within the international investment landscape.

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\(^1\) IIAs are international legal instruments that have, as its main purposes, the promotion, protection and liberalization of foreign direct investment (hereafter “FDI”). To that purpose, IIAs confer international investors numerous substantive and procedural rights which enhance investors’ confidence and feeling of protection, and thus, affecting positively countries’ FDI. W. Salacuse, Jeswald., *Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain* (Chapter I. The Basic framework of Investment Protection) in *Arbitrating foreign Investment Disputes* (ed. Norbert Horn, Kluwer Law International, 2004) 61-75.


\(^3\) Chi, Manjiao., *Privileging Domestic Remedies in International Investment Dispute Settlement* in *alternatives to Investor-State Arbitration in a Multipolar World* (ASIL Proceedings, 2013) 27.

\(^4\) Eunjung Lee, *Treaty Shopping in International Investment Arbitration: How Often has it Occurred and how has it been perceived by Tribunals*? (Department of International Development of London School of Economics and Political Science, Working Papers n°15-167, February 2015) 5.
Those problems, together with the measures taken by numerous states that have decided to withdraw from some of their IIAs or renegotiate the ISDS clauses to avoid the ISA system, give raise to the question of how or to what extent the actual ISDS mechanism should be modified.

All the actors involved in the international investment landscape (commentators, investors and states -both, capital exporting and importing ones-) have pleaded for a reform of the ISDS regime. But while there are those who claim for an improvement of the system, there are also those who support its complete redesign.

This thesis will present arguments in favor of the total redesign of the system, which seems the most suitable option to provide it with the required consistency, stability, effectives and legitimacy.

To that aim, the structure followed in the present thesis is as follows:

First of all, an overview of the scope, purposes and content of the IIAs will be presented in Chapter I, with a specific emphasis on the existing ISDS mechanisms. The different ISDS methods will be referred, with a particular reference to the ISA system. A compared analysis of the most used ISDS clauses among the major capital importing and exporting countries will also be made.

Second, the current problems of the ISDS mechanisms will be analyzed. The Chapter II will discuss the general problems that are generating a legitimacy crisis within the ISA system, while the Chapter III will approach the emerging problem of treaty shopping. As far as treaty shopping is concerned, its elements, forms, reactions to it and means to prevent it will be discussed.

After noticing the need of reformulating the actual ISDS regime, in the final Chapter IV the possible options to that extent will be examined. These possibilities will be the next ones: the first option would be going back to the use of the host state’s local courts to solve an investment dispute instead of using ISA. The second one would entitle the promotion of alternative dispute resolution (hereafter “ADR”) methods in addition to ISA, or making some improvements to the current ISA system. Four alternatives would be presented to that extent: (i) a recourse to an early neutral evaluation (hereafter “ENE”) of the case; (ii) a fact-finding process; (iii) an expediting review of claim process; and (iv) the establishment of an appellate body within the ISA system. The last option would be the creation of a standing world International Investment Court (hereafter “IIC”).

Chapter IV will conclude by suggesting that ISDS system should be redesigned and that the last option -that is to say, the constitution of an IIC- would be the most accurate one to that extent, out of the ones pointed out. Arguments in support of this final possibility will be offered, as well as the main features of the proposed IIC.
CHAPTER I: International Investment Agreements and Investor-State Dispute Settlement
Mechanisms, statement of the issue

1.1. International Investment Agreements (IIAs)

1.1.1. IIAs nowadays: Scope and Purposes

Even if the first BIT was signed in the late 50s\(^5\), in the last few decades there has been an increase in the IIA signed by the states, with more than three thousand investment agreements in force these days among 180 countries\(^6\). It is obvious therefore that International Investment law is acquiring a growing importance nowadays and IIAs are also becoming instruments of major concern.

Following the distinction highlighted by Julien Chaisse, IIAs are a type of legal instruments that encompasses both “Bilateral Investment Agreements” (hereafter “BITs”) and “Free Trade agreements” (hereafter “FTAs”)\(^7\). IIAs are only one of the three levels of international investment regulations, together

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\(^5\) This first BIT was the one signed between Pakistan and Germany in November 25, 1959 and came into force on 28 April, 1962. The goals of the Treaty was precisely “the promotion and protection of investments”, the creation of “favorable conditions for investments by nationals and companies of either State in the territory of other State” and the encouragement of “private industrial and financial enterprise and to increase the prosperity of both States”. Pakistan and Federal Republic of Germany, Treaty for the Promotion and Protection of Investments (Bonn, 25 November, 1959).

\(^6\) In the year 2014, 27 IIAs were concluded (that is one every other week), bringing a total number of 3,268 agreements in 2014. This proves that countries continue to use IIAs as a tool to attract FDI. UNCTAD, Recent Trends in IIAs and ISDS (United Nations, February 2015) 1. Available at: [http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf).

\(^7\) Julien Chaisse is a Professor of at the Faculty of Law & Director of the Centre for Financial Regulation and Economic Development (CeFRED) in the Chinese University of Hong Kong. He defined the BITs as “international instruments specifically devoted to the promotion and protection of foreign investment” while the latter ones -FTAs- are defined as “all bilateral, regional,
with the national or domestic regulation of each host State and the multilateral rules generally applicable in the investment field.

The main purposes of IIAs are the promotion, protection and liberalization of foreign direct investment (FDI). In order to attract the referred FDI, which is a cross border transfer of economic resources that has a crucial impact on the world’s economy and countries’ development, host states shall encourage the confidence of international investors ensuring them an adequate protection.

Through foreign investment, investors will normally be engaged with the host country in a medium or long-term relationship which will expose them to a variety of different possible risks, such as environmental, political, cultural or legal ones. Consequently, there has been a consolidation of foreign investor’s substantive and procedural rights to generate an optimal environment that enhances investors’ confidence and feeling of protection. Later in Chapter III we will discuss the key elements that will determine the applicability of the rights/protections/obligations established by IIAs, which are the notions of “investor” or “national” and “investment”. No rights will be recognized to investors or investments that do not satisfy the standards stablished by the applicable IIAs.

1.1.2. The protection provided by IIAs to investors: substantive and procedural rights

As far as the substantive rights are concerned, IIAs stablish specific substantive economic investment rights for foreign investors -when traditionally treaties have not created direct rights and obligations for private individuals-.

In fact, these specific rights are as follows: (i) the assurance of “fair and equitable treatment”; (ii) full protection and security or “constant protection and security” as a standard of treatment; (iii) the applicability of the standards of “international law” and “contractual obligations” -by which states assume the obligation of treat foreign investors’ investment in accordance to what is required by international law and to observe contractual obligations-; (iv) guarantees of appropriate compensation in case of expropriation; (v) promises of protection against arbitrary, unreasonable or discriminatory

or plurilateral arrangements that seek the preferential liberalization of investment flows, along with trade in goods and in services, and often provide rules on other areas, such as intellectual property, competition, and movement of natural persons”.

For the purposes of this thesis, the term IIA and BIT will be consider as equivalents. Julien Chaisse, The Treaty Shopping Practice... Ibid. 226-230.

8 Julien Chaisse, The Treaty Shopping Practice... Ibid. 231.

9 W. Salacuse, Jeswald., Towards a Global treaty on foreign Investment... Ibid. 61-75.

10 FDI might involve huge infrastructure projects such as those related to roads or power plants or even broader, and it may also involve intellectual property rights or other types of vital commercial activity. These kind of investments can have a great impact on the encouragement of economic opportunities and major development in capital importing countries. D. Franck, Susan., Integrating Investment Treaty Conflict and Dispute Systems Design (Minesota Law review, 2007) 168-169 and Horn Norbert, Arbitration and the Protection of Foreign Investment: Concepts and Means (Chapter I, The Basic framework of Investment Protection) in Horn Norbert (Editor), Arbitrating Foreign Investment Disputes, Procedural and Substantive Legal Aspects [Studies in International Economic Law, Volume 19] (Kluwer Law International, 2004) 6-7.
measures; (vi) guarantees of national and “most-favored-nation treatment” (hereafter “MFN”)\(^\text{11}\); (vii) the promise that investors’ FDI will receive treatment no less favorable than what accorded under international law; and (viii) the assurance of “non-discrimination” in relation to other investors -either national or international ones-.

Regarding procedural rights, these rights are conferred to investors within the context of the ISDS mechanism available to them. ISDS system will provide private parties (foreign investors) a direct access to a specific international forum in order to solve their disputes with their host governments\(^\text{12}\). This system is not available to domestic investors\(^\text{13}\).

While initially the previously mentioned substantive rights were the main focus of attention of IIAs, the appearance of international investment arbitration during the last two decades has proved that the existence of an effective and efficient system to ensure the enforcement of those rights, is an aspect of major importance\(^\text{14}\).

1.2. The Investor-State Dispute Settlement Mechanisms in IIAs

1.2.1. The different ISDS mechanisms

Historically, there have been various methods to resolve international investment disputes between host states and international investors.

The first traditional dispute resolution approach consisted in an exercise of “diplomacy” between the Governments involved in the dispute (the Government of the host country and the one of the affected investors´ nationality), which used to rely on the use of “force” -understood as their respective economic and political power- between them. However, due to the cost of this process and its failure to promote FDI, another dispute settlement mechanism was needed\(^\text{15}\).

Furthermore, investors could sue the host countries governments at their home local courts or make use of other alternative methods such as consultation, negotiation or mediation\(^\text{16}\). Nonetheless, these alternatives not only involved a lot of costs, but also uncertainty which sometimes could be even

\(^{11}\) In the context of international investment law, “MFN treatment ensures that a host country extends to the covered foreign investor and its investments, as applicable, treatment that is no less favourable than that which it accords to foreign investors of any third country”. UNCTAD, *Most-Favoured Nation Treatment* (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2010) 13.

\(^{12}\) D. Franck, Susan., *Integrating Investment Treaty Conflict…* Ibid. 172-173.


\(^{15}\) Franck, Susan., *Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Agreements* (Chapter 9) in P. Sauvant, Karl,(Ed), *Appeals Mechanisms in International Investment Disputes* (Oxford University Press, 2008) 149.

senseless when host countries alleged the principle of “sovereign immunity” in their defense. Moreover, investors normally felt rejected against the idea of bringing a claim before the local courts of some host states that were considered to be “instrumentalities of the Host State’s government”\(^{17}\). This is the reason why there were many cases in which investors decided not to take any action, given the difficulties and costs of the system\(^ {18}\).

In this context, and taking into account the aim of encouraging FDI and the trust of international investors, states started to sign and ratify IIAs. From one hand, states and foreign investors were provided with specific obligations and substantive rights (such as fair compensation against expropriation, national treatment and fair and equitable treatment) and, form the other hand, created a dispute resolution system that allowed foreign investors to take action directly against their host government when seeking redress through different methods, depending on the specific clause of the applicable IIAs\(^ {19}\).

Nowadays, there are still some typical dispute resolution methods such as investor-state negotiation, mediation, consultation or local remedies. Notwithstanding the existence and availability of those mechanisms -IIAs will normally give investors the right to choose amongst pre-established dispute resolution possibilities\(^ {20}\), ISA is the most used and preferred method for settling international investment disputes\(^ {21}\). Through an ISA clause the investor will be the only one entitled to sue the state -who loses its immunity- and not vice versa\(^ {22}\). Finally, and among all the arbitration options, ICSID mechanism is the most prominent one\(^ {23}\).

This new atmosphere mostly benefit foreign investors entitling them to claim their host states when they breach agreed investment regime regardless of the local system. And this is essential to promote FDI because investors tend to assume that local courts of some host countries (e.g. in the developing countries) lack the expertise, competence or impartiality to adequately and fairly resolve international investment disputes\(^ {24}\). Due to this motive, there are those who assert that “the ISDS mechanism makes the international investment regime one of the strongest international regimes in existence”\(^ {25}\).

\(^{17}\) Horn Norbert, _Arbitration and the Protection of Foreign Investment_… _Ibid._ 25.

\(^{18}\) Chi, Manjiao., _Privileging Domestic Remedies in International Investment Dispute Settlement_… _Ibid._ 27 and Franck, Susan., _Challenges Facing Investment Disputes_… _Ibid._ 150.

\(^{19}\) Franck, Susan., _Challenges Facing Investment Disputes_… _Ibid._ 149.


