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# Duration of Investor-State Dispute Settlement Proceedings

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**Abstract**

Speed is often touted as an advantage of arbitration. In recent years, however, some have worried that investment arbitration risks losing this advantage. Concerns about the length of investor-State dispute settlement (ISDS) proceedings have also been raised in the discussion about ISDS reform. This article analyses the duration of ISDS proceedings applying a data-centric approach and evaluates the impact of proposed ISDS reforms on the duration of proceedings. After some terminological clarifications on when proceedings are 'excessively' long, the article sets out the evidence on the length of proceedings using several data-sets. As a comparator, we present data on the length of World Trade Organization (WTO) proceedings, even though we urge caution as to the usefulness of such a comparator. The article then discusses the impact of various reform proposals on the duration of proceedings, namely improving ISDS, adding an appellate mechanism, establishing a multilateral investment court and abolishing ISDS.

**Keywords**

appeal – bifurcation – due process – duration of proceedings – excessive length of proceedings – investor-State dispute settlement (ISDS) – multilateral investment court – World Trade Organization

## 1 Introduction

Speed is often touted as one of the advantages of arbitration over litigation. The quick and effective resolution of claims, especially in comparison with traditional inter-State proceedings after the exhaustion of local remedies, has historically been also one of the reasons for favouring investor-State arbitration as a means of settlement of investment disputes in public international law.[1] As pointed out by Mr. Broches during the elaboration of the International Centre on Settlement of Investment Disputes (ICSID) Convention,

> the object of the convention was to provide a speedy solution to a basic dispute [namely a dispute between a foreign investor and host state on 'investment'], and not to invite an international proceeding with lengthy introductory and preliminary claims.[2]

When the creation of an appeal mechanism within the framework of ICSID was discussed by the ICSID Secretariat in 2004 'to foster coherence and consistency in the case law emerging under investment treaties,'[3] the likely increase in the length of investment arbitration proceedings was, alongside the connected increase in costs, one of the obstacles to the creation of such a mechanism.[4]

1 For the history of investment disputes and their settlement see Anna De Luca and Giorgio Sacerdoti, 'Investment Dispute Settlement' in Markus Krajewski and Rhea T Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar 2019) 193, 193–202.

2 History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention, vol II, docs 1–43 (1968, reprinted 2009) 59.

3 ICSID Secretariat, *Possible Improvements and the Framework for ICSID Arbitration* (2004) para 21. But see Barton Legum, 'Options to Establish an Appellate Mechanism for Investment Disputes' in Karl P Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 231–39, who traces back the appellate mechanism to an initiative of the United States, in 2002, when Congress enacted the Bipartisan Trade Promotion Authority Act, which set the negotiating objective of 'providing for an appellate body or similar mechanism to provide coherence to the interpretation of investment provisions in the trade agreements' in US free trade agreements, at ibid 232. See also the ICSID Secretariat, 'Suggested Changes to the ICSID Rules and Regulations' (12 May 2005) para 4.

4 Christian J Tams, 'An Appealing Option? The Debate About an ICSID Appellate Structure', (2006) 57 Essays in Transnational Economic Law 1, 15:

> the drafters [of the ICSID Convention] were certainly correct in stressing the need for a reasonably quick resolution of disputes. Whether investment arbitration presently meets that goal is of course a matter for debate. … The present system, at least in practice, thus is not ideal. This however is certainly no argument for rendering it even less ideal, as the introduction of an appeals structure would inevitably do. Whatever its design, such a structure would not reduce, but increase the amount of time lapsing before a definite

Whether arbitration still lives up to the expectation of a reasonably speedy resolution of disputes has been put in doubt over the last decade both with regard to commercial[5] and investment arbitration. As summarized by the United Nations Commission on International Trade Law (UNCITRAL) Secretariat, 'the current ISDS practice has put into doubt the oft-quoted notion that arbitration represents a speedy and low-cost method for resolving investor-State disputes.'[6]

In the current debate about ISDS reform, the length of ISDS proceedings, alongside their costs, has been repeatedly raised as a growing concern among the members of UNCITRAL Working Group III.[7] More specifically, 'lengthy and costly ISDS proceedings under some approaches raised concerns and practical challenges to respondent States as well as to claimant investors'.[8] Additionally, 'there was a shared understanding that the duration and cost of the proceedings were interlinked, as lengthy proceedings were likely to result in higher costs.'[9]

This article attempts to evaluate the impact on the duration of ISDS proceedings of the following four alternative reform options: (i) mere procedural changes, including changes to the mechanism for the appointment of arbitrators, referred to as 'investment arbitration improved' (ii) adding an appellate mechanism to investment arbitration, referred to as 'investment arbitration

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decision on the merits. Of course, much depends on time-frames governing appellate proceedings, and also on the scope of review. But it is clear that the possibility of having a second-level decision would prolong the period of uncertainty characterising legal proceedings. Ultimately, this might even discourage States or investors from seeking or providing foreign investment. Introducing an appeals facility thus runs counter to ICSID's object of resolving disputes quickly.

and ibid 33–34.

5 See the Queen Mary 2018 International Arbitration Survey: The Evolution of International Arbitration (2018) 2 ('"Cost" continues to be seen as arbitration's worst feature, followed by "lack of effective sanctions during the arbitral process", "lack of power in relation to third parties" and "lack of speed"') and ibid 26–27.

