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Modernization of the Investor-State Dispute Settlement System: Reform or Revolution?[1]

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Abstract. The UN Commission on International Trade Law established Working Group III in 2017. Within the framework of this Working Group, States' delegations and representatives of international governmental and non-governmental organizations seek to work out solutions problems identified in the investor-State dispute settlement system. Such problems include: the lack of consistency and predictability of arbitral awards; the lack of independence and impartiality of arbitrators; and the cost and duration of proceedings. These problems can be remedied, as the UNCITRAL Secretariat and States have suggested, through reforms to the system. However, the sheer number of proposals make this look more like a revolution.

The authors researched the provisions of bilateral investment treaties, case law of tribunals demonstrating the problems of the ISDS system, as well as the works of Russian and foreign scholars. The methodological basis of the research contains general scientific and special methods.

The authors analyze several options for reforming the ISDS system outlined by Working Group III. First, they consider the Draft Code of Conduct for Arbitrators, the provisions on third-party funding and the establishment of an advisory centre in the ISDS system. Each of these initiatives is able to solve certain problems of the system. Second, the authors analyze documents relating to the creation of an appellate mechanism and a standing multilateral mechanism for the settlement of investment disputes. The authors conclude that initiatives may bring the fundamental changes to the system.

The authors conclude that the only way to remedy the identified shortcomings of the ISDS system is through reform. All the problem can and should be rectified through consistent work, and not by radical changes. Not only will the revolutionary options considered, such as the appellate instance and the court, fail to solve existing problems, but they will actually add new ones. For example, a "revolution" of the system may result in the establishment of the two parallel regimes of investor-state dispute resolution.

Keywords: reform of the investor-State dispute settlement system; ISDS; code of conduct for arbitrators; third-party funding; Advisory Centre; appeal in the ISDS system; standing multilateral mechanism

[1] English translation from the Russian text: Lifshits I. M., Shatalova A. V. 2023. Obnovlenie sistemy uregulirovaniya sporov mezhdu investorami i gosudarstvami: reforma ili revolyutsiya? *Moskovskiy Zhurnal Mezhdunarodnogo Prava* [Moscow Journal of International Law]. No. 1. P. 29–46. https://doi.org/10.24833/0869-0049-2023-1-29-46

Introduction

Working Group III of the United Nations Commission on International Trade Law (hereinafter referred to as the Commission, or UNCITRAL) was created in 2017. It was given a broad mandate to develop proposals on the possible reform of the Investor-State Dispute Settlement (ISDS) system. UNCITRAL Working Group III (hereinafter referred to as the Working Group) performs the following tasks: identifying and considering concerns regarding ISDS; considering whether reform is desirable in light of any identified concerns; and developing relevant solutions. Any decisions made by the Working Group should be designed in such a way that each State is able to choose whether and to what extent it wishes to adopt the relevant solution.[2] Problems identified in the ISDS system cover three broad categories: lack of coherence, consistency, predictability, and correctness of arbitral awards; the activities of arbitrators and decision-makers; and ISDS-related costs and the duration of proceedings.

Both the working documents of the UNCITRAL Secretariat and the organization's website state that the purpose of the Working Group is to reform the ISDS system. That said, certain areas of reform are aimed more at creating what is effectively an entirely new system. In this paper, we will look at the history of the creation of the ISDS system (Section 2); consider its advantages and limitations (Section 3); illustrate through examples of several areas of reform (for example, the Arbitration Rules, the provisions on third-party funding, and the advisory centre) what a potential reform of the system would consist of and what problems such a reform could solve (Section 4); analyze the idea of creating an appellate mechanism and a judicial body, which would effectively represent a new system, a revolution of the ISDS system (Section 5); and, finally, draw conclusions about the preferred areas of reform of the ISDS system (Section 6).

The Emergence of the ISDS system

As early as the middle of the 20th century, it had become obvious that the resolution of disputes between foreign investors and states in receipt of investments in the national courts of the latter did not provide effective protection for such investors due to the distrust towards them on the part of the courts. Diplomatic protection of the state of origin of investments is also an unattractive means of resolving disputes, for several reasons:1) the mechanism of diplomatic protection is based solely on international custom;[3] 2) the effectiveness of such protection is not necessarily clear; and

[2] UN: Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (27 November – 1 December 2017). Part I. Para 6. URL: https://documents.un.org/doc/undoc/gen/v18/029/83/pdf/v1802983.pdf?token=LNthVuyQ48IyjIAjZr&fe=true (accessed: 25.11.2022).

[3] UN International Law Commission: Draft articles on Diplomatic Protection 2006. URL: https://legal.un.org/ilc/texts/instru- ments/english/draft_articles/9_8_2006.pdf (accessed: 25.11.2022).

3) the will of the state and that of the investor do not always coincide if it is necessary to enter into a dispute with the government of the country in receipt of the investment. Realizing the special nature of investment disputes, states and international organizations set about developing a special procedure for their resolution.

The ISDS system was designed to be a *neutral forum* that would give investors a fair hearing in arbitration, unencumbered by political considerations, and focusing on the legal aspects of disputes. The ISDS system was first introduced in the 1959 Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (Salacuse, 1990: 655).[4] This was followed in 1965 by multilateral treaty – the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (hereinafter referred to as the ICSID Convention).[5] The Convention established the International Centre for Settlement of Investment Disputes (ICSID). Bilateral international investment agreements often include ICSID arbitration as an option for resolving investment disputes. Additionally, such agreements may provide for disputes to be resolved through *ad hoc* arbitration procedures, at other arbitration institutions, or in accordance with alternative arbitration rules.[6] Thus, by the late 1960s, the ISDS system had become a permanent fixture of investments treaties and was considered by many countries as a *"cornerstone" of investment protection*.[7]

Features of the Existing ISDS system

The ISDS system, created to ensure the depoliticization of disputes between investors and states, has a number of advantages. First, disputes are reviewed by a qualified body that makes neutral and independent decisions. Second, the parties to a given dispute are given the opportunity to elect arbitrators to consider the dispute, the arbitration rules to be used, and the language in which the proceedings will take place. In other words, the parties to the dispute have a measure of control over the review procedure. Further, the decisions made by the arbitrators are binding on the parties

[4] Pakistan and Federal Republic of Germany: Treaty for the Promotion and Protection of Investments. Signed at Bonn, on November 25 1959. URL: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280132bef (accessed: 25.11.2022).