\(^{22}\) The reason for this design of the ISDS clause was that investors are thought to need more protection while states are more powerful and have more capital at their disposal. Mazzoleni, Verónica., _TTIP Treaty Negotiations Loom as Investor-State Dispute Settlement Is Debated_ (International ADR, Vol. 34, nº 4, April 2016) 52.

\(^{23}\) UNCTAD, _Recent Trends in IIAs and ISDS_… _Ibid._ 1.

\(^{24}\) Webb Yackee, Jason., _Conceptual Difficulties_… _Ibid._ 17.

1.2.2. International Investment Arbitration options. Special reference to ICSID system.

Nowadays, there are number of situations in which an international investment dispute can arise. For instance, a government might have; (i) revoked a banking license of an investor; (ii) changed the interpretation of a tax law causing damages to foreign investors’ investments; (iii) implemented an environmental regulation that has also a negative impact on their investment; or (iv) breached an existing commercial contract between the government and the investor\(^\text{26}\).

In those cases, IIAs will normally offer more than one type of arbitration system to foreign investors to solve these types of investment disputes. From one hand, investors have available the *ad hoc* arbitration form and, from the other hand, the institutional arbitration option\(^\text{27}\).

The former one is not administered by any arbitral international institution. On the contrary, the parties will determine all aspects of the arbitration procedure through an arbitration agreement; that is to say, they will decide the applicable law to the dispute, the number of arbitrators or the system of appointing those arbitrators, among others. The most frequent form of *ad hoc* arbitration is the arbitration under the UNCITRAL Rules (1976)\(^\text{28}\).

In the latter, a specialized institution will intervene applying pre-established rules and procedures in order to ensure that the arbitration proceeding begins and is carried out in a timely manner. There are some specialized institutions such as International Chamber of Commerce Rules of Arbitration (hereafter “ICC Arbitration”), the Stockholm Chamber of Commerce (hereafter “SCC”, principally involved in investment treaties ratified by Eastern European countries) and the International Centre for Settlement of Investment Disputes (hereafter “ICSID” or “the Centre”).

Finally, and as far as ICSID arbitration is concerned, some remarks shall be made\(^\text{29}\). So far, ICSID arbitration has proven to be one of the most -if not the most- suitable method to solve a dispute between a private international investor and its host state. The Centre was established by the Convention\(^\text{30}\) in 1965 and came into force on 1966. Up to April 2016, 161 states\(^\text{31}\) have already signed it, which demonstrates is wide acceptance among the states.


\(^{30}\) Better known as “the 1965 Convention” or the “ICSID Convention”, which is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 1965 which was sponsored by The International Bank for Reconstruction and Development (the World Bank).

\(^{31}\) 153 out of the 161 signatory states have ratify the ICSID Convention (as of April 2016). For further detail, see the *List of contracting states and other signatories of the Convention* (ICSID) available at https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf.
As will be explained in the following Section 1.2.3. of this Chapter, most IIAs make available to investors the ICSID arbitration mechanism, and along with the growing number of IIAs, the number of ICSID arbitration cases has strongly augmented in the past ten years. Since 1965, it has been the most used ISDS mechanism\textsuperscript{32}. However, we will see in the chapter IV of this thesis how the legitimacy crisis faced by the current Investor-state Arbitration (ISA) system will might well highlight its need to be reformed.

In the next table can be seeing the growing importance of both, ISDS cases and the major role of ICSID within the current ISDS landscape.

1.2.3. A compared analysis of the Investor-State Dispute settlement clauses in IIA’s

All IIA’s do not contain same investor-state dispute settlement clauses. On the contrary, they vary from providing a quite limited jurisdiction over specific compensation related issues to broad options to solve any kind of investment dispute, either contractual or treaty based\textsuperscript{33}.

Consequently, and in order to assess which is the preferred ISDS mechanisms for states, the most popular used dispute resolution options among them will be analyzed. To fulfill this purpose, the elected states are the most representative capital importing and exporting countries: Germany, France, United

\textsuperscript{32} L. Wellhausen, Rachel., \textit{Recent Trends in Investor–State Dispute Settlement... Ibid.} 119.

\textsuperscript{33} Reinisch, August., \textit{The Scope of Investor–State Dispute Settlement... Ibid.} 3.
Kingdom, Turkey, United Arab Emirates, Japan, Korea, China, India, Argentina, Colombia and the United States of America.\(^3^4\)

In the case of Germany, France and United Kingdom; Germany has been involved in three investment dispute, two of them were initiated in accordance to ICSID and the third one under the UNCITRAL Arbitration Rules. Even if the German model BIT (2008) provides a deeper range of alternatives (e.g. the ICC Arbitration Rules) none of them have been applied so far. France has ratified 110 BITs, in which there are at least 10 different types of ISDS clauses. Nonetheless, the most commonly provided option is the ICSID arbitration (62 of the BITs provide it). Regarding United Kingdom, the only publicized claim against the UK pursuant to an IIA was brought under the UNCITRAL Arbitration Rules. However, the majority of UK BITs provide for ICSID arbitration and/or UNCITRAL arbitration.

As far as Turkey and United Arab Emirates are concerned, Turkey arbitration under ICSID rules is the most commonly used ISDS method. However, UNCITRAL and ICC arbitrations are normally supplied as alternatives to ICSID arbitration. In United Arab Emirates most of the BITs also provide for arbitration under ICSID or UNICTRAL rules.

Almost all of Japan’s and Korea’s IIAs serve for arbitration in accordance with the ICSID Convention and the UNCITRAL Arbitration Rules, but ICSID is the most used one so far. In the case of China, it is normally provided the additional possibility of establishing an ad hoc arbitral panel according to the IIA that the specific claim is based on.

The preferred mechanism of dispute resolution for India is arbitration based on the UNCITRAL Rules. UNCITRAL-based arbitration was the preferred model. ICSID arbitration may not be nowadays available to a foreign investor because India is not part of the ICSID Convention.

In general terms, the most usual method in Argentina is institutional arbitration either under ICSID rules or UNCITRAL rules. Colombia has never been involved in an investment treaty dispute. However, the model BIT allows the submission of the dispute to ad hoc arbitral tribunals established in accordance to UNCITRAL Arbitration rules, ICSID or an arbitral tribunal under any other arbitration institution or any other arbitration rules, agreed by the contracting parties.\(^3^5\)


\(^3^5\) Article IX, Paragraph 4 of the Colombian Model BIT (2007).
Finally, in the case of United States, all investors have claims against the United States under the NAFTA treaty, which allows to bring claims under the ICSID or the UNCITRAL Rules.

By the year 2010, BITs offered the investor -on average- 1.7 arbitration fora to settle a dispute. However the average of fora offered by the treaties concluded in 2010 was 2.8. Thus, the tendency is upward, with the aim to provide investors’ with a greater range of possibilities to solve their investment disputes.


1.1. Overview of the situation

Traditionally, ISA has being perceived as a system to solve international investment dispute that entails numerous advantages, such as; (i) the depolitization of the dispute -a “small” investor could bring a claim against a powerful state, being heard in a neutral fora with a previously established framework of procedural rules-, (ii) the neutrality and independence of a qualified arbitrators knowing about the claim; (iii) a cheaper, flexible and expeditious way of settling an investment dispute; (iv) the perception for investors of a greater control and security over the process than litigating before the local courts; (v) as well as major chances that the award would be enforceable against the host state. In other words, ISA was perceived with a sense of legitimacy within the previously existing dispute settlement landscape.

However, the day to day of international investment arbitration has shown several disadvantages of the system that are generating the mistrust of the parties, bringing a sense of uncertainty and inefficiency towards the system. Investment arbitration has several unique features such as: (i) the long-term relationship that normally exist between an investor and a host state; (ii) the international law and international treaties will determine the applicable law to an investment dispute; or (iii) the investor will be challenging -in a long and costly process- acts or measures taken by a sovereign state.

As a result, the following disadvantages of the current practice of international investment arbitration have been perceived: (i) confidentiality of the awards and lack of transparency; (ii) huge costs of the process; (iii) the expertise of the arbitrators; (iv) their independency and impartiality; (v) the lack of a right balance between investors’ rights and host state legitimate policy changes; (vi) time delay until an arbitral award is rendered; and (vii) the fact that the award is binding without the possibility of appeal.

The legitimacy crisis faced by investment arbitration is endangering the ultimate ability of ISA to achieve its goals. Put it in another way, an investment arbitration mechanism without the necessary external legitimation might not be an efficient and effective method to solve an investment dispute between a foreign investor and a host state. In fact, there is also a perception that ISA institutions -ICSID and UNCITRAL for instance- are “in a state of paralysis and unable to move beyond the status quo”.

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36 UNCTAD, Investor-State Disputes: Prevention and Alternatives to Arbitration… Ibid. xxiii.
37 Understood as the accepted authority regarding the norms and institutions that constitute the regime in which they operate. Shany Yuval, Assessing the Effectiveness of International Courts: A Goal-based Approach (Oxford University Press, 2014).
In the next section the previously referred problems of the international investment arbitration will be assessed to analyze to what extent the legitimacy crisis faced by ISA is or not justified.

1.2. The current alleged problems

1.2.1. Confidentiality and lack of transparency

Confidentiality and transparency have always been linked. In fact, while the former one has historically been considered as a reason to choose the arbitration, the lack of transparency during the whole process as well as in the awards, are nowadays one of the major ISA concerns.

Confidentiality was fully justified in commercial arbitration where private interest and parties were involved. Nonetheless, in investment arbitration public interest of the host countries are also on the table, so the acceptability and credibility of arbitral awards are elements of major importance\(^{39}\). That is why the lack of transparency and the confidentiality of the awards avoid the development of a coherent and consistent legal doctrine which may increase the efficiency of the tribunal’s performance, as well as the quality of its reasoning in the award\(^{40}\). Indeed, if similar cases would be treated alike, the perception of fairness will be promoted enhancing the legitimacy of the system. In addition, a major transparency would decrease the uncertainty faced by both, investors and host states, by the time to make a decision regarding their investment or the governmental policy, respectively.

Consequently, there are those who demand greater transparency “in knowledge about the existence of arbitral proceedings, a significant number of which take place in secret, openness of hearings and transparency of documentation as well as greater accountability of arbitrators for their decisions”\(^{41}\) and assert that “without a sense of how the law will be applied -and access to the awards making those determinations- there can be little justified reliance”\(^{42}\).

A further concern is that within ICSID arbitration proceedings parties request private hearings and the resulting arbitration awards are normally not published unless the disputing parties give their consent, including the involvement of countervailing public interests\(^{43}\).

This “closed doors” focusing of ISA on issues involving public interest, has generated pressure from the public and interest groups that claim for the end of that practice and the publication of the


\(^{40}\) Franck, Susan., *Challenges Facing Investment Disputes...* Ibid. 188.


\(^{42}\) Franck, Susan., *Challenges Facing Investment Disputes...* Ibid. 189.

\(^{43}\) Trakman, Leon E., *Investor State Arbitration or Local Courts...* Ibid. 101-103.
awards\textsuperscript{44}. At the end, an investment arbitral awards may have significant outcomes -for instance, in the national budget of a state or on its future performance or investment decisions-, so the public interest in international investment disputes outcomes is totally justified and understandable. This is the explanation of the major transparency requirement, despite the consideration of the publication on the protection of confidential information related to the private business of an investor or to governmental information\textsuperscript{45}.

1.2.2. Costs

Arbitration has generally thought to be a less expensive way to solve disputes than litigating in court. Contrary to those expectations, there are a lot of costs linked to investment arbitration that have proved otherwise.

From one hand, we have the economic costs; (i) in the case that it is concluded that the host state violated any of the treaty provisions, damages ranges from tens of thousands to billions of euros or dollars; (ii) there are also costs of the own process, which entails the payment of legal fees, arbitrators’ fees, the costs of experts and/or witnesses if needed and the administration fee of the arbitration center knowing about the dispute\textsuperscript{46}. Moreover, this cost are becoming even higher due to the complexity of the investment disputes\textsuperscript{47}.

**Box 1. Examples of amounts ordered to pay by host countries**

- In *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL proceeding, final award 14 of March 2003) the respondent was ordered to pay the claimant a total amount of 269,814,000 USD.