6 UNCITRAL Secretariat's Note, 'Possible Reform of Investor-State Dispute Settlement (ISDS)-cost and Duration' (UN Doc A/CN.9 WG.III/WP.153, 31 August 2018) para 2 ('Accordingly, concerns were expressed regarding increasingly high costs and lengthy proceedings'). Empirical studies also confirm that the duration of investment arbitration increased significantly in the period 2005 to 2014. See Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?' (2020) 21(2–3) JWIT 188–250.

7 UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 November-1 December 2017) UN Doc A/CN.9/930/Rev.1, paras 36–51.

8 ibid para 36.

9 ibid para 38.

+ appellate mechanism', (iii) the creation of a multilateral investment court, and (iv) abolishing investor-State investment arbitration altogether, referred to as 'no ISDS' (which include the resort to the domestic courts and to State-to-State dispute resolution mechanism).[10] In carrying out this evaluation the present article takes a data-centric approach. Following the proposals of the UNCITRAL Working Group it will include comparators, namely the length of World Trade Organization (WTO) proceedings, the length of domestic litigation, and that of interstate investment proceedings.[11]

Before proceeding to the substantive analysis, the present article will highlight that the duration of the ISDS proceedings is not the problem as such, but the fact that at times it might be (perceived) as 'excessive'. As such, the article will deal with the notion of 'excessive' length of proceedings (Section 2). It will then present data on duration of investment arbitration proceedings stemming from different data sets (Section 3). As a comparator it then offers a summary of the Graduate Institute's data on the length of proceedings before the WTO Dispute Settlement Body (Section 4).[12] Finally, the article turns to the various reform proposals and their possible impact on the length of ISDS proceedings, tackling in turn the improvement of the current system (Section 5), the addition of an appellate mechanism (Section 6), the multilateral investment court (Section 7) and the abolition of ISDS (which include the resort to the domestic courts and to State-to-State dispute resolution mechanism) (Section 8).

The evaluation of the impact of the various reform proposals on duration of ISDS proceedings faced a number of challenges. First of all, none of the reform scenarios has been intended to specifically address the duration of ISDS proceedings. Therefore the impact of the reform proposals on the duration of ISDS proceedings seems to be more of a collateral damage or benefit of the reform proposals under discussion. It is, accordingly, no surprise that the impact on the duration of ISDS proceedings of the reform scenarios is not always easy to ascertain.

10 See Malcolm Langford and others, 'UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions – An Introduction' (2020) 21(2–3) JWIT 167–87.

11 UNCITRAL (n 7), para 11 ('cost and duration of ISDS proceedings should not be examined in isolation, but by reference to suitable comparators, which might include other international dispute settlement bodies such as the International Court of Justice (ICJ) and the Dispute Settlement Body (DSB) of the World Trade Organization (WTO), and domestic court procedures').

12 The authors are grateful to Joost Pauwelyn and Weiwei Zhang for giving them access to their dataset developed with funding by the Swiss National Science Foundation (SNF) in the context of the Project 'Convergence Versus Divergence? Text-as-Data and Network Analysis of International Economic Law Treaties and Tribunals.'

Secondly, while the use of comparators can give a rough indication of the duration of alternative procedural arrangements, neither the selection of the data used as comparators, nor the comparison itself is straightforward. The average length of proceedings differs considerably from one court or dispute settlement system to another, given that the jurisdictional scope of, and the law applicable by, each system significantly varies from one to another. Even within the same system different procedures might result in considerably different durations of proceedings: this in turn raises complex methodological questions with regard to how best to estimate the length of proceedings.[13] The case of the Court of Justice of the European Union is illustrative: on the one hand, in 2017, the average duration of proceedings before the Court was roughly 16.5 months; on the other, the average duration of urgent preliminary rulings was roughly less than 3 months.[14] When a comparator is chosen and data for it has been collected, one has to bear in mind that the types of disputes at issue and the procedural setup differ significantly from ISDS.

Thirdly, the length of investment arbitration proceedings is so heavily fact-specific that it seems to defy all attempts at generalisation. Multiple factors may influence the duration of an ISDS case.[15] Among these are factors contingent on the features of the case itself (for instance, the complexity and intricacy of the factual and legal background, which can lead the tribunal to decide to bifurcate), and factors depending on the disputing parties' conduct in the procedure (for instance, the lack of mutual agreement on arbitrators, their request for additional time to submit their briefs, or their decision to put the dispute

13 See for proceedings in the United States, David S Clark and John Henry Merryman, 'Measuring the Duration of Judicial and Administrative Proceedings' (1976) 75 Mich L Rev 89 using the number of cases pending at the beginning of a year and the number of cases filed during that year.