[5] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington, 18 March 1965). URL: https://icsid.worldbank.org/sites/default/files/ICSID_Convention_EN.pdf (accessed: 25.11.2022).

[6] Approximately 56% of bilateral investment agreements offer investors the choice of at least two arbitration forums. Most agreements explicity specify ISCID Arbitration and ad hoc arbitration under UNCITRALRules as the acceptable forums (Pohl, Mashigo, Nohen 2012: 8, 21). The Global Arbitration Review, a leading resource for international arbitration news and analysis, provides statistical data for all countries on its website, including information on arbitration forums provided for in the bilateral investment treaties (BITs) of states. See: Investment Treaty Arbitration. URL: https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration (accessed: 25.11.2022). By way of an example, here are the figures for Dutch agreements: ICSID arbitration is provided for in 67 BITs; ad hoc arbitration under UNCITRALRules is allowed in 27 BITs; and arbitration under the ICSID Additional Facility Rules or the rules of the Court of Arbitration of the International Chamber of Commerce is provided for in 16 BITs. See: Investment Treaty Arbitration: Netherlands (Section 11). URL: https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/netherlands (accessed: 25.11.2022).

[7] Investor-State Dispute Settlement – UNCTAD Series on Issues in International Investment Agreements II. 2014, p. 20. URL: https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf (accessed: 25.11.2022).

and are enforced in accordance with the ICSID Convention and the 1959 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[8] The wide range of states parties to these conventions guarantees that the decisions will be enforced in a significant number of jurisdictions.

These advantages have led to the widespread acceptance and effectiveness of the ISDS system. According to the United Nations Conference on Trade and Development data, the total number of known ISDS cases reached 1190 at the end of 2021.[9] Investor confidence in the ISDS system is typically linked to foreign investment growth rates. For example, in 2022, global foreign direct investment flows recovered to pre-COVID levels, reaching $1.6 trillion.[10]

At the same time, over the half-century history of dispute resolution, the ISDS system has acquired a number of *deficiencies*. Researchers note that, from 2002 to August 1, 2017, the success ratio for investors in finally resolved cases was 44% (Langford, Behn, 2018: 567). A study by the British Institute of International and Comparative Law notes that the amounts recovered from states regularly range from hundreds of millions to billions of dollars.[11] As of June 2021, the average amount of compensation sought by investors was $1.16 billion, with average arbitrator-mandated pay-outs being $437.5 million.[12] The award amounts are so significant that they have placed considerable pressure on public finances and created obstacles to the sustainable economic development of countries. However, the sizable sums paid out in compensation to investors from state budgets are not the only reason why countries are concerned about the effectiveness and appropriateness of the ISDS system.

First, foreign investors often use the ISDS system to challenge measures taken by governments in the public interest, for example, policies aimed at protecting the environment or public health. Consequently, the issue of the legitimacy of arbitration decisions relating to the domestic policies of states is often raised. Another concern is the confidentiality of arbitration proceedings. While the transparency of the ISDS system has improved since the early 2000s (for example, with the publication of the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration in

[8] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. URL: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf (accessed: 25.11.2022).

[9] At least 68 ISDS cases were initiated under international investment agreements in 2021. See: UNCTAD: Facts on Investor–State Arbitrations in 2021: With a Special Focus on Tax-Related ISDS Cases, p. 1. URL: https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf (accessed: 25.11.2022).

[10] UNCTAD: World Investment Report 2022: International Tax Reforms and Sustainable Investment. P. 3. URL: https://unctad.org/system/files/official-document/wir2022_en.pdf (accessed: 25.11.2022).

[11] Empirical Study 2021: Costs, Damages and Duration in Investor-State Arbitration. Prepared by British Institute of International and Comparative Law and Allen & Overy LLP. P. 28. URL: https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf (accessed: 25.11.2022).

[12] If we do not include particularly large claims against Russia, the average is $817.3 million. Ignoring an arbitration decision that ordered the Russian Federation to pay $50 billion to the claimant/investor, the average award in ISDS cases was $169.5 million.

2014[13]), most ISDS proceedings remain entirely confidential. The confidentiality of proceedings depends on whether the parties agree to make information regarding the arbitral award publicly available or not.[14] As an extension of these concerns, states point to the practice of investors structuring their activities through intermediary countries with the sole purpose of benefitting from international investment agreements, including the dispute resolution mechanisms enshrined in them.

Second, an analysis of publicly available arbitration decisions reveals that arbitrators often come to conflicting conclusions in various cases, despite the fact that they refer to international treaties on investment protection with identical/similar provisions, or whose circumstances are almost exactly the same. The inconsistency in the interpretation of investor protection standards by arbitrators means that the disputing parties cannot predict how the standards will be applied to their dispute. Incorrect decisions are another problem: arbitrators make awards imposing large amounts of compensation on states without the possibility of effective review. Existing review mechanisms, for example the ICSID annulment mechanism or reviews before the national courts in the place of arbitration, are limited in the sense that appeals can only be filed on certain grounds.[15]

Third, the growing number of challenges to arbitrators may indicate that the disputing parties believe that they are biased. Particular concerns have arisen due to the perceived tendency of the disputing parties to nominate individuals who are more likely to take their side in disputes. States and investors have also reconsidered their positions on so-called *double hatting,* or the practice of individual simultaneously playing the role of counsel and arbitrator in similar matters. In many disputes, the parties try, often unsuccessfully, to have such individuals removed from the case.[16]

Fourth, ISDS dispute resolution practices challenge the notion that arbitration is a faster and less costly method of resolving disputes. Arbitration proceedings take an average of two to three years, and the associated fees are signficant. In addition, the inconsistency of arbitral awards prompts parties to invest huge resources to develop a robust legal position through the careful study of previous decisions. This is another reason why arbitration proceedings take so long.