- Another example would be the awards rendered against Argentina due to the damages faced by foreign investors due to the Argentina’s government decision to devaluate its currency on January 2002. Thirty-nine international investors claimed against Argentina and up to now, there have been three awards rendered: in *CMS Gas Transmission Co. v. Argentine Republic*, the tribunal awarded 133,200,000 dollar in damages (44 I.L.M. 1205, 1257, ICSID May 12, 2005), in *Azurix Corp. v. Argentine Republic*, the tribunal awarded 165,240,753 dollar (No. ARB/01/12, Award, ICSID July 14, 2006) and the third tribunal has not yet established the exact amount of damages (*LG&E Energy Corp. v. Argentine Republic*, No. ARB/02/1, Decision on Liability, ICSID Oct. 3, 2006).

The social and financial implications for the host country of paying such a monetary awards could have disastrous consequences for the country and might lead to hard negotiations regarding debt financing and/or reconstruction\textsuperscript{48}.

The economic costs can be even greater if we take into account the possibility of the so called “multiple proceeding”, where investors seek relief claiming against its host state in different arbitration proceedings. One clear example of multiple proceedings emerging from the same government’s decision is the previously referred case of Argentina, for which there are around 40 ICSID proceedings pending nowadays. In addition, this might lead to the existence of parallel proceeding and the eventual possibility of conflicting awards\textsuperscript{49}.

<table>
<thead>
<tr>
<th>Box 2. Other costs involving international arbitration</th>
</tr>
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<tbody>
<tr>
<td>• In \textit{Plama Consortium v. Bulgaria} (ICSID Case No. ARB/03/24), the claimant’s legal costs were $4.6 million, while respondent’s ones amounted to $13.2 million. \textit{Plama} was required to pay not only its own all arbitration costs, but also half of the host state’s legal expenses.</td>
</tr>
<tr>
<td>• In \textit{Pey Casado v. Chile} (ICSID Case No. ARB/98/2), the claimant was required to pay approximately $11 million in legal costs while the respondent had to pay $4.3 million. The host state had to pay 75 per cent of all the arbitration costs and also $2 million of the claimant’s legal fees.</td>
</tr>
<tr>
<td>• In \textit{ADC Affiliate Limited and ADC &amp; ADMC Management Limited v. The Republic of Hungary} (ICSID Case No. ARB/03/16), Hungary was required to pay a total amount of $7.6 million, which already included investor’s legal expenses.</td>
</tr>
</tbody>
</table>


From the other hand, the arbitration costs involve more than economic ones, such as reputational -the host country’s reputation can be at stake due to the challenge of its regulation policies-\textsuperscript{50} or time costs -because the proceeding might take several years, affecting both investors and governments-\textsuperscript{51}.

These kind of costs, as said before, affect both foreign investors and host states. The former ones, especially when they are small and medium-sized enterprises, may not have enough resources to litigate due to the time and high legal fees costs.

\textsuperscript{48} Muchlinski, Peter., \textit{The COMESA Common Investment Area...} \textit{Ibid.} 6.
\textsuperscript{50} Karl P. Sauvant, \textit{The International Investment Law and Policy Regime...} \textit{Ibid.} 12.
The later ones, remarkably when they are developing or poor countries which lack the experience to defend themselves properly, might not have enough financial resources to hire an adequate counsel. All this may lead to settlements even when one of the parties potentially could prevail\(^52\).

1.2.3. Expertise

Yet another argument against the current arbitral dispute settlement mechanism is the expertise of the arbitrators. In the arbitration system, parties are the ones choosing the arbitrators, who tend to be experts in commercial law field but have less or no expertise in the field of public international law. This can lead not to pay the due attention to the eventual public consequences of the award. Thus, one of the critics is that investment arbitrators do not take into regard a wide state’s policies such as labor, health, environmental, national security or the regulation and protection of the national market. On the contrary, they focus their main attention in interpreting IIAs provisions literally -using the plain word meaning-, with disregard of a major element, which is the public interest in the state’s policy\(^53\).

Nonetheless, and given the kind of issues that investment arbitrators have to deal with -for instance, deciding about the fairness of an expropriation or a nationalization-, they should not only be experts in investment and international law, but also be in possession of good judgment skills\(^54\).

In the end, the easiest and most effective way to enhance the efficacy and consistency of the international investment law, is to assure that people with proved knowledge and expertise in the field are the members of the tribunals\(^55\).

1.2.4. Impartiality and independency

There are also concerns regarding the impartiality and independency of ISA arbitrators.

In respect to their independency, there is a perception that they might not be neutral in their adjudications, giving rise to a number of doubts on the parties regarding the integrity and real fairness of the arbitration process. As a matter of example, there are not few cases in which the same arbitrator has serve as arbitrator and as a counsel of a corporation in two different cases involving the same company, or where the arbitrator has purposely delay the process to favor one of the parties\(^56\).

It seems clear that in those cases the existence of potential conflict of interest is hardly deniable, and that is why there are those who stood up for the creation of a “code of ethics for arbitrators” that

could serve to avoid those undesired cases of conflicts of interest. For the same reason, there are those who demanded the establishment of stricter rules to regulate the “appointment and eligibility” of international investment arbitrators. In the end, independence is thought to be an indicator of procedural fairness and proper decision-making process, which reinforces the legitimacy of the system.

Regarding the independency of arbitrators, it is generally thought that as international investment cases involve huge amount of money, they attract as well political interests that might lead to partiality. Specifically, there are two factors that generate mistrust to that extent: the selection processes of the arbitrators -shall be reminded that two of the arbitral members are appointed by the parties to a dispute while the third, is appointed by the consent of both parties, which makes difficult to rely on their independency and impartiality-, and the possible interference of political bodies in their duty. In fact, is not uncommon finding an arbitrator that has acted as a counsel for the conflicting parties -either for investors or for states- in other cases.

Some measures have been proposed in order to ensure that there are not external factors influencing arbitrators’ decision-making process. Some of those measures are as follow: (i) the creation of standing panels of arbitrators in order to avoid doubts in regard to their selection process; (ii) widen the interpretation faculties of the parties with respect to treaty provisions when they have to decide about an ongoing investment dispute; or/and (iii) regulate specifically under which parameters or criteria host states will have the right to make policy changes in the public and general interest, even if it entails a damage or imposes some limits to international foreign investors’ investments.

1.2.5. Right Balance between investors’ rights and host states’ legitimate policy changes

In the international investment sphere, it is not clear whether investment treaties exist to provide protection to investors’ investments or to encourage the public welfare through the attraction of foreign investment. In the first case, if ambiguity arises, the case should be settled in favor of investors. In the second case, the host state decisions should be analyzed under the perspective of the underlying policy goals.

While commentators do not agree on the ultimate reason, most of them agree about the fact that arbitral tribunals have not being extremely successful by the time to find a right balance between the

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57 Karl P. Sauvant, The International Investment Law and Policy Regime... Ibid. 8-9.
58 Muchlinski, Peter., The COMESA Common Investment Area... Ibid. 8.
60 Horn Norbert, Arbitration and the Protection of Foreign Investment... Ibid. 28.
62 Gaukrodger, David and Gordon, Kathryn., Investor-State Dispute Settlement... Ibid. 44 and 94.
63 Karl P. Sauvant, The International Investment Law and Policy Regime... Ibid. 9.
investors’ interests and the public interests of the host states. As a consequence, ISDS mechanism is generating the well-known “chilling effect” on governments, meaning that they are refraining from taking numerous regulatory measures for the benefit of the general interest because of the potential threat of a claim before an international arbitral tribunal. That is why IIAs are providing clauses that allow host states wide regulation capability in issues connected to sustainable development objectives, such as the preservation of natural resources or the protection of humans’ and animals’ life and health.

Moreover, the actual system is thought to generate a breach of the existing links between investors and host states, which is exactly the opposite of what both parties are looking for. While states are looking to attract and promote FDI as a way to encourage their country’s economic development, investors seek good returns on their international investment that may require, more probably, numerous years of uninterrupted operations.

In short, ISDS mechanism shall provide an adequate balance between investors’ and host states’ rights and obligations. It should provide investors with the necessary substantive and procedural rights to overcome their concerns about local courts, but it should also make possible for host state the adoption of legitimate policy decision on the benefit of public interest.

1.2.6. Time

Another major concern is that arbitration was originally design to be an expedited method to solve a dispute, and lately has proven to be otherwise. The average of time to reach a final award and its execution has risen significantly. Parties use different cunning resources to that extent, ranging from recourse to provisional measures to the initiation of an annulment procedure. So far, the average duration for a case to be finally settle by a final award varies from three to four years, without making any different from litigating before the national courts of the host state. There are also those who establish the average of ages even in a higher threshold, ranging between seven and nine years.

1.2.7. Arbitral awards are binding without the existence of an appeal body

Without the possibility to appeal a binding final award, there are only two ways of challenging an arbitral award available to the parties.

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69 Muchlinski, Peter., The COMESA Common Investment Area… Ibid. 11.
70 UNCTAD, Investor–State Disputes: Prevention and Alternatives to Arbitration… Ibid. 18.
72 Yannaca-Small, Katia., Improving the System of Investor-State Dispute Settlement… Ibid. 4-7.
The first and main one is the procedure to review the final arbitral award. Its main goal is to set aside the award in the case that new facts have emerged after the award was rendered and are of such nature that the final award could have been to the contrary. The second one is the annulment procedure, which is an option available only in a few cases where errors in the process or the due omission of reasoning occur\textsuperscript{73}.

In these cases, if the arbitral tribunal declare the nullity of the award, the original decision will be declared invalid. However, it does not exist the possibility of modifying the arbitration award on the merits\textsuperscript{74}. That is to say, the in the case that there is an error in the application of law by the arbitral tribunal, that error could not be remedied\textsuperscript{75}.

An appeal mechanism is the only way to achieve the modification of an award based on the same facts that were known by the arbitral tribunal. In addition, an appellate body cannot only change the first tribunal decision but also require that tribunal to amend its own mistakes\textsuperscript{76}.

The fact that the resulting arbitral award is binding without the possibility of appeal has commonly been seen as a positive aspect of the arbitration mechanism over the traditional judicial settlement\textsuperscript{77}, but its creation is becoming these days an element of growing importance.

Unreasoned and inconsistent awards can create confusion on both sides; (i) they may make difficult for the parties to understand the scope and the extent of investor’s protection under a treaty, as well as the circumstances that need to concur so the host state is found liable under an IIA; (ii) they could be questioned by the parties because the awards might be perceived as unfair and lacking the required reasoning, especially as far as cost-related measures and costs shifts is concerned; and (iii) parties may not be able to negotiate effectively because they lack the necessary criteria, rules or precedent system to make an accurate cost-benefits calculus\textsuperscript{78}.

\textsuperscript{73} E.g. The article 52 of the ICSID Convention states that: “Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based”. This shows how small are the chances to get the nullity of an arbitral award.

\textsuperscript{74} Trakman, Leon E. Investor State Arbitration or Local Courts… Ibid. 101.

\textsuperscript{75} Rachel., Recent Trends in Investor–State Dispute Settlement… Ibid. 131.

\textsuperscript{76} Yannaca-Small, Katia., Improving the System of Investor-State Dispute Settlement… Ibid. 6-8.

\textsuperscript{77} European Parliament, Investor-State Dispute Settlement (ISDS) Provisions… Ibid. 64.

\textsuperscript{78} Franck, Susan., Challenges Facing Investment Disputes… Ibid.190.
Hence, it can be concluded that as investment arbitration comprises substantial public interests - e.g. environmental standards and protections, public health regulation, labour standards or nuclear power related measures -, inconsistent, contradictory, unwell reasoned and mistaken decisions are therefore difficultly justifiable\textsuperscript{79}.

\begin{table}[h]
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\begin{tabular}{|p{0.9\textwidth}|}
\hline
\textbf{Box 3. An example of the unpredictability of arbitral awards} \\
\textbf{In Aguas del Tunari S.A. v. Republic of Bolivia (ICSID Case No. ARB/02/3) while the foreign investor claimed around 25,000,000 USD in damages, the settlement made the host state responsible for 1,600,000 USD in legal expenses; that is to say, more than the five per cent of the initially claimed compensation.} \\
\hline
\end{tabular}
\end{table}

\textsuperscript{79} European Parliament, \textit{Investor-State Dispute Settlement (ISDS) Provisions... Ibid. 64-65.}
CHAPTER III: Current problems of the Investor-State Dispute Settlement Mechanism (Part II):

The problem of the treaty shopping

1.1. What is Treaty Shopping?

A major problem of the international economic and investing landscape that influences the perception of the current dispute settlement system is the one known as “treaty shopping”. Along with the lack of transparency and inconsistencies of arbitration decisions, treaty shopping is nowadays perceived as a deficiency of the ISDS system by host countries.