14 CJEU, *2017 Annual Report-The Year in Review* (2017) 37–39.

15 This is, of course, a significant difficulty when analysing the length of legal proceedings in other fields, as well. See the example of cartel cases under the EU law, where EU Commission decisions can be appealled before the General Court of the EU by decisions' addressees and the judgment of the General Court can be, in turn, appealed before the European Court of Justice by the unsuccessful party (with the note that these appeals to the CJEU are limited to questions of law only). Smuda, Bougette and Hüschelrath refer to the following factors in discussing the duration of the appeals mechanisms in the EU cartel cases: (a) authority-related determinants, such as the characteristics of the case while handled by the EU Commission; (b) court-related determinants, for example the organizational structure or the educational standard and practical experience of the appeal courts; (c) appeals-related determinants, such as who the appellant is in the second appeal; etc. See Florian Smuda, Patrice Bougette and Kai Hüschelrath, 'Determinants of the Duration of European Appellate Court Proceedings in Cartel Cases' (2015) 53(6) JCMS 1352, 1358–60.

on ice while trying to settle). There can also be factors resting with arbitrators; for instance, an arbitrator can fall ill or even die, she can be well-organised or poorly organised, she can focus more or less on a specific arbitration, tight work schedules can make the coordination of dates for hearings difficult and she can benefit from more or less administrative help. Furthermore, respondent States have strong incentives to delay the proceedings.

Finally, short proceedings are not automatically better proceedings. Proposals to shorten ISDS proceedings can affect dispute resolution in complex ways and usually involve trade-offs. Reducing the time for writing an award might negatively impact the quality of legal reasoning of ISDS decisions, as well as the soundness of ISDS outcomes. Shortening the procedure by limiting the numbers of submissions might affect disputing parties' right to be heard. Not all trade-offs are readily apparent. Thus, for example, short timeframes can negatively affect the capacity of poorer states to effectively participate in proceedings and significantly damage the legitimacy of the award. The approach chosen here is to point out trade-offs rather than decide which approach is the better one.

## 2 The Notion of 'Excessive' Length of Proceedings

The notion of 'excessive' length of proceedings resists generalisations and is notoriously elusive, if one looks at the international judicial practice. Along these lines, UNCITRAL Working Group III has also acknowledged that 'notions of cost and duration were relative in nature, and whether the process was excessively costly or lengthy should be determined on a case-by-case basis and taking into account the need for effective administration of justice.'[16] Nevertheless, the Working Group has emphasised the need '…to draw a distinction between "excessive" or "unjustified" time and cost on the one hand, and "necessary" or "justified" time and cost on the other', as well as that to balance the quality of outcomes with the desire to reduce cost and duration.[17] Accordingly, some comments on the concept of 'excessive' duration are in order.

While a particular proceeding might, of course, be excessively long, it is impossible, in the light of the fact-specific nature of the length of individual investment arbitration proceedings, to state any rule of thumb as to a particular

16 UNCITRAL (n 7) para 12.
17 ibid.

length that might allow us to qualify the duration of an arbitral procedure as 'excessive' and 'unjustified', or 'necessary' and 'justified' in the abstract.

Looking outside the field of investment arbitration to those instances where international tribunals evaluate the duration of domestic judicial proceedings in the light of international law provisions on due process or access to, or denial of, justice for help with regard to clarifying the distinction between 'justified' and 'necessary' length and 'unjustified' or 'excessive' length is hardly enlightening. The international judicial practice confirms that, while the speedy resolution of cases is of paramount importance, according to the old legal maxim 'justice delayed is justice denied', no clear universally accepted notion of 'excessive' length of proceedings exists, but criteria exist to evaluate length.

As a matter of example, the European Convention on Human Rights guarantees the right to a fair trial in its Article 6 stating that '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

The 'reasonable' duration of proceedings occupies a good part of the workload of the European Court of Human Rights (ECtHR). That notwithstanding, the Court has not developed fixed maximum periods for the length of legal proceedings.[18] Instead, it has held that the reasonableness of the length of proceedings 'must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute.'[19] Even where proceedings as such are not excessively long, they can still be unreasonably long if the court becomes inactive.[20] On the other hand, the complexity of a case – and delay caused by the parties' own behaviour – can also justify comparatively long proceedings.[21] The approach of the ECtHR thus confirms that judging the length of proceedings is a heavily fact-specific exercise.

Furthermore, even admitting that the key concept in the present context is that of '(un)reasonable' duration (rather than the notion of 'excessive' or

18 Jens Mayer-Ladewig and others (eds), *EMRK Europäische Menschenrechtskonvention-Handkommentar* (4th edn, Nomos 2017) § 6, para 199.

19 *Comingersoll SA v Portugal* [GC] App No 35382/97 (ECtHR, 6 April 2000) para 19; *Frydlender v France* App No 30979/96 (ECtHR, 27 June 2000) para 43; *Glykantzi v Greece* App No 40150/09 (ECtHR, 30 October 2012) para 47.

20 *Gjashta v Greece* App No 4983/04 (ECtHR, 18 October 2007) para 16; see also *Herbst v Germany* App No 20027/02 (ECtHR, 11 January 2007) para 78.

21 *Yildiz v Germany* App No 23279/06 (ECtHR, final 1 March 2010) paras 48 et seq.