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[13] For more on confidentiality and transparency in the consideration of ICSID disputes, see: ICSID: Confidentiality and Transparency. URL: https://icsid.worldbank.org/procedures/arbitration/convention/process/confidentiality-transparency/2006 (accessed: 25.11.2022); UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (effective date: April 1, 2014). URL: https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency (accessed 25.11.2022).

[14] In accordance with Art. 48, para. 4 of the ICSID Convention, the Centre does not publish information on awards *without the consent of the parties.* Rule 62, para. 1 of the ICSID Arbitration Rules states that the Centre publishes every arbitration award with the consent of the parties. However, in the absence of consent of the parties to publish the arbitration decision in its entirety, the Centre is obliged to publish excerpts from it. See: ICSID Arbitration Rules. URL: https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf (accessed: 25.11.2022).

[15] For example, the grounds for convening an ICSID ad hoc committee for the purposes of annulling an arbitral award are: the Tribunal was not properly constituted; the Tribunal manifestly exceeded its powers; there was corruption on the part of a member of the Tribunal; there was a serious departure from a fundamental rule of procedure; or the award failed to state the reasons on which it was based (Art. 52, para. 1 of the ICSID Convention).

[16] ICSID: Double-Hatting. Code of CONDUCT – Background Papers. URL: https://icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_(final)_2021.02.25.pdf (accessed: 25.11.2022)

The UNCITRAL Working Group was established in 2017 to develop ways and means to overcome these shortcomings. Some states note the positives of the current dispute resolution system and seek only to improve certain aspects of it. Others believe that the only way to solve the problems we have outlined is through fundamental structural changes. Accordingly, the Working Group resolved to develop both structural solutions and solutions that involve reforms within the current system.[17] What we are effectively talking about is the scale of changes to the system. With this in mind, let us look at existing proposals to answer the question posed in the title of this article: What is the best way to modernize the ISDS system – *through reform or revolution?*

Issues Aimed at Improving the Current ISDS System

Looking at the list of areas of activity of the Working Group posted on the official UNCITRAL website,[18] we can posit that implementing some of them may solve the problems identified within the current system. The concerns of states and investors about the lack of independence and impartiality of arbitrators can be eliminated if two documents are adopted and put into practice: *a code of conduct for arbitrators and provisions on third-party funding of disputes.*

A Code of Conduct for Arbitrators

The Working Group's first deliverable will be the Code of Conduct for Arbitrators in International Investment Dispute Resolution. The document, prepared by the UNCITRAL Secretariat, includes the best standards of conduct for arbitrators and establishes the obligation to comply with the provisions of the code.[19] The fact that special significance is attached to ethical standards implies the need to establish mandatory application of the code (Giorgetti, Dunoff 2019: 313–314). To this end, the Secretariat has developed a declaration as an annex to the code that the arbitrator must sign, thereby confirming their compliance with the requirements set out in the code (in particular, the provision on the duty of diligence), and indicating the absence of information that could raise doubts about their independence and impartiality. While the Code does not provide for the imposition of sanctions for violations of the provisions contained therein, it does state that arbitrators may be subject to penalties established in the applicable procedural rules or international investment agreements.

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[17] UN: Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019). Paras. 80–81. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V19/024/06/PDF/V1902406.pdf?OpenElement; UN: Possible reform of investor-State dispute settlement (ISDS). Note by the Secretariat. URL: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/081/97/PDF/V1908197.pdf?OpenElement (accessed: 25.11.2022).

[18] Working Group III: Investor-State Dispute Settlement Reform. URL: https://uncitral.un.org/ru/working_groups/3/investor-state (accessed: 25.11.2022).

[19] UNCITRAL: Draft Code of Conduct. Note by the Secretariat. URL: https://documents-dds-ny.un.org/doc/UNDOC/LTD/221/033/8E/PDF/2210338E.pdf?OpenElement (accessed: 25.11.2022).

The Code also contains other important provisions relating to the activities of arbitrators. For example, with regard to the problem of "multiple roles," Article 4 of the Draft Code states that an arbitrator shall not act concurrently as a legal representative or an expert witness in any other proceeding involving:

(a) The same measure(s);

(b) The same or related party (parties); or

(c) The same provision(s) of the same instrument of consent.

This provision will make it possible to avoid the negative consequences of *déformation professionnelle* and eliminate instances where the parties to a dispute can influence arbitrators. In its current version, Article 4 also proposes restricting the ability of arbitrators to perform other functions if the disputes involve legal issues that are so similar that the simultaneous performance of another function would be in violation of the arbitrator's general duty to be independent and impartial in accordance with Article 3 of the Draft Code. This provision has not yet received the unanimous support of states, as some states fear that arbitration may be turned into an international judicial body that will restrict the ability of judges to carry out other activities.

In our opinion, arbitrators should not be able to perform different functions simultaneously in two disputes involving similar legal issues. Arbitrators who have reached an opinion in the legal assessment of the actions of a state or investor will find it difficult to devitate from this opinion in another dispute. What is more, the consideration of similar legal issues by different arbitrators in cases with the same factual circumstances allows us to identify gaps in the legal regulation of international relations.