As explained in the first chapter, only the nationals of a state that belong to the IIA will be eligible for the rights and protections conferred by them. This requirement has led to an increase on the practice of “treaty shopping” or “nationality planning”.

Treaty shopping can be commonly defined as the conduct by which foreign investors deliberately “shop” at their convenience for home countries that have a more favorable IIAs with the host country where their investment are to be made. Therefore, their investment can qualify for the protection and standards established by the treaties. In other words, is a practice by which foreign investors route their investment through a third country in order to benefit from a favorable investment treaty that such third country has with their actual or planned host state.

1.2. Why does it happen and why does it matter?

There are two main reasons that can motivate an investor to enter into the treaty shopping practice. The first one is when an investor’s home country does not have any IIA with the host country, so the investor will “shop” and acquire another nationality or rout the investment through a third country that does have an IIA with the pretended host country.

The second one is when an investor’s home country does have any IIA with the host country but he “shops” to gain access to a more favorable IIA protection that a third country has with the pretended host state. Within the term “more favorable IIA” can be encompassed either substantive rights or benefits.

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80 Eunjung Lee, Treaty Shopping in International Investment Arbitration... Ibid. 1.
82 Eunjung Lee, Treaty Shopping in International Investment Arbitration... Ibid. 5.
83 Van Harten, 2010; Skinner et al., 2010; UNCTAD, 2005; Gaukrodger & Gordon, 2012 in Eunjung Lee, Treaty Shopping in International Investment Arbitration... Ibid. 5.
for the investors (i.e. stronger protection in case of expropriation), or a procedural ones (i.e. easier way to have access to arbitration in case a dispute arises)\textsuperscript{85}.

\begin{center}
\begin{tikzpicture}
\begin{scope}
\node (X) [circle, draw] at (0,0) {Country X};
\node (Y) [circle, draw] at (3,0) {Country Z};
\node (Z) [circle, draw] at (3,-3) {Local Subsidiary};
\node (A) at (0,-3) {Country Y (host country)};
\node (B) at (0,-1) {Parent Company};
\node (C) at (3,-1) {Intermediate Holding Company (Claimant)};
\draw[->] (X) -- (B);
\draw[->] (Y) -- (C);
\draw[->] (X) -- (Z);
\draw[->] (Y) -- (Z);
\end{scope}
\end{tikzpicture}
\end{center}

\textit{Source: Eunjung Lee, Treaty Shopping in International Investment Arbitration.}

Although the practice of treaty shopping is not expressly banned in any treaty, there are several objections to it\textsuperscript{86}.

Firstly, treaty shopping breaches the principle of reciprocity that IIAs are based on. The elementary principle of reciprocity determinates reciprocal rights and obligations between contracting states/nationals.

However, when an investor of a third country (not a contracting one) benefits from a BIT without its home state assuming any obligation to the nationals of that host state, the balance between the two contracting states is altered. That is to say, the \textit{quid pro quo} in which the treaty relies on, is compromised because treaty concessions are extended to an investor (the one who “shops”) whose state may not equally benefit the nationals of the other party (i.e. exchange of information).

\textsuperscript{85} Julien Chaisse, \textit{The Treaty Shopping Practice... Ibid.} 228 and Eunjung Lee, \textit{Treaty Shopping... Ibid.} 5

\textsuperscript{86} As far as these section is concerned, a summarize of the objections pointed out by the next authors will be made: see Eunjung Lee, \textit{Treaty Shopping... Ibid} 5-6, Julien Chaisse, \textit{The Treaty Shopping Practice... Ibid.} 20, 35-64 and Avi-Yonah, Reuven. S. and Hji Panayi Christiana, \textit{Rethinking Treaty Shopping... Ibid.} 6-10.
Nevertheless, the weak point of this argument resides on the recognition of unilateral rights conferred by the treaty. Therefore, the breach occurs in the balance established by the contracting parties and not necessarily in the “fair balance”.

Secondly, it may also occur that the own nationals of the host country try to have access to an IIA that their own state has with another third country, by establishing a corporation in that third country. The basic principle is that the nationals of a state cannot sue their own state invoking the protection of an IIA; that is to say, they do not have access to the rights or protections offered by their state to international investors. When nationals of a host country are involved in the practice of treaty shopping it might entail the distinction (breach of balance) between the ones that have to go before national courts in an attempt to seek protection, and the nationals that “shop” in order to have access to an international jurisdiction or dispute resolution mechanism that may be more beneficial than the local courts.

Normally, big companies and different subsidiaries could be able to benefit from this practice, while local investors -such as small companies with no access to costly legal services- will not have that possibility. The internalization of domestic investments as a way to initiate an arbitration against investors´ own country is therefore another objection to this practice.

Thirdly, treaty shopping involves a diminution in the scope of regulatory tools of the host country and broadens the jurisdiction of international bodies that might be eligible to know about a case involving host state’s policy decisions. That is to say, treaty shopping exposes the host country to claims by investors who would otherwise not be entitled to claim under the protection of a treaty.

This is one of the major problems of this practice -either in a theoretical or in a practical sense-, because one of the strengths of the IIAs for investors is that they generally involve ISDS mechanisms under which they can sue their host state.

Through treaty shopping even a firm in a third country or a “no national” investor might file a claim against its host government, leading to an unexpected investor-state dispute to the detriment of the state. The existence of multinational corporations (“MNCs”) makes quite affordable such undesired outcome for states due to their capacity to conveniently relocate the investment or sue under a subsidiary - thus, under another more favorable nationality- as a way to reach new or more favorable jurisdictions to benefit from.

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87 See Phoenix Action, LTD. v. The Czech Republi (Phoenix Case) ICSID Case No. ARB/06/5, paragraphs 141-144, where the Tribunal, as will be pointed out after, found that: “The unique goal of the “investment” was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty”.
Fourthly, and due to the multiple options that IIAs provide to investors (e.g. local courts, ICISD arbitration or ad hoc arbitration) a foreign investor may enter in the practice of treaty shopping to bring a claim against a state based on the same facts, entering into the so-called parallel or multiple proceedings.

**Box 4. An example to illustrate the possible diminution in the scope of the regulatory tools of the host country**

The case of *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia* - which award is still pending even if the process was initiated on June 22, 2011 - is a suitable example to explain it. In this case, PMI (Philip Morris Incorporation) filed a claim against Australia’s plain packaging legislation alleging that it violates the Hong Kong, China-Australia BIT. In order to do it, PMI used an Asian subsidiary even though it is an American company based in Virginia. The point so far was that the USA–Australia Free Trade Agreement (FTA) does not have ISD settlement mechanism and thus, would not allow PMI to sue Australia for a breach of the USA-Australia FTA. Australia introduced in 2010 the “plain packaging” system, which entails that all tobacco products would be drab dark brown and with no trademarks on them. Australia opted for this policy option with some novel purposes, such as:

(i) Discouraging smoking; and
(ii) Complying with the World Health Organization (“WHO”) established Framework Convention on Tobacco Control (“FCTC”).

Health issues are under the sovereignty of each state, and obviously, Australia never thought about giving up intended its regulatory power regarding health issues in the BIT concluded with Hong Kong, China (1996). Yet, objectionable situations like this one might arise and are not forbidden by law due to the treaty shopping practice.

Finally, it might also be argued that the practice of treaty shopping threatens the basic principle of good faith due to its consideration as an abuse of the right to access ISDS mechanism. This means that, the practice by which investors restructure their investment with the sole purpose of gaining access to an ISDS mechanism, is consider as an *abuse of right*. Although the specific parameters of this principle have not been yet clearly defined, there are several ICSID awards that pointed out this idea.
Even if the practice of restructuring a corporation or an investment in order to achieve a legal benefit is not a banned practice, it cannot be denied that as long as this was not the aim of the contracting parties when they entered into an IIA, it is not a practice that should be commonly accepted. On the contrary, different measures shall be taken to avoid it and protect the ultimate will of the contracting states, which is the promotion of FDI by offering the rights and protection determined by each applicable IIA to those nationals and investments that are genuinely under their scope.

1.3. Which are the key elements of treaty shopping? Investor and investment definition

1.3.1. Introduction

The definition of “national or investor” and “investment” are the most important concepts in regard to the scope of application of the IIA. Consequently, whose investments are eligible to take a claim to the agreed ISDS mechanism has to be determined. The definition is of the discretion of the parties, who mostly define these terms in their IIAs.

The OECD highlights the motives of both concepts crucial importance as follows: (i) they identify the group of investors that the capital importing countries are willing to attract and protect -from the perspective of capital importing countries-; (ii) they identify the group of investors that will be eligible for that protection -from the perspective of a capital exporting countries-; (iii) they identify the way in

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Box 6. Treaty shopping and the principle of good faith

- In *Phoenix case* it was noted that: “The principle of good faith has long been recognized in public international law, as it is also in all national legal systems. This principle requires parties “to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage”, and that; “There is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. This principle governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused” (See *Phoenix Action Case*, Paragraph 107).

- In *Metal-Tech v. Uzbekistan case* the award stated that a breach of the prohibition of abuse of right, understood as a manifestation of the general principle of good faith, might give rise both, to an objection to jurisdiction and/or to a defense on the merits (See *Metal-Tech LTD. v. the Republic of Uzbekistan*, ICSID Case No. ARB/10/, Paragraph 127).

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88 OECD, Definition of Investor and Investment in International Investment Agreements (Chapter 1) in International Investment Law: Understanding Concepts and Tracking Innovations (OECD, March 2008), 9.
90 OECD, Definition of Investor and Investment... Ibid. 9-10.
which investment shall be designed in order to have access to the IIAs protection from the investor’s perspective; and (iv) they determine the eligibility of the investors to bring a claim under the jurisdiction of the arbitral tribunals established pursuant the IIAs.

The last two mentioned benefits are therefore the ones that will generate the willingness of investors to get involved in the practice of treaty shopping, in order to take advantage of the rights and dispute settlement mechanisms provided by the IIAs. This practice will be facilitated due to the vagueness and broadness of the terms used to define both concepts.

1.3.2. The concept of investor or national

Under the definition of the term investor, both natural and legal persons can be encompassed.

As far as an investor as a natural person is concerned, and rooted on an established principle in international law, the nationality of the investor will be generally determined by the national law of the state whose nationality is claimed. Nevertheless, there are some IIAs that in order to determine the investor’s nationality introduce additional criteria besides the nationality, such as the requirement of permanent residence or domicile. Although nationality standard will still remain as the main factor.

As far as the nationality of legal person is concerned, it is generally accepted that the term “investor” covers legal entities including companies, corporations, business associations, partnerships and other organizations with or without legal personality.

However, to determine the nationality of a corporation is not an easy task. In these days, it is quite common that a corporation is established under the laws of a country (A), is managed or has its center of control in another country (B) while its center of operations or main businesses remain in a different third country (C).

On this basis, the definition of “investor” in the context of legal entities may rely on one, or any combination of the next four criteria: (i) the criteria of the place of constitution in accordance with the law in force in the country.

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91 Regarding the nationality of natural persons, it must be highlighted that is not as problematic as the one related to legal ones. See Eunjung Lee, Treaty Shopping... Ibid. 7.

92 E.g. See US-Uruguay BIT, entered into force on 1 November 2006, which states that: “a) for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act; b) for Uruguay, a natural person possessing the citizenship of Uruguay, in accordance with its laws”.

93 E.g. This is the case of the existing IIA between Canada and the Government of the Republic of Argentina signed on 5 November 1991, where according to the Art.1(b) the term “investor” means “i) any natural person possessing the citizenship of a Contracting Part in accordance with its laws”.

94 Efe Uzezi Azaino, Nationality/Treaty Shopping... Ibid. 9.

95 E.g. See art. 2.a of the BIT signed between Chili and Germany and in force since 08/05/1999. However, and for practical reasons, in this section the term legal person and corporation will be used indistinctly.