'unjustified' duration), as applied by the ECtHR, it is difficult to reconcile the afore-mentioned human right law standard with the more 'conservative' and cautious standard applied by some investment tribunals in deciding the issue of when the duration of domestic proceedings is so excessive as to amount to an investment treaty breach. As has been observed in legal literature, the concept of denial of justice adopted by the ECtHR is less restrictive than the concept adopted by some investment tribunals.[22]

Absent *lex specialis* provisions, such as the so-called effective means clauses that exist in some investment treaties,[23] investment arbitration practice follows the position that only extremely gross misconduct by a domestic judiciary can amount to a denial of justice, as an element of the fair and equitable treatment standard (FET). The case *Jan de Nul N.V. Dredging International N.V. v Egypt* well illustrates the point.[24] In dismissing claimants' claim that a first instance domestic proceedings, which lasted nearly ten years, was so excessively long as to be considered in breach of the FET, the *de Nul* Tribunal clarified that:

> there is no doubt that ten years to obtain a first instance judgment is a long period of time. However, the Tribunal is mindful that the issues were complex and highly technical, that two cases were involved, that the parties were especially productive in terms of submissions and filed extensive expert reports. For these reasons, it concludes that, while the duration of the proceedings leading to the Ismaïlia Judgment is certainly unsatisfactory in terms of efficient administration of justice, it does not rise to the level of a denial of justice.[25]

22 See Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 EJIL 729–49; John Dugard, Special Rapporteur, International Law Commission, 'Third Report on Diplomatic Protection', UN Doc A/CN.4/523 and Add.1 (2002) para 98 observing with reference to CF Amerasinghe, *Local Remedies in International Law* (Grotius Publications 1990) that it is easier to require shorter time-limits for violations of personal and civil rights than for injuries to property and economic interests, while injuries to large corporations, giving rise to more complex cases than injuries to individuals, are easily subject to longer time-limits than injuries to individuals.

23 Energy Charter Treaty (signed December 1994, entered into force April 1998) 2080 UNTS 100, art 10(26) ['Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect of Investments, investment agreements, and investment authorizations']; and Ecuador-United States BIT (signed 1993, terminated 2018) art II(7) ['Each Contracting Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations']

24 *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* ICSID Case No ARB/04/13, Award (6 November 2008).

25 ibid para 204.

Such investment arbitration practice is consistent with international judicial practice on customary law on foreign investors' protection and the traditional law of diplomatic protection,[26] but, to a certain extent, at odds with ECtHR practice.[27]

But while the notion of 'excessive' duration of ISDS proceedings does not lend itself to being captured in a fixed and simple formula and hence may be rather unworkable in the present context, longer duration of proceedings could bear particular effects, even when not qualifying as 'excessive'. Generally, the longer the investment arbitration proceedings will last, the higher will be the overall costs of the ISDS procedure.[28] In turn, high costs of investment arbitration (regardless of whether or not they are 'justified') may unduly limit the access of small and medium sized enterprises to international protection, as well as impose a heavy burden on developing states.[29] After all, not only justice delayed but also justice which is unaffordable to most, is justice denied. The link between ISDS duration and costs, on the one hand, and access to justice (including the role of third-party financing as well as support for developing states and small and medium enterprises), on the other, should be considered when reform proposals of ISDS are designed.[30] It is, nonetheless, beyond the scope of this article.[31]

## 3 Length of ISDS Proceedings: The Evidence

It has already been stated above that the length of ISDS proceedings is heavily fact-specific. Nevertheless, one can collect data from awards that are publicly accessible and through this exercise gain a more factual insight into how long

26 *Interhandel* (*Switzerland v US*) (Judgment) [1959] ICJ Rep 1959 6, where the International Court of Justice (ICJ) did not consider 10 years of litigation before the US courts as to be unreasonably long.

27 Francioni (n 23) 735–37.

28 See Daniels Kalderimis, 'The Future of the ICSID Convention: Bigger, Better, Faster?' in Crina Baltag (ed), *ICSID Convention After Fifty Years: Unsettled Issues* (Wolters Kluwer 2017) 553, 575.

29 UNCITRAL (n 7) para 94.

30 See Thomas Wälde, 'Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution After the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?'(2005) TDM 2/2005 71, 74 who observes that adding an appeal within the framework of ICSID in accordance with the ICSID Secretariat's proposal of 2004, would have made proceedings even more expensive, thus putting under-resourced disputing parties (smaller investors or poor States) at a disadvantage.

31 See Gabriel Bottini and others, 'Excessive Costs and Recoverability of Cost Awards in Investment Arbitration' (2020) 21(2–3) JWIT 251–99.

ISDS proceedings really take. This article will, firstly, present a study by ICSID itself on the duration of ICSID arbitration proceedings (1), then offer some data from PluriCourt's Investment Treaty Arbitration Database(2); and finally supplement these datasets by data from a dataset developed for this article by King's College London (3).

### 3.1 *ICSID's Review of Case Duration*

ICSID reviewed the duration of cases as part of its rule amendment project.[32] For its study, it reviewed 63 cases that concluded with an award between 1 January 2015 and 30 June 2017.[33] The review yielded an average duration of proceedings of 1,336 days, i.e. three years and seven months per case – 1,382 days for joint proceedings, 1,301 days for bifurcated proceedings. Single proceedings on the merits only lasted for an average of 829 days. The result for bifurcated proceedings is somewhat more nuanced however, if one looks at the details – it took 749 days on average for an award on jurisdiction, but 1,893 days if an award on the merits became necessary. As to the stages of the proceedings, after registration of the request it took 258 days on average to constitute the tribunal and another 71 days until the first session. The written process then took 581 days in joint proceedings, 369 days in the jurisdictional stage of bifurcated proceedings, another 516 days for the merits stage. The time between the final written or oral submission to the award was 258 days on jurisdiction in bifurcated proceedings, another 364 days on the merits in bifurcated cases. For joint proceedings the average was 414 days.[34]

### 3.2 *PluriCourt's Investment Treaty Arbitration Database*

PluriCourt's Investment Treaty Arbitration Database (PITAD) is a comprehensive dataset on investment arbitration containing 635 cases at the time of data extraction for the present article.[35] Table 1 gives an overview of the duration of the cases in the dataset.