One of the best examples of the consideration of similar legal issues by different arbitration tribunals is the investment disputes involving Argentina.[20] The numerous lawsuits filed against Argentina had to do with measures taken by the government to deal with the economic crisis that hit the country in 2001–2002. These measures included a ban on sending remittances in excess of an certain amount and the establishment of a higher ARS–USD exchange rate. The investors who filed the lawsuit argued that they had invested on the basis of the fixed exchange rate between the Argentine peso and the U.S. dollar. In the case of *Gas Natural SDG, S.A. v. The Argentine Republic*, the claimant alleged several violations of the guarantees it had been given.[21]

In their consideration of the disputes between investors and the Argentine government, the arbitrators analyzed whether the measures taken by the state were the only recourse available to it to protect an essential interest, that is, whether the state could invoke necessity as a ground for precluding the wrongfulness of an act under Article 25 of the Responsibility of States for Internationally Wrongful Acts developed

[20] ICSID: Sempra Energy International v Argentine Republic. Case No ARB/02/16. Award. September 28, 2007. URL: https://www.italaw.com/cases/1002 (accessed: 25.11.2022); ICSID: Impregilo v Argentina Impregilo SpA v Argentine Republic. Case No ARB/07/17. Award. June 21, 2011. URL: https://www.italaw.com/cases/554 (accessed: 25.11.2022).

[21] ICSID: Gas Natural SDG, S.A. v. The Argentine Republic. Case No ARB/03/10. Decision of the Tribunal on Preliminary Questions on Jurisdiction. June 17, 2005. URL: https://www.italaw.com/cases/476 (accessed: 25.11.2022).

by the International Law Commission.[22] In the case of *Sempra Energy International v Argentine Republic,* the tribunal, despite recognizing the existence of a serious crisis, equated the essential interests of the state with the very existence of that state, which in this particular instance was not under threat.[23] However, in the case of *Impregilo v Argentine Republic,* the arbitral tribunal held that essential interests should not be limited to the threat to the existence of the state and should also encompass "subsidiary […] interests, such as the preservation of the State's broader social, economic and environmental stability, and its ability to provide for the fundamental needs of its population."[24]

On the one hand, these cases are an indicator of the inconsistency of arbitration awards as a flaw of the ISDS system. On the other hand, such arbitration practice allows us to identify a gap in the regulation of the issue of the responsibility of states for the measures they take in emergency situations. In 2020, a number of states, including Russia, put forward a proposal at UNCITRAL to consider the issue of state responsibility when adopting various measures to combat the COVID-19 pandemic.[25] The issue was first discussed at the 41st session of the Working Group on November 15, 2021.[26] Two concepts were considered at the meeting, which was organized by the Secretariat: a clause in international agreements to protect the essential security interests of states; and the state of necessity under Article 25 of the Responsibility of States for Internationally Wrongful Acts (Kabra 2019: 727–730). During the discussions, state delegations came to the conclusion that these concepts are not an acceptable solution due to the high standards in place for their application and the ambiguous interpretations of these provisions by tribunals. However, the delegations agreed that a unified approach in relation to the powers of states to introduce protective measures in emergency situations similar to the situation caused by COVID-19 needs to be developed (Lifshits, Shatalova 2022:116).

Let us note another important provision of the code: arbitrators are not allowed to delegate their decision-making function. Many states, the Russian Federation included, have expressed concerns about arbitrators transferring this responsibility to their assistants. For example, when considering disputes over the demands of YUKOS

[22] UN International Law Commission: Responsibility of States for Internationally Wrongful Acts. 2001. URL: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (accessed: 25.11.2022). For an analysis of the invocation by states of necessity, see: (Katsikis 2021: 46–69).

[23] ICSID: Sempra Energy International v Argentine Republic. Case No ARB/02/16, Award of 28 September 2007. Para. 348. URL: https://www.italaw.com/cases/1002 (accessed: 25.11.2022). In the case of *AWG Group Ltd v Argentine Republic,* the tribunal noted that "the severity of a crisis, no matter the degree, is not sufficient to allow a plea of necessity to relieve a state of its treaty obligations." See: ICSID: AWG Group Ltd v Argentine Republic. Case No ARB/03/19. Decision on Liability of 30 July 2010. Para. 258. URL: https://www.italaw.com/cases/1057 (accessed: 25.11.2022).

[24] ICSID: Impregilo v Argentina Impregilo SpA v Argentine Republic. Case No ARB/07/17. Award of 21 June 2011. Para 346. URL: https://www.italaw.com/cases/554 (accessed: 25.11.2022).

[25] UNCITRAL: Submission by the Governments of Armenia, the Russian Federation and Viet Nam. August 19. 2020. URL: https://undocs.org/en/A/CN.9/1039/Rev.1 (accessed: 25.11.2022).

[26] UN: Exploratory work on the impact of COVID-19 on international trade law of May 6, 2022. P. 4–5. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V22/026/18/PDF/V2202618.pdf?OpenElement (accessed: 25.11.2022).

shareholders, representatives of the Russian Federation (the defendant) repeatedly pointed to the fact that 76–80% of the arbitration award was drawn up by assistant arbitrators, rather than by the arbitrators themselves.[27] The new Draft Code should eliminate such abuses. Furthermore, assistants must now sign a declaration confirming that they are familiar with the rules of conduct described in the Code and that they agree to comply with them. In turn, arbitrators must ensure that their assistants comply with the principles laid down in the code.

The provisions of the Code that is currently being developed will only affect the ISDS system if they are applied in practice. Consequently, the implementation of the Code becomes a crucial issue. States are looking into various implementation options, having rules written into international investment agreements, the rules of arbitration institutions, or a multilateral document on the reform of the ISDS system.[28] Implementation of the Code into procedural rules can, in our opinion, be effective. By choosing, for example, the UNCITRAL Arbitration Rules[29] as the procedural basis for the consideration of a dispute, the parties to that dispute agree that the arbitrators they select will comply with the provisions of the Code, which is an integral part of the rules. However, significant time will be required to bring the provisions of the regulations and Code into line with one another. Another option is to implement the code into international investment treaties, but this will also require considerable time for changes to the wording of clauses to be passed at the government level.

The code may become part of a multilateral treaty (document) on the reform of the ISDS system through the inclusion in this document of a general provision on the applicability of the Code or its contents.[30] By signing this treaty, states agree to the application of the Code to investment disputes arising from investment agreements they have entered into. What is more, this instrument can include all the documents approved by the Commission on issues of reform and thus give it a certain degree of flexibility, allowing states to choose individual areas of reform that are acceptable to them when signing such an agreement. The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the MLI, or BEPS Convention)[31] developed under the auspices of the Organisation for Economic

[27] Supreme Court of the Netherlands: Judgment of 5 November 2021 No. ECLI:NL:HR:2021:1645. Para. 3.3.1 URL: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2021:1645&showbutton=true&keyword=ECLI%3aNL%3aHR%3a2021%3a1645 (accessed: 25.11.2022).