96 Borchard was an international legal scholar, jurist, and Sterling Professor at the Yale Law School that, in the early twenty century, pointed out that three elements are determinant to attach a corporation to a territory, that is to say: the place of foundation, the centre of administration and place of exploitation. He also acknowledged that the large majority of European countries adhere to the principles of the centre of administration (siège social), but the United States follow the place of incorporation criteria. However, on IIAs there is also another fourth criteria that is commonly used to determine the nationality of a legal person, which is the “place of constitution in accordance with the law in force in the country”. E.M. Borchard, The
law in force in the country; (ii) the criteria of incorporation; (iii) the criteria of seat; and (iv) the criteria of control. Thus, their nationality will be determined by applying several tests: the test of constitution, the test of incorporation, the test of seat (siège social) or the test of control\textsuperscript{97}. The existence of each of these criteria will be verified as follows\textsuperscript{98}:

First of all, and according to the \textit{test of the place of constitution in accordance with the law in force in the country}, a corporation which has been constituted according to the law provisions of any of the contracting parties will be considered an investor of that state and thus, will be entitled to the protection conferred by the IIA.

Second of all, regarding the \textit{incorporation test}, a legal entity acquires nationality by \textit{way of incorporation} -also in accordance with the law in force in the country-. These both tests are the simplest among the four of them, and that is why they are also the most applied trials. Nevertheless, due to their simplicity, some corporations had used these criteria to carry out the practice of treaty shopping\textsuperscript{99}. This is why both criteria are normally applied in connection with another one with the aim of ensuring a company’s substantive connection with the state in which it is incorporated/constituted\textsuperscript{100}.

Third of all, as far as the \textit{siège social or real seat test} is concerned, the test states that a legal corporation “\textit{possesses the nationality of its place of principal administration}”, with the aim is to ensure that the corporation is actually doing business under the laws in force where a place of effective management is situated\textsuperscript{101}. Under this criteria, the host states want to prevent the acquisition or the establishment of a shell company in a jurisdiction where a relevant BIT applies.

Finally, the control test will be used to identify a real and effective link between a legal entity and a State. The goal will be to determine the nationality of the controlling shareholders\textsuperscript{102} of the corporation.
lifting the corporate veil\textsuperscript{103} when necessary. All in short, the aim of this test is to confer to the nationality of the shareholders a greater importance than to the nationality of the company. The use of this test is increasing and may be the most appropriate factor to identify the ultimate and real nationality of multinational enterprises or big conglomerates. It is often combined with other criteria such as incorporation, constitution and/or seat to justify the protection of a corporation under the treaty.

In order to put an end to this section, it is essential to point out that there is a trend to try to protect national interests in the global economy and therefore, states are claiming to enhance the protection of those companies that can be considered as nationals of a territory mainly on economic terms. For this commentators, the economic reality shall be the important aspect to determine the nationality of a company\textsuperscript{104}.

1.3.3. The concept of investment

If there are different standards to determine the \textit{nationality} of an investor, a similar problem arises when determining which instruments can be considered under the scope of the term \textit{investment}, because; (i) there is not just a single definition about what constitutes a \textit{foreign investment}; and (ii) the right to claim of minority shareholders is that \textit{“if the host state ratified investment instruments with many or all home states of the minority shareholders, it can easily face multiple claims in respect of one and the same investment and the same regulatory measure”}. The problem is that the consolidation of claims brought on the basis of different investment instruments is a difficult task to achieve. See OECD, \textit{Definition of Investor and Investment}… Ibid. 42-44 and European Parliament, \textit{Investor-State Dispute Settlement (ISDS) Provisions in the EU’s International Investment Agreements, Volume 2 – Studies} (European Union, 2014) 105.

\textsuperscript{103} In this sense, see Kryvoi, Yaraslav., \textit{Piercing the Corporate Veil in International Arbitration} (Global Business Law Review Vol. 1:169, 2011).

definitions tend to be broad, *numerus apertus*\(^{105}\) and presented just as a list of certain indicative types of covered investments\(^{106}\).

Although the lack of an exact and commonly accepted definition of this term, there is nowadays a widely accepted “test” to assess whether certain economic activity might be considered as an investment or not, which is the so-called “Salini test”\(^{107}\).

The *Salini test* established five standards for an investment to be considered as such under the Convention, which are the followings; (1) a *contribution of money or other assets of economic value* -here underlies also the idea of a substantial commitment in terms of quantity--; (2) with a *certain regularity of profits and return* -a mere expectation of profits or returns is, further, a typical aspect of an investment--; (3) a *certain duration* -underlies the idea of substantial commitment in terms of extended duration--; (4) an *element of risk*, usually by both sides -which is the possibility of contractual failure which gives out the necessity of protection by a treaty--; and (5) a *contribution or significance to the host state’s development* -which is the element that motivates states to accept and protect the operation and investors at issue\(^{108}\).

However, there are cases where the tribunals have refused to rely exclusively on the *Salini test* and have pointed out that additional elements must also be presented. *Phoenix Action* Decision, took into account another two elements: (6) *assets invested in accordance with the law of the host state*; and (7) *assets invested bona fidei*\(^{109}\).

Some scholars have assert that he *Salini* formula is excessively narrow, taking into consideration the evolving quality of an investment itself. They have also understood that those characteristics are only referred to one form of investment -the direct investment- with disregard to the second kind of investment, the portfolio investment\(^{110}\).

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\(^{106}\) There are cases in which the list can be considered as an “exhaustive one” though. In this sense, NAFTA sets an exhaustive list of economic activities that will be considered as an investment, even if the terms used to describe each of the activities are broad and thus, also widely interpretable. See art. 1139 (definition of Investment) of the NAFTA of 17 December 1992.

\(^{107}\) In *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco* (Case No. ARB/OO/4, 23 July, 2001) paragraph 52, the Tribunal held that for the purposes of Article 25 of the ICSID Convention: “The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction... In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition”. The referred test has also been completed by further ICSID awards and scholars contributions in the following years.

\(^{108}\) See Rubins Noah, *The Notion of “Investment” in International Investment Arbitration* (Chapter III, Arbitrating foreign Investment Disputes) in Horn Norbert (Editor), *Arbitrating Foreign Investment Disputes...*Ibid. 61-84.

\(^{109}\) To assess the element of *bona fidei* the Tribunal regarded the timing of the investment, of the initial request to ICSID and the claim; the real substance of the transaction and the real nature of the operation (e.g. the existence of a business plan, a real economic objective or valuation of economic transactions). For more detail of additional two elements, see *Phoenix Action* award, *Ibid.*, paragraphs 134-143.

\(^{110}\) The former one is understood as the kind of investment where the investor “seeks to control the consumption and production functions of the enterprise” and is made for the purpose of “lasting relations between the investor and the host state”; while the latter one does not necessarily incorporates the required features of “substantial commitment”, “certain duration” or “regularity of profits and returns”. The last one is therefore, it is referred to stocks, bonds and other different financial derivatives and complex instruments which nowadays are the heart of the international economic order. This sector states that international
Hence, Tribunals should advocate in favor of a flexible and objective definition of the term investment, because “a private party and a state contracting with each other are not at liberty to create their own definition of an investment under the ICSID Convention”\(^\text{111}\).

**Box 8. An example of a model clause to define investment**

All in all, if we had to mention a “model clause” to determine the scope of the term investment, and taking into consideration the definitions of “investment” provided by some of the most important capital exporting and importing countries (see reference nº34), the instruments considered as such will be the following:

(i) “every kind of asset” owned or controlled by investors of either of the Contracting States;

(ii) Such definition may include (though not exclusively) (a) shares, stocks, bonds or any form of participation in companies; (b) returns reinvested, claims to money or any other rights having financial value related to an investment; (c) movable and immovable property, as well as any other rights as mortgages, liens, pledges and any other similar rights related to investments as defined in conformity with the laws and regulations of the Contracting Party in whose territory the property is situated; (d) industrial and intellectual property rights related to investments such as patents or industrial designs; (e) business concessions or any other rights confirmed by law or by an investment contract.

1.4. Forms of treaty shopping

There are different forms of treaty shopping depending on the element that we paid attention to. If we consider the investment itself, we can find the forms known as “back-end” and “front-end” of the investment\(^\text{112}\).

In the former concept, the primary investor sells the investment -regarding to a dispute that has already arisen- to a third company that is already incorporated in a contracting state that has a more favorable IIA with the host state. Basically, the investor A sells to the investor B the investment, so the investor B can claim against the host state under the referred more favorable IIA. This investor B might be; (i) a subsidiary owned by investor A in the host state; or (ii) a third company (C) that due to its different nationality has access to a more favorable IIA with the host state where the investments have been made.

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\(^{112}\) Srah Kabochi, *Treaty Shopping Abuse...* Ibid. 6.
In the latter subject, the investor plans his nationality in advance (before the investment is made) in order to have access to the rights and benefits that come along being nationals of that specific contracting state with a favorable IIA with the host state.

Anyhow, if we consider the manner in which an investor can channel his investment, we can find the direct or indirect treaty shopping. In the former case, the investor creates his own company within a country -which has a more favorable IIA with the expected host state- and make the investment directly through this entity, while in the latter one he will use an already existing company that invest in the pretended host state for that purpose.

Box 9. A hypothetical example of direct and indirect treaty shopping

Building on the fact that there were no IIA between Bulgaria and Iran and a Bulgarian national wanted to invest in Iran, the investor will have two options to articulate his investment:

a) Direct investment (Direct Treaty Shopping): the Bulgarian investor could create a new company in Rumania -which does have a favorable IIA with Iran- and articulate the pretended investment through this Rumanian company.

b) Indirect investment (Indirect Treaty Shopping): the investor will not create his own company in a contracting state with a more favorable IIA. On the contrary, he will invest in a company that is already investing in the host state of reference. That is to say, and following the prior example, the Bulgarian investor will not create his own company in Rumania as a way to invest in Iran, he will invest in a previously existing Rumanian company that is already investing in Iran. In this he cans ensure that, in case a dispute arises, his investment through the Rumanian company will be protected under the IIA’s rights.

Furthermore, and even if it might not be adequate to talk about “forms” of treaty shopping in this case, it has to be highlighted that not only foreign investors can engage in the practice of treaty shopping, but also the national investors of the host states. In this case, the national/s of the host state would form a shell corporation in another country with a favorable IIA with the only purpose of transferring the assets to that shell company and make and investment through it in its own country. Hence, the internalization of a local investment will be the approach chosen by national of the host state to gain access to a more favorable IIA.

Finally, and as mentioned in the prior section 1.3.3.1, in reference pointed to the concept of investor, treaty shopping is a practice that can be carried out either by natural persons or legal persons/corporations in all forms described before.

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113 Even if these terms (“Direct” and “Indirect” treaty shopping) have not being expressly coined by the commentators, there are those who have hinted this distinction although without mentioning with such names. See Efe Uzezi Azaino, Nationality/Treaty Shopping... Ibid. 7.

114 Eunjung Lee, Treaty Shopping... Ibid. 5.
1.5. Reactions to Treaty Shopping by States and Tribunals

As expected, treaty shopping is a practice totally undesired by states\(^\text{115}\). As of now, we have seen how by virtue of this practice, rights, protections and ISDS mechanisms provided by the treaties are extended to the nationals of non-contracting states and, as a consequence, how contracting states are exposed to multimillion-dollar lawsuits which might not be otherwise possible. The objections pointed out in the prior 1.3.2. Section, are therefore significant reasons for the frown of the states to the practice of treaty shopping.

The truth is that the rejection against treaty shopping as a system to gain access to an ISDS mechanism that will not otherwise be available, has caused the withdrawal from ICSID of some states\(^\text{116}\). Besides, decisions such as the renegotiation of some treaties with countries considered as “treaty heavens” for investors’ protection -due to the extensive definitions of “investor/national” and “investment” contained in their BITs- are also being taken by states.

<table>
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<tr>
<th>Box 10. Some reactions to the practice of treaty shopping and the current ISDS regime</th>
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<tr>
<td>• Bolivia and Czech Republic governments threatened to denounce their BITs with the Netherlands.</td>
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<td>• Venezuela actually terminated its existing BIT with the Netherlands on 2008. The Netherlands is nowadays generally known as a site for the practice of treaty shopping because of its wide and tough ISDS provisions.</td>
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<tr>
<td>• Ecuador, South Africa and Indonesia have also withdrawn for some of their investment treaties.</td>
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As far as Tribunals are concerned, there are some cases in which they have shown a permissive or conservative attitude towards it\(^\text{117}\). However, this approach is not because they support the practice of treaty shopping, but for the definitions of “investor/nationality” and “investment” established on the BITs.