The average case length of decided cases in the dataset is 3.73 years (1,361 days) which falls to 1,263 days if non-decided cases are included. The standard deviation, a measure for the dispersion of the data, is 0.57 years.

32 See in this regard ICSID Secretariat, 'Backgrounder on Proposals for Amendment of the ICSID Rules' (2018) <https://icsid.worldbank.org/en/Documents/Amendment_Backgrounder.pdf> accessed 8 July 2019.

33 The study on which this section is based can be found in ICSID Secretariat, 'Proposals for Amendment of the ICSID Rules: Working Paper' vol 3 (2 August 2018) 899 et seq.

34 The quoted ICID paper describes in detail which adjustments were made to yield these outcomes.

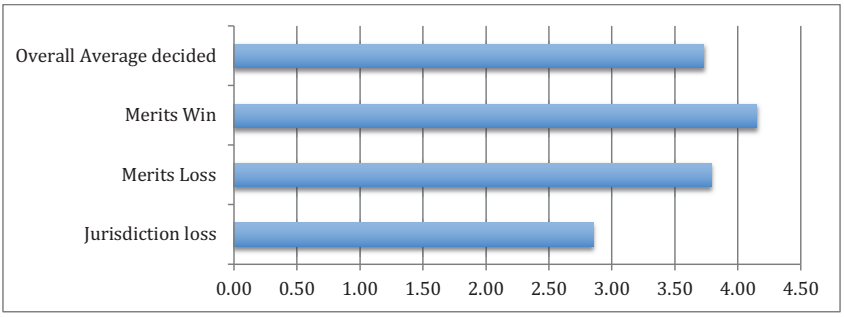
35 The database is available online <https://pitad.org/index#welcome> accessed 8 July 2019.

TABLE 1 Duration of Proceedings – Summary Statistics (PITAD)

| Type | Cases | Days | Years | Standard deviation – years |
|---|---|---|---|---|
| Average – All | 635 | 1263 | 3.46 | 2.2 |
| Average: Decided | 444 | 1361 | 3.73 | 0.57 |
| *Non-Decided* | | | | |
| Settled | 97 | 793 | 2.17 | 1.56 |
| Discontinued | 60 | 1055 | 2.89 | 3.02 |
| Settled after jurisdiction | 30 | 1628 | 4.46 | 3.51 |
| Discontinued after jurisdiction | 4 | 8789 | 24.08 | 2.82 |
| *Decided* | | | | |
| Jurisdiction Loss | 109 | 1042 | 2.85 | 1.28 |
| Merits Loss | 127 | 1382 | 3.79 | 1.66 |
| Merits Win | 208 | 1515 | 4.15 | 2.28 |

SOURCE: Daniel Behn and others, 'Why the Delay? Explaining Length of Proceedings in International Investment Arbitration' (January 2019) PluriCourts Working Paper.

FIGURE 1 Length of Cases by Type of Decision (PITAD)




SOURCE: Daniel Behn and others, 'Why the Delay? Explaining Length of Proceedings in International Investment Arbitration' (January 2019) PluriCourts Working Paper.

As is shown in Figure 1, and as one would have expected, cases lost by the claimant on jurisdictional grounds take less time (2.85 years) than those decided on the merits (4 years on average – 4.15 for a merits win by the claimant, 3.79 for a merits loss by the claimant). Remarkably, cases won on the merits by the claimant vary considerably in terms of their length. The standard deviation for this category is 2.28 years.

The duration of annulment proceedings is summarised in Table 2. Annulment proceedings take, on average, 1.91 years (1.75 taking into account

TABLE 2 Duration of Annulment Proceedings – Summary Statistics (PITAD)

| Type | Cases | Days | Years | Standard deviation – years |
|---|---|---|---|---|
| Average – All | 87 | 639 | 1.75 | 0.93 |
| Average: Decided | 61 | 697 | 1.91 | 0.67 |
| *Non-Decided* | | | | |
| Annulment Discontinued after Failure to Pay Fees | 6 | 574 | 1.57 | 0.90 |
| Annulment Discontinued | 20 | 485 | 1.33 | 1.42 |
| *Decided* | | | | |
| Annulment in Full | 5 | 771 | 2.11 | 0.70 |
| Annulment Partial | 9 | 735 | 2.01 | 0.78 |
| Annulment Rejected | 47 | 681 | 1.87 | 0.66 |

SOURCE: Daniel Behn and others, 'Why the Delay? Explaining Length of Proceedings in International Investment Arbitration' (January 2019) PluriCourts Working Paper.