[28] UN: Draft code of conduct: Means of implementation and enforcement. Note by the Secretariat. URL: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/064/63/PDF/V2106463.pdf?OpenElement (accessed: 25.11.2022).

[29] UNCITRAL Arbitration Rules 1976 (as adopted in 2021). URL: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf (accessed: 25.11.2022).

[30] UN: Multilateral instrument on ISDS reform. Note by the Secretariat. URL: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp221_multilateral_instrument.pdf (accessed: 25.11.2022).

[31] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS dated June 7, 2017. URL: https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (accessed: 25.11.2022). The Russian Federation has signed and ratified the document. See: Federal Law No. 79-FZ of the Russian Federation dated May 1, 2019. *Collection of Legislation of the Russian Federation,* 18, May 6, 2019. P. 2203.

Co-Operation and Development (OECD) is an example of such a flexible multilateral treaty. On the other hand, it is unlikely that this multilateral instrument will be widely accepted since some states are extremely wary of multilateral conventions.[32]

In our opinion, the approval of the text of the Code by the Commission and its further use in the consideration of disputes will help to alleviate the concerns of states and investors regarding the independence and impartiality of arbitrators. More importantly, establishing ethical standards for arbitrators will solve one of the problems of the current ISDS that we have identified, without the need to make fundamental changes to the system as a whole.

Third-Party Funding

The ISDS system protects investors from the wrongful actions of states receiving investments. This protection comes in the form of compensation. At the same time, lengthy proceedings in the ISDS system require significant financial investments, which not all investors can afford. In response, various companies have emerged that are prepared to bear these costs in return for a significant portion of the compensation awarded by arbitrators. Different financing models exist: through corporate debt or equity; as risk avoidance vehicles; or through special purpose vehicles (Brekoulakis, Rogers 2019: 6).

The established practice of this kind of financing has a negative impact on the ISDS system: the process of protecting a violated right turns into a mechanism for earning income for parties that have no interest in protecting investments, with the number of frivolous claims growing as a result (Güven 2020: 290).[33] Furthermore, in the same way that the presence or absence of a conflict of interest between arbitrators and the parties to a dispute needs to be determined, a similar vetting process must be carried out in relation to between arbitrators and third parties financing the dispute. These risks, as well as the impact of third-party funding (TPF) on the ISDS system, have prompted many states and arbitral institutions to start including provisions on third-party funding in bilateral agreements[34] and in the rules of arbitration institutions.[35]

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[32] For example, Russia has not ratified the Washington Convention of 1965 or the Energy Charter Treaty of 2004. And there is little reason to expect Moscow's policy to change with regard to the proposed multilateral document.

[33] The issue of frivolous claims is noted both in UNCITRAL documents and in studies carried out by NGOs. See: UN: Security for cost and frivolous claims. Note by the Secretariat. January 16, 2020. URL: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/003/87/PDF/V2000387.pdf?OpenElement (accessed: 25.11.2022); Third-party funding – Possible solutions. Note by the Secretariat. August 2, 2019. Para 5. URL: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/083/90/PDF/V1908390.pdf?OpenElement (accessed: 25.11.2022); Report of the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration. The ICCA Reports. 2018. No. 4. P. 203. URL: https:// www.arbitration-icca.org/icca-reports-no-4-icca-queen-mary-task-force-report-third-party-funding (accessed: 25.11.2022).

[34] European Union-Canada Comprehensive Economic and Trade Agreement (CETA). Art. 8.1; European Union-Vietnam Investment Protection Agreement. Art. 3.28, 3.37.

[35] Investment Arbitration Rules of 2017 issued by the Singapore International Arbitration Centre (SIAC). Art. 24; International Investment Arbitration Rules issued by the China International Economic and Trade Arbitration Commission (CIETAC). Art. 27.

The provisions on third-party funding are handled by the Working Group within the framework of the document entitled "Draft Provisions on Procedural Reform."[36] Draft regulations are being discussed by state delegations. However, no decision has been made thus far on the most important issue, namely, the *regulatory model for third-party funding*. Proposals made by the Secretariat include: a prohibitive model; a restrictive model; a permitting model; and the establishment of an obligation to disclose information about the TPF of a proceeding (as a separate model or in addition to the other models). Each of these models would reduce the risks associated with appointing an arbitrator whose independence or impartiality may be in doubt. Moreover, disclosing the provisions of a financing agreement is important as the party may effectively supplant the investor/claimant by dictating their behaviour during the hearing (Chaisse, Eken 2020: 119).

The authors of the present paper have proposed an alternative method for regulating TPF, namely, prohibiting it altogether, with the exception of financing for SMEs and non-commercial financing (Lifshits, Shatalova, 2022: 123–124). Non-commercial financing means any financing where the investor repays only the amount provided by the financing party without any additional fees, such as interest or contingency fees. Such a model would eliminate speculative demands and interventions by third parties, which would have a vested interest in the investor winning the claim.

It is also important to consider the consequences for investors who are in receipt of prohibited financing. According to the entitled "Draft Provisions on Procedural Reform," the tribunal may order the disputing party to terminate the funding agreement and/or return any funding received; suspend or terminate the proceeding; take non-compliance into account when allocating costs for the proceeding.

In addition to the provisions on TPF, the "Draft Provisions on Procedural Reform" propose the following issues for consideration by delegations: the early dismissal of claims without legal merit; security for costs; counterclaims; allocation of costs (according to the Working Group, this could help reduce legal costs overall and avoid inconsistency). The adoption of provisions on these issues will solve one of the problems of the system that we have identified – significant costs and lengthy proceedings. TPF provisions can be implemented through the same mechanisms as the Code of Conduct.