\(^{115}\) Efe Uzezi Azaino, Nationality/Treaty Shopping... Ibid. 10.

\(^{116}\) Eunjung Lee analyzed the ISDS cases available in the UNCTAD database that had been brought by legal persons as of the 28 April 2014, and concluded that 66 cases -the 15.7%, thus 420 out of 499- were potential treaty shopping cases. He also found out that “home country of claimant and home country of claimant’s parent company suggests that treaty shopping is negatively skewed towards developing countries; in about 80% of potential treaty shopping cases, developing countries have been respondent states whereas about 88% of the cases are brought by claimants which have a parent company incorporated or headquartered in developed countries”. This argument might easily explain why developing countries are either renegotiating or withdrawing their BITs with some developed countries, such as the Netherlands. See Eunjung Lee, Treaty Shopping... Ibid. 9-19 and Annex I.

Tribunals have found out that when the language used in the BITs to define those concepts is broad and ambiguous, they are not entitled to impose a narrower definition in comparison to the established by the own contracting parties, exercising its freedom to negotiate. In other words, the Tribunals felt themselves constrained by the plain language used on the treaties even if they share sympathy for the arguments against treaty shopping.

Nonetheless, there are other cases in which they have taken a more prohibitive position. E.g. in Phoenix Action (2009, Ibid. para. 142 and 144) the Tribunal concluded that “The unique goal of the ‘investment’ was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty. This kind of transaction is not a bona fide transaction and cannot be a protected investment under the ICSID system... It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs”.

Same conclusion was reached by the Tribunal in Mobile Corporation and others v. Bolivarian Republic of Venezuela. In the “Banro” case, the ICSID Tribunal also expressed clearly that a deceptive assignment of assets between a parent company and a subsidiary as a manner to gain access to ICSID jurisdiction should not be allowed, and concluded that when a parent company never had the ius standi before the ICSID, the right to access to ICSID jurisdiction cannot be “extended” or “transferred” to one of its affiliates established in an ICSID Convention contracting state after a dispute had already arose.

Thus, it is fair to conclude that Tribunals had not adopted a unanimous approach regarding the practice of treaty shopping.

1.6. Means of preventing Treaty Shopping

There are several lanes in which the practice of treaty shopping can be prevented. Among all of them, the next ones could be stressed out:

a) A more careful design of the terms “investor/national” and “investment” in the IIAs: The use of a clearer language by states when designing those concepts would avoid problems of interpretations by
Tribunals. Technical accuracy will facilitate the application of the IIAs to those investors with a real link or sufficient nexus with host countries, which is their ultimate purpose.

b) The inclusion of the clause known as a denial of benefit clause (“DOB clause”) in the IIAs: instead of incorporating requirements by the time to define investor/investment, host states can deny the benefits/rights conferred by the treaty to those investors or whose investments cannot show particular criteria that prove an economic connection to their pretended nationality.¹²²

c) The lifting of the corporate veil: is a tool that would allow the host state to request the tribunal to treat an investor not as a company, but as shareholders of a company (the real owners of the investment) and thus, prevent fraud, misuse or abuse of rights.

d) The termination or renegotiation of a BIT: this would prevent the practice of treaty shopping and will force investors to seek protection before local courts.

e) Adopt a Multilateral investment regime: the motive of treaty shopping is the singular rights, benefits and ISDS mechanism that are established by IIA. Thus, a balanced multilateral investment regime (with multilateral rules) would definitely reduce this practice.

e) The creation of an International Investment Court: Under my humble opinion, this option, together with the adoption of a multilateral investment regime, would solve most of the issues regarding the ISDS mechanism -including the practice of treaty shopping-, as we will analyze on the next Chapter IV.

¹²² E.g. The Art. 17 (“Non-application of part III in certain circumstances”) of the ECT states that “Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized…”.
CHAPTER IV: Possible solutions for the crisis within the Investor-State Dispute Settlement Mechanisms

1.1. Theoretical considerations

After stating which are the ongoing problems faced by the ISDS mechanism-namely the ISA system-it cannot be denied that its actual design is, at least, improvable. Actually, some scholar’s research have already expressed their perception about the system’s shift\textsuperscript{123}.

As international investment involves different interests, it is true that it might be difficult to find an ISDS method that satisfy both parties at same level; firstly, we have the interests of the host countries that will seek to maintain enough legislative capacity to adopt legitimate policies in the best interest of the public-without being constantly threatened by foreign investors’ claims-; secondly, we have the home countries that will try to provide their national investors some procedural and substantive rights-to facilitate their investment operations abroad and protect their investments\textsuperscript{124}.

Hence, and taking into account the growing importance of international investment law in the current globalized world, as well as the systematics benefits of engaging in ISA mechanism, it is worthy considering redesigning or even changing the ISA system in order to upgrade it.

Empirical evidence prove that when stakeholders trust on the fairness of the process, they are more likely to accept the final outcome of the award, comply with its mandate, accomplish with the law in future cases and commit with the respect and loyalty to the designed system\textsuperscript{125}. The reliance on the system is thereupon the only way to ensure its legitimation.

If the re-evaluation of the system that will be suggested in this chapter is done under the standards of fairness, mutual cooperation and acceptance the public credibility and effectiveness of the ISDS mechanism will be definitely strengthened, and consequently, its legitimacy as well\textsuperscript{126}.

All in all, it is meritorious to focus in the real interests underlying international investment law to create a mutually acceptable ISDS mechanism that, according to practical and widely accepted principles, is able to meet all parties’ requirements, improve its perception as a fair and reliable system and decrease its procedural costs and the financial exposure of the involved parties.

\textsuperscript{123} Campbell, Chris., Sophie Nappert & Luke Nottage (Respectively: Assistant Director, Center for International Legal Studies, Salzburg; Arbitrator, London; Professor of Comparative and Transnational Business Law, University of Sydney) carried out an study in order to assess whether the current ISDS mechanism should be abandoned, retained or reformed. Out of 25 valid responses to the survey: 22 believed treaty-based ISDS could be usefully changed in some ways, three considered it should remain unchanged, and none believed it should be abandoned altogether. Chris Campbell, Sophie Nappert & Luke Nottage, Assessing Treaty-based Investor-State Dispute Settlement: Abandon, Retain or Reform? (Sydney Law School Legal Studies Research Paper, No. 13/40, June 2013).

\textsuperscript{124} Karl P. Sauvant, The International Investment Law and Policy Regime...Ibid. 5.

\textsuperscript{125} D. Franck, Susan., Integrating Investment Treaty Conflict and Dispute Systems Design...Ibid. 214-215.

\textsuperscript{126} Franck, Susan., Challenges Facing Investment Disputes... Ibid. 148.
Thus, we are going to evaluate which are the different possibilities available so as to improve the current ISDS mechanism and achieve its pretended legitimacy. We will also assess which would be the best option among all of them and its reasons. The first option will be going back to the use of the host state’s local courts to solve an investment dispute instead of using ISA. The second one will entitle the promotion of alternative dispute resolutions (ADR) methods in addition to ISA, or making some improvements to the current ISA system. These proposed alternatives would be the next ones: (i) a recourse to an early neutral evaluation (ENE) of the case; (ii) a fact-finding process; (iii) an expediting review of claim process; and (iv) the establishment of an appellate body within the ISA. Finally, the last option will be the complete redesign of the system, opting for the creation of a standing International Investment Court (IIC).

### Box 11. Possible solutions within the current ISDS landscape

1. **First option: Back to the past**
   Back to local remedies

2. **Second option: Giving a step forward through halfway options**
   a. The recourse to an early neutral evaluation (ENE)
   b. Encourage the so-called fact-finding process
   c. An expediting review of claim process
   d. The establishment of an appellate body within ISA

3. **Third option: Creation of a standing world International Investment Court (IIC).**
   **Suggested features of the proposed new International Investment Regime**
   a. The creation of an Investment Advisory Centre (IAC) and the establishment of faster and more efficient proceeding
   b. Compulsory Mediation
   c. Standing Court with qualified judges
   d. Restricted Appeal Court

Below will be justified why this last possibility would be the most suitable one among all of them.

**1.2. First option: Back to the past**

1.2.1. Local remedies

In recent years, there has been observed a trend among states -either capital importing or exporting ones- in the following terms\(^{127}\):

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(i) Some of them have announced that they will no longer agree to ISDS clauses in their IIAs and that disputes shall be solved before national courts -this would be the case of Australia--; and

(ii) Others have introduce the requisite of the exhaustion of local remedies as a prerequisite for ISA -this is, for instance, the case of China-.

Those who argue that local courts of the host states are the appropriate instance to solve international investment disputes, consider that this possibility should be the norm. They assert that domestic courts exist precisely to resolve all the disputes involving their territory and thus, the ones regarding foreign investors and their host states are also included.\textsuperscript{128}

For these commentators, this would be the only way to avoid privileging -with greater rights- foreign international investors over the national ones and to establish a rightful \textit{rule of law}\textsuperscript{129} in the field of international investment law. Besides, it would ensure the decision-making power of the host state without the threat of being sued before ISA\textsuperscript{130}.

In this sense, Australia has been the first state to openly state that its Government will not recognize anymore the possibility of using ISDS clauses and from now on, will only agree to a dispute settlement mechanism that involve the participation of its domestic courts\textsuperscript{131}.

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\textbf{Box 12. Trade Policy Statement of the Australian Government (April, 2011) announcing its position on ISD Resolution as follows:} \\
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- ISDS clauses discriminate national investors -thus, domestic businesses- in favor of international investors and their businesses and constrain the ability of the Australian Government to rule in fields such as social, environmental or economic ones.

- Australian Governments will not include investor-state dispute resolution procedures in its trade agreements with developing countries. Thus, if Australian businesses “\textit{are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries}”.

- Australia will negotiate its BITs on the basis that investment disputes with foreign investors are solved before local courts. \\
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\textsuperscript{128} Chi, Manjiao., \textit{Privileging Domestic Remedies in International Investment Dispute Settlement... Ibid. 26-27.} \\
\textsuperscript{129} Trakman, Leon E., \textit{Investor State Arbitration or Local Courts... Ibid. 100.} \\
\textsuperscript{130} Chi, Manjiao., \textit{Privileging Domestic Remedies in International Investment Dispute Settlement... Ibid. 17-28.} \\
\textsuperscript{131} Trakman, Leon E., \textit{Investor State Arbitration or Local Courts... Ibid. 84-90.}
1.2.2. Disadvantages

There are several factors that make this option far from advisable\textsuperscript{132}: (i) investors of capital exporting countries would be required to deeply evaluate the economic, legal and political risks of their pretended host country before making an investment -with the major costs that that would imply-, as well as face the consequences of not doing such previous research or the consequences of a bad legal or business advise; (ii) investors also would face the risk of receiving a less favorable treatment than the national before the national courts of the host country; and (iii) they will have to bear the uncertainties regarding the process -which would rely on standards and procedures previously established in the judicial system of the host state-\textsuperscript{133} and the expertise of the judges -who are not generally known by their impartiality and expertise in the field of international investment law-.

That is why it is more desirable to find an international investment dispute settlement mechanism that, overcoming the problems faced by the ISA system, is able to cohere and harmonize the international investment law derived from the interpretation and enforcement of IIA clauses.

1.3. Second solution: giving a step forward through halfway options

1.3.1. The recourse to an early neutral evaluation (ENE)

The aim is that the parties, in an early stage of the process, agree in a trustworthy person that will hear all the arguments and evidences available at that time. That is to say, within the process, parties consent to find a respected individual who enjoys the trust of both. Then, that third-neutral party will give an evaluation of the case without proposing any outcome or possible agreement to settle. This process has proven to be quite expedite -between two and four months in most of the cases-, which makes it a potential cost-saving alternative method, as this is fundamentally an evaluative process\textsuperscript{134}.

Any settlement of an investment dispute reached through this ADR mechanism could be incorporated in the award of the arbitral tribunal\textsuperscript{135} leading the dispute to an end.

1.3.2. Encourage the so-called fact-finding process

Through this confidential and non-binding procedure, parties will be able to get an expert evaluation about the objective facts -such as economic, accounting or technical ones- of their case. The parties will submit the factual information surrounding their dispute to a neutral expert that will make an

\textsuperscript{132} Trakman, Leon E., \textit{Investor State Arbitration or Local Courts… Ibid.} 98 and 111-117.