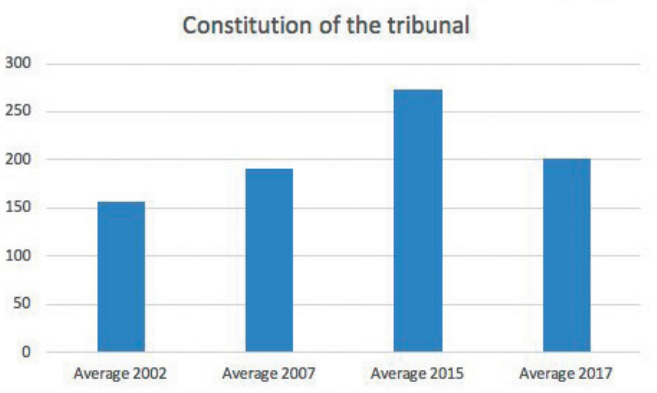
discontinued cases). Here, again, successful cases take a bit longer (2.11 years for a full, 2.01 years for a partial annulment) than rejected annulments (1.87 years). As indicated by the standard deviation, case length varies significantly from case to case. Identifying causes for a longer duration of arbitration proceedings requires testing various hypotheses with the available data and finding statistically significant differences. In assessing the available empirical evidence, Behn and others come to the conclusion that procedural events, such as bifurcation, arbitrator challenges and arbitrator replacements as well as the existence of a dissenting opinion are the most significant factors that prolong arbitration.[36]

### 3.3 *King's College London Dataset*

The King's College London dataset contains 110 public cases with awards rendered in randomly selected years (1997, 2002, 2007, 2015 and 2017), which brought the arbitration to an end. Different years were selected to include developments over time 59 of the 110 awards were rendered in ordinary proceedings without annulment, 32 proceedings were bifurcated, 10 ordinary proceedings went through annulment, 9 bifurcated cases went through annulment. While the data was extracted specifically to determine the length of duration of the various stages of the proceedings and thus supplement the

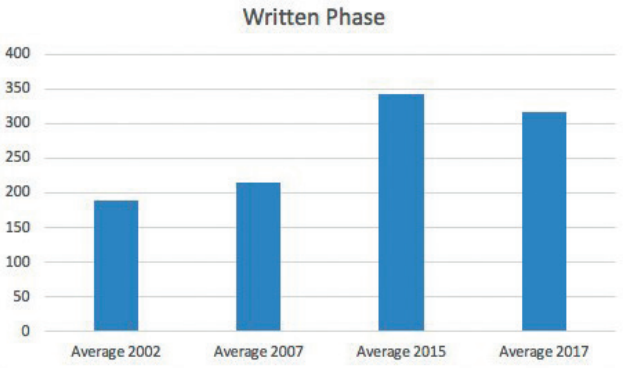
36 See Daniel Behn and others, 'Why the Delay? Explaining Length of Proceedings in International Investment Arbitration' (January 2019) PluriCourts Working Paper.

FIGURE 2 Duration of Tribunal Constitution by Years in Which Award Was Rendered (KCL)




SOURCE: Author compilation based on the KCL dataset.

FIGURE 3 Duration of the Written Phase by Years in Which Award Was Rendered (KCL)




SOURCE: Author compilation based on the KCL dataset.

other available data, it is important to note that not all of the cases allow for clear results, as for some of them some relevant dates are not known.

The dataset illustrates the significant differences in the duration of the proceedings on a case-by-case basis. It contains cases ranging between 448 days and 4,375 days in length from the request for arbitration or registration to the final award.

As to the specific stages across all selected years, the constitution of the tribunal took an average of 181 days ranging from 17 to 712 days. Annulment committees were constituted rather more quickly, namely on average within 103 days (in between 28 and 229). The written phase of ordinary proceedings without annulment took an average of 407 days (ranging from 30 to 1,511),

bifurcated cases took on average 224 days for the first, 379 days for the second and 403 days for the third stage (where a case is trifurcated).

Last, as Figures 2 and 3 evidence, the constitution of tribunals rendering the awards in 2015 and 2017, as well as the written phase therebefore, took much longer than that of tribunals rendering their awards in the other selected years, i.e. 2002 and 2007. Given the limited data-set and lacking of relevant dates with reference to some of the cases analized, as already pointed out above, it is difficult to pinpoint specific causes explaining the above differences in duration. We can only speculate on the possible causes. Among the influencing factors might be an accumulation of treaty based cases coupled with the limited and small number of individuals routinely involved therein as investment arbitrators,[37] the phenomenon of 'repeat arbitrators',[38] the increasing number of disputing parties' challenges against repeat arbitrators (which trigger at ICSID the suspension of the proceedings until the decision of the challenge), and an increasing complexity of ISDS cases, both factually and legally.

## 4 Length of Proceedings in International Law: The WTO Dispute Settlement Body

ISDS proceedings are unique in international law in that they allow access to non-states, generally without the need for prior recourse to local remedies, and issue enforceable awards for full compensation of damages. Comparing ISDS proceedings to any other type of proceeding under international law is, therefore, an exercise of limited value. That there is some value, however, is equally hard to deny: it is worthwhile to have at least some idea of how long international legal proceedings take elsewhere – even if it is only to then conclude that the difference in nature of the proceedings justifies a difference in their length. Since the WTO and its dispute settlement mechanism have inspired some of the thinking behind proposals of a multilateral investment court, this article chooses the WTO as a comparator, even though WTO proceedings are State-to-State and remedies are only prospective. The dataset used has been compiled by Joost Pauwelyn and Weiwei Zhang with support by the Swiss National Fund (SNF).[39]

37 Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 JIEL 301.