The provisions on third-party funding, as well as other provisions on procedural reform, will reduce the costs incurred by the parties to disputes, allow for unreasonable claims to be identified and rejected at an early stage, and establish the presence or absence of doubts regarding the independence and impartiality of arbitrators. At the same time, these reform options are aimed at developing the current system and do not devest it of its main features and advantages.

[36] UN: Draft provisions on procedural reform. Note by the Secretariat. URL: https://documents-dds-ny.un.org/doc/UNDOC/LTD/221/043/2E/PDF/2210432E.pdf?OpenElement (accessed: 25.11.2022).

Advisory Centre

In addition to the current ISDS system, state delegations are considering the possibility of establishing a new structure in the form of an advisory centre (hereinafter referred to as the Centre). The Advisory Centre is conceived as an international intergovernmental body that would provide a range of services for beneficiaries of the Centre. The UNCITRAL Secretariat has developed draft regulations that envision the establishment of two units within the Centre: an assistance mechanism and a forum.[37] The assistance mechanism is expected to provide legal advice and support with regard to international investment dispute proceedings. Meanwhile, the forum will give states the opportunity to obtain information about available mediation centres or other alternative methods of dispute resolution, exchange experience with other states, and take part in capacity-building activities. The Advisory Centre will be created through contributions of member states in accordance with their level of development. The creation of the Advisory Centre is aimed both at ensuring access to justice for least-developed countries (LDCs) and at harmonizing the ISDS system as a whole. Its establishment will rectify the following problems of the system: the high costs of ISDS procedures, the inconsistency of decisions, and limited access to justice. In addition, the Centre is an example of interstate cooperation towards the achievement of a common goal – to improve the ISDS system.

A similar body already exists today, operating within the framework of the World Trade Organization. The Advisory Centre on World Trade Organization Law was established to provide legal advice on WTO law, support in WTO dispute settlement procedures, and training in WTO law. The beneficiaries of the Advisory Centre on WTO Law are LDCs and developing countries. Developed countries (members of the WTO Advisory Centre and the centre's main donors) are not eligible for the services (Van der Borght 1999: 726). The experience of the WTO may be useful in establishing an advisory centre within the ISDS system; and the Centre under consideration by the Working Group will offer services in some capacity to all member states.

We believe that the most effective way to get the Centre up and running is to consistently increase the range of services provided. Because setting up the Centre will require significant financial investments from states, we agree with the proposal to establish, at least in the early stages, a forum to provide informational and educational services. The Centre will serve as a platform for exchanging best practices and coordinating the parties to a dispute on the issue of resolving the dispute through alternative methods. The range of services offered by the Centre can be expanded, assuming sufficient financial resources are earmarked for this purpose. At the forty-third session of the Working Group, the delegations agreed that only states should be able to benefit

[37] UN: Advisory Centre. Note by the Secretariat. December 3, 2021. URL: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/090/93/PDF/V2109093.pdf?OpenElement (accessed: 25.11.2022).

from the Centre's services. The exclusion of investors from the circle of beneficiaries is justified, first of all, because other sources of financing are available to investors (via third-party financing or ombudsmen), and, secondly, because providing services to both potential parties in a dispute would create a conflict of interests.

It is important for the Centre to be independent both from international organizations and states, and from individuals. To this end, some researchers have suggested that it should be established as a separate intergovernmental organization (Sauvant 2021: 362). Others believe that creating it as part of an existing organization is workable, provided that issues of conflicts of interest and budget are resolved (Joubin-Bret 2015: 11). In our opinion, while establishing the Centre as part of an existing organization will require fewer resources, it will nevertheless not allow it to work independently, and this will additionally create distrust on the part of its beneficiaries.

As we have already noted, the Centre will remedy many of the problems inherent in the ISDS system. What is more, such a structure will fit organically into the current set-up, and the services it offers will not contradict the current basic principles of the system.

Reform Options for Creating a New System

Insofar as some states view the problems of the ISDS system as indicative of its failure as a whole, the Working Group is examining other reform proposals. However, as we will show later, these proposals are aimed not at reform, but rather the creation of an entirely new regime for resolving disputes between investors and states.

Appeals in the ISDS System

The problem of the inconsistency and lack of predictability of arbitral awards can, according to some states, be solved by establishing an appellate review stage. Under the current system, only two mechanisms exist for the limited review of awards: a procedure for annulling an arbitral award by the national court of the place of arbitration; and a procedure for recognizing and enforcing arbitral awards. An appeal that includes a review of a decision on the merits runs counter to the fundamental principle of international commercial arbitration in general, and investment arbitration in particular, namely, the *finality of the arbitral award* (Viktorova 2019: 102).[38]

When considering the appropriateness of appeals in the ISDS system, researchers and state delegations rely on the review mechanism in national courts, as well as in the WTO system. We hold that such a comparison is not correct. Appeals in national courts

[38] International treaties reflect this principle. Article 53 of the ICSID Convention states that "the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." According to Article 34 of the UNCITRAL Model Law on International Commercial Arbitration of 1985, recourse to a court against an arbitral award may be made only by an application for setting it aside on limited grounds. UNCITRAL Model Law on International Commercial Arbitration. URL: https://uncitral.un.org/ru/texts/arbitration/modellaw/commercial_arbitration (accessed: 25.11.2022).

are necessary because state judicial bodies of the first instance resolve disputes arising from various branches of national law. Accordingly, there is no guarantee that rulings of courts of first instance will be of the required quality. The ISDS system considers disputes under international law, and the parties select the most qualified arbitrators in the field of international investment law with the relevant experience. Furthermore, in most jurisdictions, a single judge considers cases brought before national courts of first instance, whereas three arbitrators are typically selected to consider cases in the ISDS system.[39] Collegiality is important when considering disputes since arbitrators can compare their respective points of view during the assessment of a given situation.