\textsuperscript{133} Yannaca-Small, Katia., \textit{Improving the System of Investor-State Dispute Settlement… Ibid.} 8.

\textsuperscript{134} Lvesque, Celine., \textit{Encouraging Greater Use of Alternative Dispute Resolution… Ibid.} 24-27.

\textsuperscript{135} See ICSID Arbitration Rule 43(2), available at: \url{https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap05.htm#r43}. 

41
impartial assessment of those facts. That evaluation will allow parties to know where they are standing, advancing them an objective picture of the controversy.\footnote{UNCTAD, \textit{Investor–State Disputes: Prevention and Alternatives to Arbitration…} \textit{Ibid.} xx.}

The Article 15 of the ICSID Fact-Finding (Additional Facility) Rules provide parties with this possibility. Under the ICSID system, an independent committee will examine the facts of the dispute and will compose a neutral written evaluation of them, without offering any recommendation to the parties.\footnote{ICSID web page (Last visited, June 2016). Available at: \url{https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Fact-Finding.aspx}.}

1.3.3. Expediting review of claim process

The process of \textit{summary dismissal of unmeritorious claims} grants a respondent the chance to argue that the claim brought by the claimant lacks the legal merit to prevail; that is to say, that is manifestly a claim without legal substance to support it. The host state shall initiate that process not later than 30 days after the tribunal has been constituted. The tribunal will have to conclude in those cases whether the claim lacks the necessary merit and therefore, will throw the case out or, on the contrary, the case shall continue its due process.\footnote{Lvesque, Celine., \textit{Encouraging Greater Use of Alternative Dispute Resolution…} \textit{Ibid.} 31.}

This possibility has existed in ICSID since 2006, and was incorporated through the Rule 41(5) of the ICSID Arbitration Rules. It has been also known as the “\textit{sleeping beauty}” of the ICSID system,\footnote{Uchkunova, Inna and Temnikov, Oleg., \textit{Rule 41(5) of the ICSID Arbitration Rules: The Sleeping Beauty of the ICSID system} (Wolters Kluwer Arbitration blog, June 2007). Available at: \url{http://kluwerarbitrationblog.com/2014/06/27/rule-415-of-the-icsid-arbitration-rules-the-sleeping-beauty-of-the-icsid-system/}.} because it allows a right balance between investors’ rights -allowing them to bring a meritorious claim within a due process and guarantees- and host states’ rights -that do not have to be forced to stand a long process and its related costs when the claim lacks the required legal merit to prevail-.\footnote{Karl P. Sauvant, \textit{The International Investment Law and Policy Regime…} \textit{Ibid.} 11.}

1.3.4. The establishment of an \textit{appellate body} within ISA

Another possible option would be the creation of an appellate body within the ISA system. The incorporation of an appeal mechanism could be reached quite easily, with the aim of enhancing its coherence and predictability.\footnote{Yannaca-Small, Katia., \textit{Improving the System of Investor-State Dispute Settlement…} \textit{Ibid.} 10.}

There would be two ways to incorporate such an appellate body: (i) allowing a constitution of an \textit{ad hoc} appellate body under each IIA and thus, for each dispute; or (ii) establishing one single appeal body entitled to know about all cases in appeal.\footnote{\texttt{https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Fact-Finding.aspx}.}

The former alternative faces a remarkable disadvantage. Considering the current international investment landscape -where there coexist more than three thousand IIA- and the existence of \textit{ad hoc}
tribunals to solve each ISD, the establishment of an appellate body will not likely provide the regime the pretended coherence and predictability.\textsuperscript{142}

Consequently, the second alternative seems more accurate in order to achieve the coherence of the system and the consistency of law through the case law or precedent system\textsuperscript{143}.

Even if there are those who support this option, there are also those who are completely against that possibility and think that an appellate body is unnecessary and a \textit{bad idea}. There are some arguments to support that position\textsuperscript{144}: (i) the ICSID system -the most commonly used one- is incompatible with it because is based upon the idea of an \textit{ad hoc} annulment system that would be inconsistent with the functions of an appellate body; and (ii) there are not always similarities in investors’ rights and obligations in the IIAs and thus, an appellate body would be less prepare to address such a different kind of issues efficiently. Therefore, they assert that not only would be a problem adjusting the design of the IIAs to insert an appellate system, but also the effort to get it will not be worth enough.

Moreover, these authors argue that appellate bodies are established to address problems where international investment law has been inconsistently or improperly applied -or even have not been applied-. By that time the mistake has already been committed by the tribunal and that is why the fundamental issue is not whether the creation of an appellate body is necessary or not, but to ensure that elevate standards of competence and professionalism are followed by the arbitrators\textsuperscript{145}.

1.4. The third option: the creation of a standing word International Investment Court (IIC)

1.4.1. Why is it necessary?

Given the legitimacy crisis that the current ISA method is facing and the consequences surrounding it -such as the renegotiation of IIAs or withdrawal from them carried out by some states-, it seems clear that actions shall be taken to rebuild the confidence and public trust on the ISDS regime.

The main goals that international courts are encouraged to achieve are the followings: (i) enhance the compliance with the IIAs, international investment law and its principles; (ii) resolve investor-state disputes; and (iii) legitimize the system’s international procedural rules and institutions\textsuperscript{146}.

That is why there are authors who assert that the establishment of an International Investment Court will enable this purpose to be met, will promote the procedural fairness and justice of the system\textsuperscript{147}

\textsuperscript{142} Karl P. Sauvant, \textit{The International Investment Law and Policy Regime}... \textit{Ibid.} 11.
\textsuperscript{143} Yannaca-Small, Katia., \textit{Improving the System of Investor-State Dispute Settlement}... \textit{Ibid.} 10.
\textsuperscript{145} Appleton, Barry., \textit{The Song is Over}... \textit{Ibid.} 25.
\textsuperscript{146} Shany Yuval, \textit{Assessing the Effectiveness of International Court}... \textit{Ibid.} 22.
and will also promote the rule of law\textsuperscript{148}, as well as the specialization within the field of international investment law\textsuperscript{149}.

This option is considered as a unique solution to generate the pretended legitimacy, both the external and the internal legitimization. The former one is referred to the general acceptance of the norms and institutions’ authority that compose the system. The latter one is referred to other goals that permit the external legitimacy, such as the norm-compliance or the effective dispute resolution\textsuperscript{150}.

Moreover, it has been already pointed out that the actors of the international investment landscape have different and sometimes even conflicting interests\textsuperscript{151}, so the creation of a permanent and independent investment court will promote a balanced interpretation of the main underlying principles of IIAs and the implementation of the system of precedent. This ultimate consequence would lead to the increase of the perceived consistency and predictability\textsuperscript{152} of the ISDS mechanisms and decrease the risk of inconsistent and multiple awards\textsuperscript{153}. In the end, an institutional memory facilitated by a permanent court will likely contribute to that extent\textsuperscript{154}.

In a nutshell, a permanent world investment court -as a court of first instance- deciding on any dispute between the parties, would put an end to the decentralized ISDS system. Moreover, the establishment of an IIC could be considered as the \textit{first stone} towards a multilateral design of international investment framework\textsuperscript{155}.

1.4.2. Main features of the proposed International Investment Regime

1.4.2. a) The creation of an Investment Advisory Centre (AC) and the establishment of faster and more efficient proceeding

The constitution of an independent investment advisory center would be determinant to provide adequate assistance to the parties -regarding either procedural or legal issues- at reduced rates. The centre would help the parties to understand which are their rights and obligations and to which extent are they entitled to act to defend their interests\textsuperscript{156}.

\textsuperscript{148} Shany Yuval, \textit{Assessing the Effectiveness of International Courts...} \textit{Ibid.} 35.
\textsuperscript{149} Karl P. Sauvant, \textit{The International Investment Law and Policy Regime...} \textit{Ibid.} 11.
\textsuperscript{150} Shany Yuval, \textit{Assessing the Effectiveness of International Courts...} \textit{Ibid.} 62.
\textsuperscript{151} Rosenfeld, Friedrich., \textit{The Trend From Standards to Rules in International Investment Law...} \textit{Ibid.} 193.
\textsuperscript{153} Yannaca-Small, Katia., \textit{Improving the System of Investor-State Dispute Settlement...} \textit{Ibid.} 3.
\textsuperscript{156} See the manual ACWL, \textit{The advisory Centre on WTO Law} (July, 2014). Available at: \url{http://www.acwl.ch/download/qi/ACWL_Quick_guide_2014.pdf}.
This proposed feature would not be something new; within the WTO an independent advisory centre was successfully created on 2001, in order to provide advice to developing countries -and not to investors- in all matters related to WTO law\textsuperscript{157}.

On the contrary to the case of WTO, I would suggest that the advice was provided to both parties -investors and states-. Under my point of view, the presumption that the developing host countries are the only ones lacking the resources needed to get the required professional advice is not accurate. That is to say, an investor able to prove that lacks the financial capability to access the necessary legal support and thus, to defend themselves properly, shall have the same rights as those recognized to developing host states.

As far as ISDS proceedings are concerned, they are generally thought to be hard to manage, disruptive, dilatory and unpredictable in their outcomes\textsuperscript{158}.

In order to avoid the procedural problems and enhance the efficiency of the system, the IIC shall create specific procedural rules or codes to ensure that the timings of the process make it expeditious, while ensuring its efficacy as well.

For instance, it should be established that the investors are only allowed to bring a claim against their host state within certain period of time -after their interest have been negatively affected due to their host states actions-, or that parties will have a certain period to gather information and determine their internal strategy in the case that the amicable dispute settlement option does not put an end to the problem.

1.4.2. b) Compulsory mediation:

Mediation -which is perceived as a more informal process than conciliation- would be helpful for the parties so they could focus on the underlying interest and find an amicable solution that satisfies both of them. It would provide the parties with a major control over the whole process in an early stage of the dispute and will facilitate non-disrupting agreements.

Thus, the establishment of a compulsory mediation requirement\textsuperscript{159} will serve to\textsuperscript{160}; (i) facilitate the interaction and communication of the parties; (ii) determine the extent and the scope of the problem; (iii) improve the possibilities of mutual gratification; and (iv) save costs and time.

\textsuperscript{158} Trakman, Leon E., \textit{Investor State Arbitration or Local Courts…} \textit{Ibid.} 107-110.
\textsuperscript{159} This compulsory mediation requirement will take place over a specific period of time under a request of the parties, and would only be extended if both parties agreed to that extent. After the mediation time expires, investors will have another specific period of time to submit their claim in the case that the agreement could not be reached. If investors would have not bring a claim against their host state within that period, they would lose the right to claim in the future. The aim of these proposed measures is to provide parties with certainty and avoid the delays of the process over the time.
\textsuperscript{160} Franck, Susan., \textit{Challenges Facing Investment Disputes…} \textit{Ibid.} 172-180.
The employment of a third neutral independent party to resolve disputes peacefully before going to court is highly desirable. Moreover, a great percentage of the cases nowadays end in a settlement even though it is not a mandatory stage within the current ISA process\textsuperscript{161}. 

![Figure 5. Results of concluded cases (total as of end 2014)](image)

Source: UNCTAD, Recent Trends in IIAs and ISDS

In the light of this, it is worthy regulating the procedure and circumstances under which those settlements might take place to encourage and increase the rates of amicable solution of investment disputes.

A clear advantage of this approach is its flexibility, which will probably allow the parties that reach an agreement to continue their ongoing relationship\textsuperscript{162}.

\textsuperscript{161} There are already those who have proposed that the access to ISDS mechanisms “should be subject to a compulsory attempt to reach settlement”. See European Parliament, Investor-State Dispute Settlement (ISDS)... Volume 2. Ibid. 162.

\textsuperscript{162} UNCTAD, Investor–State Disputes: Prevention and Alternatives to Arbitration… Ibid. xxiv.
1.4.2. c) Standing Court with qualified judges

The disputes in which a settlement through a compulsory mediation is not reached shall be solved by an IIC, which will enable the achievement of the goals described in the previous section 1.4.1.

At this point, a reference to the composition of the court is obliged.

The legitimacy and the perception of fairness and accuracy of the system will only be reinforced if the judges of the proposed IIC are truly impartial and independent experts with high ethical standards. Their selection through an internationally agreed transparent and democratic vetting process\textsuperscript{163} will enhance the confidence of the parties in the process and will increase their willingness to comply with the Court’s judgment.