38 Chiara Giorgetti and others, 'Independence and Impartiality in Investment Dispute Settlement: Assessing Challenges and Reform Options' (January 2020) Academic Forum on ISDS Concept Paper 2020/1 <www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/6-independence.pdf> accessed 3 February 2020.

39 Joost Pauwelyn and Weiwei Zhan, 'Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload' (2018) 21 JIEL 461.

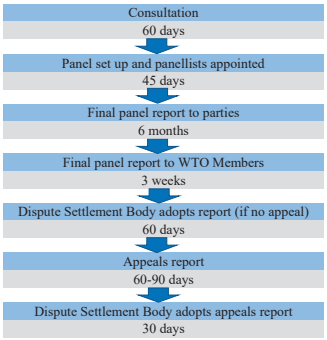



FIGURE 4
WTO Target Figures for Length of Proceedings
SOURCE: <www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed 8 July 2019.

### 4.1 *Indicative Timeframe*

The WTO Dispute Settlement Understanding (DSU) contains indicative time frames for many of the procedural steps.[40] The WTO has, on its website, translated these into target figures for each stage of the proceedings:[41]

Under the above indicative timeframe, dispute settlement is supposed to take 308.5 days until the circulation of the Panel report and a maximum of 458.5 days until the Appellate Body Report.

### 4.2 *Reality*

The indicative time frame has always appeared ambitious – and was meant to be flexible, given that WTO cases vary in complexity, from straightforward legislative discrimination to complex fact-based violation claims. In reality, cases vary enormously in length: The shortest case for the panel stage was *US – Wool Shirts and Blouses*,[42] which took just 298 days from the request of consultation to the circulation of the Panel Report. The *Australia – Tobacco Plain Packaging* disputes (combining several disputes into one and counting from the earliest request for consultations) needed 2,276 days for the same stage.[43] Appeals from notice of appeal to the report by the Appellate Body took between 57 days

40 WTO, 'Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes' <www.wto.org/english/docs_e/legal_e/28-dsu_e.htm> accessed 25 January 2020.

41 WTO, 'Understanding the WTO: Settling Disputes, a Unique Contribution' <www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed 8 July 2019.

42 WTO, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* (27 May 1997) WT/DS33/5.

43 WTO, *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Procedural Agreement Between Australia and Ukraine, Honduras, The Dominican Republic, Cuba and Indonesia (28 April 2014) WT/DS434/12, WT/DS435/17, WT/DS441/16, WT/DS458/15, WT/DS467/16.

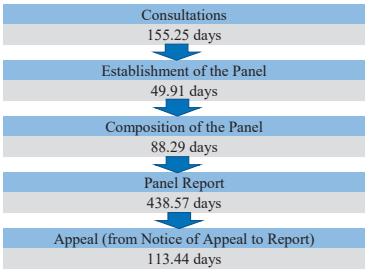



FIGURE 5
WTO Actual Figures for Length of Proceedings
SOURCE: Dataset by Joost Pauwelyn and Weiwei Zhan, 'Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload' (2018) 21(3) JIEL 461.

(*Japan – Alcoholic Beverages II*)[44] and 395 days (*Russia – Commercial Vehicles*).[45] Average times for various stages of the procedure are given in the preceding graph.

In recent years, the use of WTO settlement has increased. However, this is not 'due to an increase in new cases filed, but rather because pending cases take much longer to conclude as they have become more complex and are often delayed for lack of human resources.'[46] All in all, Pauwelyn and Zhan identifiy three factors that contribute to the cases taking longer: fewer settlements, a high appeal rate and significant compliance problems.[47] In particular the decrease of settlements and the high appeal rate negatively impact the duration of WTO proceedings. With the current deadlock of the Appellate Body it remains to be seen how a potential change of the dispute resolution mechanism will affect the duration of the proceedings.

## 5 Investment Arbitration Improved

ICSID, the leading forum in the field of investment arbitration, explicitly tackled the topic of duration and efficiency of investment arbitration in its Working Papers #1, #2 and #3 in Proposals for Amendment of the ICSID Rules.[48] The exercise yielded some proposals for rule amendments to speed up proceedings,

44 WTO, *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

45 WTO, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, Report of the Appellate Body (9 April 2018) WT/DS479/AB/R.

46 Pauwelyn and Zhan (n 40) 461.

47 ibid.

48 The Papers are available on ICSID's website at <https://icsid.worldbank.org/en/amendments> accessed 12 February 2020. By way of background, ICSID initiated this amendment process in October 2016, as explained in Working Papers #1 and #2 (at 1). The ICSID Secretariat released the Working Paper #1 on 3 August 2018. Following comments received from States and the public, on 15 March 2019, ICSID issued an updated working paper, Working Paper #2. In August 2019 the ICSID Secretariat released Working Paper

which shall be listed below.[49] As suggested by the current ICSID amendment process, ISDS can be improved as to the length of proceedings in the following ways: first, speeding up the constitution of the arbitral tribunals, with the application of the default method under Article 37(2)(b) ICSID Convention absent a disputing parties' agreement on the number of arbitrators and the method of their appointment within 45 days after the date of registration of the claim;[50] secondly, including a general obligation for parties and arbitrators to conduct the proceedings in an expeditious manner;[51] thirdly, speeding up the deliberation process and specifying/shortening the time limits for the delivery of the arbitral award;[52] fourthly, introducing expedited arbitration proceedings; and finally, explicitly providing for procedural improvements related to bifurcation and deadlines for filing written submissions. We discuss each in turn.