Comparisons with the Appellate Body of the World Trade Organization (WTO-AB) are not particularly productive here, for a number of reasons. First, the purpose of the WTO Dispute Settlement Body (DSB) is to adjudicate interstate disputes, while ISDS investment tribunals deal with disputes between states and individuals. What is more, the system for resolving investment disputes was deliberately established on an arbitration model, removed from the control of states, and depoliticized. Second, the WTO appeals mechanism is not the best example for ISDS to use, since the precedential value of its Appellate Body reports are often called into question (van den Berg 2019: 165–166). Third, we must not forget that complaints filed with the WTO DSB concern changes to, or the cancellation of, measures implemented by a member state that are not in compliance with the WTO agreements, and the payment of compensation is a temporary remedy applied only in the event that the defendant has not complied with the recommendations of the arbitration panel groups, and only for the duration of such non-compliance.[40] This is why it is said that this is future compensation since it aims to compensate for harm that will arise at some point in the future (Van den Bossche, Zdouc 2022: 216).[41] In investment disputes, the main goal of the investor is to recover compensation from the respondent (state) for the past expropriation of investments. Thus, two systems differ significantly in the subject matter of their requirements. Fourth, it is well known that the activities of the WTOAB have been blocked, and it is unlikely that it will return to its previous functioning.[42]

One of the main benefits of creating an appellate body is to contribute to the development of consistent and predictable arbitral tribunal practice. At the same time, some scholars believe that a "soft precedent" already exists in the ISDS system, and

[39] Garcia A. I. Is the Principle of Finality "Losing Its Appeal"? // Kluwer Arbitration Blog. 11.05.2011. URL: https://arbitrationblog.kluwerarbitration.com/2011/05/18/is-the-principle-of-finality-losing-its-appeal/ (accessed: 25.11.2022).

[40] WTO: Annex 2. Dispute Settlement Understanding. Art. 22. URL: https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm (accessed: 25.11.2022).

[41] See also: Shumilova V. M., Lifshitsa I. M., eds. *World Trade Organization (WTO) Law: A Textbook*. 3rd ed. Moscow: KNORUS. P. 242.

[42] WTO: Statement by the United States at the Meeting of the WTO Dispute Settlement Body. May 23, 2016. URL: https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf (accessed: 25.11.2023); The WTO Annual Report 2022 (Chapter 7 – Dispute settlement). P. 143–144. URL: https://www.wto.org/english/res_e/publications_e/anrep22_e.htm (accessed: 25.11.2023).

that consistency is already developing in investor-state arbitration (Laird, Askew 2005: 298–299). However, the issue of predictability or consistency of practice is one that cannot be resolved completely. International investment law is based on a network of over 3000 investment treaties.[43] Since investment arbitration proceedings are typically established *ad hoc* on the basis of an individual treaty, the decisions of tribunals must be based on the substantive rules in each individual case (Alvarez et al. 2016: 8). Other scholars argue that consistency in the interpretation of investment treaty provisions does not guarantee a corresponding increase in the accuracy of interpretation; and the move to a more institutionalized ISDS regime would significantly affect the balance of power between states and arbitrators, creating the need for oversight mechanisms to address the issue of tribunals potentially overstepping their powers (Feldman 2017: 530).

The creation of an appellate body, in addition to providing no guarantees that it will solve the problems inherent in the ISDS system, entails a number of difficulties. The most obvious flaw of the appeals procedure is that it extends the length of proceedings. What is more, some of the grounds for filing an appeal provided for in the working paper produced by the UNCITRAL Secretariat are the same as those that apply to annulment or setting aside procedures in a national court.[44] On the one hand, maintaining such grounds of appeal is contrary to the established exclusive competence of national courts, the embodiment of the principle of state sovereignty. If these functions are transferred to the appellate authority, then states will no longer be protected at home against the wrongful decisions of arbitration bodies located in foreign jurisdictions. On the other hand, if these powers are taken away from the appellate instance, then it will not be able to terminate proceedings by confirming, for example, the arbitration tribunal of the first instance wrongly established that it had jurisdiction in a given case. Accordingly, the parties will incur significant costs only to find that the national court deems itself incompetent to consider the matter at hand.

Another problem exists in the correlation between the appeal mechanism and existing international treaties. For example, the ICSID Convention does not provide for an appeal mechanism under Article 53(1). Amendments to the Convention can only be made by the unanimous decision (Article 66(1)), something that is unlikely to be achieved in practice. Alternatively, a group of states parties to the ICSID Convention can modify the Convention *inter se*. Some scholars claim that this is not the case (Calamita 2017: 610), while others believe that there are no legal obstacles to applying the Convention in this manner (van den Berg 2019: 170).

[43] According to UNCTAD's *World Investment Report 2022,* a total of 3288 international investment agreements currently exist, with 2558 of those being in force. UNCTAD: World Investment Report 2022: International Tax Reforms and Sustainable Investment. P. 16. URL: https://unctad.org/system/files/official-document/wir2022_en.pdf (accessed: 25.11.2022).

[44] UNCITRAL: Appellate mechanism. Note by the Secretariat. URL: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_wp_-_appeal_0.pdf (accessed: 25.11.2022).

If an appellate body is created in spite of the shortcomings of the system, states will have to decide how to ensure its independence while minimizing the financial expenditure involved in its establishment. The first option is to create an *ad hoc* appeals tribunal, similar to the current tribunals of first instance. Despite the obvious upside to this option (that it would preserve the foundations of the ISDS system), it would be almost impossible to ensure the consistency of *ad hoc* resolutions of such appeals. The second option is to create an appeals mechanism based on existing arbitration institutions. This route has a number of advantages: the autonomy of the parties in choosing arbitrators would be preserved; fewer financial resources would be needed; and decisions of the appellate court would be more consistent and predictable than in an *ad hoc* review. The third option is to establish a permanent appellate body. However, this would require significant financial investments. More than this, it would essentially mean creating an international court, that is, it would involve setting up an entirely new system of dispute resolution.