In my opinion, these will be some of the main features that should be incorporated in the proposed IIC: (i) states shall appoint a fixed number of judges -through a fair national system of their election- that would be part of the IIC; (ii) the specific judges of the court knowing about the dispute could not be of the same nationality of the disputing parties: (iii) strict rules that forbid them from getting involved in any kind of outside activity should be established -with the aim to avoid conflict of interests or partiality-; and (iv) they would have a fixed salaries, which will deter fraudulent practices and partial positions that would endanger their independence and impartiality.

Since international investment field involves a wide variety of stakeholders -such as investors, states, international organizations or general public, among others- who frequently have conflicting

interests, an IIC will be a more suitable instance than an arbitral tribunal to assess and clarify which interests deserve IIAs’ protection.

1.4.2. d) Restricted Appeal Court

As pointed out by Yannaca-Small in a study carried out for the OECD, there are three major benefits derived from the establishment of a restricted appellate body, which are:

- (i) the consistency of the judgments -which will promote the coherence of the jurisprudence and the predictability regarding the outcome of the case-;
- (ii) the possibility to rectify legal error or remarkable errors of fact committed in the first level of judicial review -taking as a reference international standards-; and
- (iii) an effective and more expeditious enforcement of the awards, without the need to achieve it through domestic courts of the host state -nowadays most of the awards are enforceable under rules such as the New Your Convention, which governs the recognition and the enforcement of arbitral awards-.

To support this initiative, the same author also has made some considerations of vital importance that should be emphasized. She suggested that creation of an appellate body will not necessarily create further delays or cost within the process, which nowadays could already take several years before being rendered. In fact, an affordable possibility in order to avoid major delays is establishing of specific time limits for an appellate case to be solved.

She also acknowledged that the concern regarding the possibility of appealing every case in the case that an appellate body was established -regardless of the strength of the reasons to support that decision-, could be prevented by introducing the requisite to make a deposit as a way to discourage frivolous appealing tendencies.

1.4.3. Conclusion

Experience has already demonstrated that ad hoc tribunals are not suitable enough to adequately safeguard states’ real intentions when entering into IIAs with other countries. Nor they provide the needed consistence and legitimacy to the ISDS system given the fact that there are more than three thousand IIAs and that ISD are solved on treaty-by-treaty basis.

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165 Yannaca-Small, Katia., Improving the System of Investor-State Dispute Settlement… Ibid. 11-14.
166 European Parliament, Investor-State Dispute Settlement (ISDS)… Volume 2. Ibid. 62.
167 D. Franck, Susan., Integrating Investment Treaty Conflict and Dispute Systems Design… Ibid. 219-220.
That is why a multilateral approach should be followed, in order to provide a homogeneous and consistent dispute resolution regime that decreases the uncertainty faced by host states and investors by the time a dispute arises.

Even if there are different possibilities to that purpose, the positive outcomes of the establishment of an IIC are definitely worth considering. An IIC might as well serve to open up a path towards a multilateral international investment agreement model, in which countries could share common interests, goals and principles.
Box 14. Transatlantic Trade and Investment Partnership (TTIP) and a permanent International Investment Court of Justice

On July 8, 2013, the European Union and the United States begun to negotiate an international investment agreement, which is the so-called Transatlantic Trade and Investment Partnership (TTIP). This investment agreement would “create the world’s largest free trade area and cover almost half of the entire global economic output” (WEAVER, 2014).

Both, U.S. and EU leaders, have publicly affirmed that the final agreement will provide investor-state dispute settlement provisions, which are already included in the TTIP Draft (See Chapter II, Section 3 - Resolution of Investment Disputes and Investment Court System-).

In the Draft, it is contemplated the establishment of an Investment Court system (with a *Tribunal of First Instance*) that will know about foreign investors claims in cases such as expropriation, nationalizations or losses due to armed conflicts, revolutions or insurrections (See Articles 4 and 5 of Section 2 - Investment Protection-).

The constitution of an Appeal Tribunal is also contemplated in the TTIP Draft, whose final judgment - as well as the final judgments of the Tribunal of first Instance- will be binding between the disputing parties (See Articles 10 and 30 of Section 3).

All in all, these are the main elements of the pretended ISDS mechanism and its purposes, to promote the parties’ trust on the system:

- The constitution of an Investment Court (composed by a Tribunal of First Instance and an Appeal Tribunal).
- The Appeal Tribunal will only know about cases in which the Tribunal “(a) has erred in the interpretation or application of the applicable law, (b) has manifestly erred in the appreciation of the facts or (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b)” (See Article 29, Section 3).
- Governments will retain their rulemaking powers and its protection will be ensured and guaranteed under the provisions of the TTIP.
- Judges -with high expertise and qualifications- will be publicly appointed.
- Transparent proceedings, open hearings and explicit distinction between domestic and international law will be ensured.
- Forum-shopping, frivolous claims and multiple and parallel proceedings will be prevented.

The First Vice-President of the European Commission, Juncker Commission, stated on September 2015 that “With this new system, we protect the governments' right to regulate, and ensure that investment disputes will be adjudicated in full accordance with the rule of law”.

Moreover, and together with the negotiation of the TTIP, the Commission is planning to work with other countries (non-EU members), with the aim to establish a permanent International Investment Court (IIC), which would increase eventually the *legitimacy, efficiency and consistency* of the ISDS regime. This (IIC) will substitute the currently existing ISDS mechanism within the international trade and investment landscape.

CONCLUSIONS

I. IIAs are becoming instruments of major importance to encourage, promote and liberalize FDI within the international investment landscape. The fact that nowadays are more than three thousand BITs in force and the negotiation of the TTIP that is taken place between two of the major capital exporting and importing territories -the UE and the US- are only two clear factual examples that do nothing but confirm this assertion.

II. Among the procedural rights that IIAs recognize to foreign investors, the most remarkable one is the access to the ISDS mechanism, which provide foreign investors with the right to bring a claim against their host government in the case that, due to a government’s action -such as a reversal of a banking license or a change in the interpretation of a tax or environmental law-, their investments are negatively affected.

III. Among the numerous methods to resolve international investment disputes between host states and international investors, ISA is nowadays the most used and preferred method for settling international investment disputes among all of them. ICSID system is the most commonly chosen arbitration option by the parties.

IV. However, the analysis carried out in this thesis shows several disadvantages of the ISA system that are generating the mistrust of the parties, bringing a sense of uncertainty and inefficiency towards it. All in all, the following disadvantages of the current practice of ISA have been perceived: (i) the confidentiality of the awards and lack of transparency within the process -with private hearings- are perceived with mistrust given the host countries’ public interests involved in international investment disputes; (ii) the huge costs of the process, not only the financial ones, but also the reputational ones; (iii) the expertise of the arbitrators, who are thought to lack the needed knowledge in fields, such as international investment, financial, economic or public law; (iv) their independency and impartiality, given the fact that arbitrators are appointed directly by the conflicting parties and that often they have had previous connections with those same parties or have intervened as arbitrators in other disputes concerning one of them; (v) the lack of a right balance between investors’ rights and host states legitimate policy changes, which is perceived by states as a threshold for their rulemaking power in areas concerning public interests -such as health or environmental ones-; (vi) time delay until an arbitral award is rendered, which might even take nine years; and (vii) the fact that the award will be binding without the possibility of appeal, countervailing the possibility of amending the award when the arbitral tribunal errs in the interpretation or application of the applicable law or in the appreciation of the facts of the case.

V. Another major problem of the current ISDS mechanism is the one known as treaty shopping or nationality planning, which may expose the host state to claims by investors who might otherwise not be
entitled to claim under the protection of a treaty, and threatens the international principle of *good faith*. The broad definitions of protected investors and investments contained in the IIAs, are the key elements that are allowing this practice. Being regarded as a totally undesirable practice by states, and given the current problems of the ISDS mechanisms, *the creation of an International Investment Court* would be the most effective and suitable option to prevent it. By eliminating the option of different ISDS mechanisms and readdressing all claims against host countries before an IIC, the conduct by which investors try to seek an ISDS method not available to them would be discouraged.

**VI.** Therefore, it can be concluded that ISDS mechanisms are facing a legitimacy crisis -specially, the ISA system-, which is endangering the ultimate ability of the IIAs to achieve their goals. Within this context, and taking into account the growing importance of international investment law in the current globalized world, it is worthy considering redesigning ISA system or even changing the whole ISDS mechanism in order to upgrade it. Even if it might be difficult to find an ISDS method that satisfy both parties -foreign investors and host states- at same level, there are several options that might be worth considering to that extent.

**VII.** The first option will be going back to the use of the host state’s local courts to solve an investment dispute instead of using ISA. However, this alternative would be far from advisable: (i) investors of capital exporting countries would be required to deeply evaluate the economic, legal and political risks of their pretended host country before making the investment -with the major costs that that would imply- and will bear the consequences of not doing such previous research or the consequences of bad legal or business advise; (ii) investors also would face the risk of receiving a less favorable treatment than the nationals of the host state before its domestic courts; and (iii) they will have to bear the uncertainties regarding the process -which would rely on standards and procedures previously established in the judicial system of the host state- and the expertise of the judges -who are not generally known by their impartiality and expertise in the field of international investment law-.

**VIII.** The second option will entitle the promotion of alternative dispute resolution (ADR) methods in addition to ISA, or making some improvements to the current ISA system. These proposed alternatives would be the next ones: (i) a recourse to an early neutral evaluation (ENE) of the case -by which a third-neutral party will give an evaluation of the case, without proposing any outcome or possible agreement to settle-; (ii) a fact-finding process -by which the parties will submit the factual information surrounding their dispute to a neutral expert that will make an impartial assessment of those facts-; (iii) an expediting review of claim process -by which the respondent wold have the chance to argue that the claim lacks manifestly the legal substance to prevail--; and (iv) the establishment of an appellate body within the ISA, with the aim of enhancing the coherence and predictability of its awards, as well as establishing a precedent system.
IX. The last option would be the establishment of an IIC. As pointed out in the Chapter IV - section 4.1.1.- authors assert that international courts are encouraged to achieve the following goals: (i) enhance the compliance with the international investment law and its principles; (ii) resolve investor-state disputes; and (iii) legitimize the system’s international procedural rules and institutions. Thus, an IIC will enable this purposes to be met, will reinforce the perception of fairness and justice towards of the ISDS system and will also promote the rule of law and specialization within the field of international investment law.

X. Under my point of view, and given the legitimacy crises faced by ISA and the conflicting interest of the actors involved in the international investment landscape, the creation of a permanent and independent world IIC will provide major benefits: (i) will reinforce the external and internal legitimacy of the ISDS regime, as well as the consistency of the judgments; (ii) will promote a balanced interpretation of the main underlying principles and goals of IIAs; and (iii) will lead to the implementation of the system of precedent. This ultimate consequence would lead to the increase of the perceived consistency, coherence, cohesion and predictability of the ISDS system and will decrease the risk of inconsistent and multiple awards. A permanent world investment court -as a court of first instance- deciding on any dispute between the parties would put an end to the decentralized ISDS system. Moreover, the establishment of an IIC could be the first stone towards a multilateral international investment framework.

XI. All in all, the main features of the proposed IIC are as follows: (i) the creation of an Investment Advisory Centre (IAC) to provide adequate assistance to the parties regarding either procedural or legal issues at reduced rates; (ii) the establishment of faster and more efficient proceeding to ensure the efficiency and efficacy of the regime; (iii) the implementation of a compulsory mediation system to improve the possibilities of mutual gratification and settlement, where possible; (iv) the constitution of a First Instance Investment Tribunal with qualified judges, who are truly impartial and independent experts with high ethical standards; and (v) the establishment of a restricted Appeal Tribunal, which will be entitled to rectify remarkable errors in the interpretation or application of the applicable law or in the appreciation of the facts of the case by the First Instance tribunal.

XII. Even if this proposal suggesting the creation or a world IIC goes beyond the initiatives known to date -the latest proposal so far is the one discussed regarding the TTIP which would imply the constitution of a First Instance Tribunal an Appeal Tribunal to solve investment dispute between the US and the EU-, in a multilateral, globalized and interconnected world as the current one it is, in my opinion, a possibility that is worth considering. In fact, it might lead to the establishment of a more uniform and coherent international investment law -due to the implementation of the system of precedent-, with common shared rights, obligations, standards and principles.
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