To sum up, the creation of an appellate body would affect the functional foundations of the ISDS system, which goes beyond the scope of the term "reform." Reform of any system must preserve the key principles of that system, in this case, the principle of the finality of arbitration decisions in investment disputes. Moreover, an appellate body does not appear to be a suitable mechanism for addressing the problems inherent in the ISDS system. On the contrary, it would likely create even more difficulties.

Multilateral Investment Court

Many states (primarily the EU member states) believe that the establishment of a standing multilateral mechanism in the form of a Multilateral Investment Court (MIC, Court) will eliminate many of the problems of the ISDS that have been identified: the lack of independence and impartiality among decision-makers; the limitations in existing challenge mechanisms; and the lack of adequate diversity of arbitrators.[45]

Many elements of the Secretariat's Working Paper on the standing multilateral mechanism are still being reviewed by delegations, and decisions on key issues regarding the future of the Court have not been made.[46] However, the essence of how this body will function is clear even now: the idea is to create a permanent institution with

[45] UN: Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018). Paras. 83, 90, 98, 108. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/075/14/PDF/V1807514.pdf?OpenElement (accessed: 25.11.2022). The UNCITRAL Secretariat notes that reform through the creation of an MIC is also driven by the need to review the practice of parties to disputes in appointing arbitrators since this practice is the main cause of concern regarding the lack of indpendence and impartiality of decision makers. See: Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session (Vienna, 20–24 January 2020). Paras. 104. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V20/007/35/PDF/V2000735.pdf?OpenElement (accessed: 25.11.2022).

[46] UNCITRAL: Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters. Note by the Secretariat. URL: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/standing_mul-tilateral_mechanism_-_selection_and_appointment_of_isds_tribunal_members_and_related_matters__0.pdf (accessed: 25.11.2022).

chambers of three to five judges in each. A governing body consisting of representatives of member states will be set up. Judges will be selected by the court, rather than being appointed by the parties, to consider a specific dispute. The proposed selection process will involve appointing candidates from various regional groups, meeting requirements for gender, age, diversity, etc. Once a pool of candidates has been formed, a special selection committee will make the final decision.

The establishment of an MIC will, of course, necessitate the creation of a new procedure for resolving investment disputes, namely, that they will be considered by an international court. This can hardly be called reforming a unique system that was created over half a century ago. First, the autonomy of the parties to disputes will be completely levelled, including when it comes to determining the procedural rules for considering the dispute, resolving the issue of confidentiality, and choosing the jurisdiction in which the dispute will be heard. Second, the arbitrators will be judges who have a different status. Their independence is dubious, as is the "transparent" procedure (as the authors of the idea for this court claim) for selecting them. Granted, the initial stage of candidate selection (nomination by states) may be equitable and transparent to some extent. However, at the second stage of selection, where candidates are assessed by a selection committee, the Secretariat's Working Document states the committee's discussions remain confidential. In other words, the final selection of candidates is hidden from the public. Many scholars quite rightly believe that appointments under the MIC are likely to become politically motivated decisions (Lavranos 2021: 849).

The proposed mechanism for appointing judges deprives both the state and the investor of the right to elect decision-makers. In its comments on the Working Document, the Russian delegation noted the following: "The perception of an international investment court as an instrument depriving investors acting in good faith of the possibility to participate in the selection of the applicable procedure may have a negative impact on the implementation of investment projects in host countries."[47] One cannot but agree with this argument. In our opinion, the dispute resolution system is an integral part of the special relationship that arises between the investor and the host state. The establishment of such a court will lead to the destruction of the general understanding of the status of foreign investors and the procedure for protecting their capital investments.

What is more, there is no clear information on the extent to which individual states will be able to exercise their right to appoint judicial candidates since the working document has not yet established the number and ratio of judges from different regional groups. The European Union may propose a larger number of members in

[47] United Nations Commission on International Trade Law: Possible reform of Investor-State dispute settlement (ISDS). Submission from the Government of the Russian Federation. December 31, 2019. URL: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/001/57/PDF/V2000157.pdf?OpenElement (accessed: 25.11.2022).

their particular regional group. One argument in favor of this could be that the European Union and its members are likely to make up the majority of states parties to the treaty on the establishment of the MIC during the initial stages of the Court's work (Bungenberg, Reinisch 2021: 2309). If this is the case, however, the MIC runs the risk of not being sufficiently diverse in its composition, and subject to high levels of political influence.

Another important issue is the term of office of judges and whether or not this term can be extended. There are advantages and disadvantages to short and long terms in office. The problem with non-extendable terms is that valuable experience may be lost, and this is one of the reasons for the inconsistency of decisions in the current ISDS system. On the other hand, fixed and non-renewable terms in office gives judges greater independence since it protects the members of the tribunal from possible conscious or subconscious pressure connected with their desire to be re-elected (Kaufmann-Kohler, Potestà 2017: 91–92).

Thus, the proposal by EU member states to create an international judicial body is actually a step backwards in the development of the ISDS system. While it would seem that such a body would be set up to protect the rights of investors, the main role in the functioning of the system for resolving investment disputes will nevertheless be given to states. The main drawback of the proposed revolution is that it will not solve the problems that have been identified by the UNICTRAL Working Group. The main risk of creating an MIC is that two different dispute resolution mechanisms may emerge due to the lack of universal support for the EU initiative. Accordingly, the new parallel regime would deepen the existing fragmentation of international investment law.

Conclusion

The Investor-State Dispute Settlement System has a number of issues, the solution of which requires the joint efforts of the entire global community. The majority of the solutions considered by Working Group III do indeed address ISDS *reform*. However, the initiatives to create an appeal mechanism and an investment court will lead to a fundamental change in the system, that is, to a *revolution* of that system. The introduction of an appeals function and an MIC would nullify the advantages of the current system: the finality of decisions; the apoliticality and neutrality of arbitrators; and the high degree of autonomy of the parties. In this respect, we believe that the only way to improve the system without destroying its unique properties is to implement gradual change in the individual institutions of the system. Thus, our answer to the question posed in the title of this paper is categorical – *reform*.

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