### 5.1 *Speeding up Arbitral Tribunals' Constitution*

The survey of the arbitral proceedings conducted by ICSID on the occasion of the amendment process showed that the average duration of the surveyed tribunal constitutions was 258 days.[53] This long process is explained by (i) no

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#3 (WP #3) which contains the latest iteration of the proposed amended rules based on comments received by August 15, 2019.

49 But see the comments received from the ICSID Contracting States to Working Papers #1 and #2. In particular, Canada's comment regarding the consequences of default in payment of estimated costs of proceedings indicates that States' participation in the proceedings is likely to be one of the sources of longer duration of arbitration proceedings: 'The reality is that the amount of the deposit required or the particular timing of a request often requires States to seek lengthy internal approvals.' Canada in ICSID, 'Rule Amendment Project – Member State & Public Comments on Working Paper # 2 of 15 March 2019' (20 June 2019) 13.

50 ICSID Convention, art 37 (2)(b) provides that:

> Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

51 ICSID Secretariat, 'Proposals for Amendment of the ICSID Rules – Consolidated Paper: Working Paper #3' vol 1 (2019) proposed Rule 2(1) of the new ICSID Arbitration Rules.

52 ICSID Secretariat (n 51) vol II, proposed Rules 34(4) and 57. For the arbitral award, the new Rule 57(1) provides the following:

> The Tribunal shall render the Award as soon as possible, and in any event no later than:
> (a) 60 days after the latest of the Tribunal constitution, the last written submission or the last oral submission, if the Award is rendered pursuant to Rule 41(3);
> (b) 180 days after the later of the last written or oral submission if the Award is rendered pursuant to Rule 44 (3)(c); or
> (c) 240 days after the later of the last written or oral submission in on all other cases.

53 ICSID Secretariat, 'Proposals for Amendment of the ICSID Rules: Working Paper #1' vol 3 (2018) 902.

initial participation by the respondent due to delay in organizing its defence; (ii) methods that provide for a long appointment process; (iii) no immediate request by a party for the Chairman of the Administrative Council to appoint a missing arbitrator after the expiry of the 90-day period provided in Art. 38 of the Convention; and (iv) agreed methods that eventually lead to default.[54] Proposed Rule 15 speeds up the constitution of the arbitral tribunals by providing for the application of the default method under Article 37(2)(b) ICSID Convention in the case disputing parties fail to reach an agreement on the number of arbitrators and the method of their appointment within 45 days after the date of registration of the claim.

### 5.2 *Disputing Parties and Arbitrators' General Obligation to Conduct the Proceedings in an Expeditious Manner*

Such an obligation already exists in national arbitration laws[55] and the rules of major arbitral institutions such as the International Chamber of Commerce (ICC),[56] and is also included in the UNCITRAL Arbitration Rules.[57] Failure to observe this obligation could be reflected in the allocation of the costs of arbitration or in the fees of arbitrators, respectively. For instance, the ICC rules expressly include the 'rapidity' with which the arbitral proceedings have been conducted in fixing the fees of arbitrators.[58]

The ICSID Convention, in Article 61(2), provides for sufficient flexibility for the arbitral tribunal to sanction a failure of one party in complying with such obligation: 'the Tribunal shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid.'[59] Proposed Rule 2(1) of the new

54 ibid.

55 See, eg UK Arbitration Act 1996, s 33.

56 International Chamber of Commerce Arbitration Rules 2017 (ICC Rules), art 22.

57 UNCITRAL Arbitration Rules (2010), art 17. Related to this, several measures are contemplated in the proposed ICSID Arbitration Rules, such as the electronical submission of written submissions. ICSID Secretariat (n 51), proposed Rule 4(2): 'Documents shall only be filed electronically, unless the Tribunal orders otherwise in special circumstances.'

58 Appendix III, art 2(2) of the ICC Rules currently in force provides that:

> In setting the arbitrator's fees, the Court shall take into consideration the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award, so as to arrive at a figure within the limits specified or, in exceptional circumstances (Article 38(2) of the Rules), at a figure higher or lower than those limits.

59 This is also considered in the ICSID Secretariat (n 51), proposed Rule 51(1) of the new ICSID Arbitration Rules:

> 'In allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including:

ICSID Arbitration Rules establishes that both the Tribunal and the parties 'shall conduct the proceeding in good faith and in an expeditious and cost-effective manner.'[60]

### 5.3 *Speeding up the Deliberation Process and Shortening the Time Limits for the Delivery of the Arbitral Award*

As with the conduct of proceedings in an expeditious manner, the failure to render the award within the specified period of time, unless justified, could be reflected in the fees of arbitrators, as the ICC rules currently provide.[61] The data indicates that the rendering of the award often takes more than six months after the final procedural action in the proceedings and awards rendered a year later are not uncommon. Proposed Rule 57 establishes that ICSID tribunals have to render awards 'as soon as possible', and explicitly provides for the following time limits for the delivery of awards:

> (a) 60 days after the latest of the Tribunal constitution, the last written submission or the last oral submission, or the Tribunal constitution, whichever is later, if the Award is rendered pursuant to Rule 41(3);
> (b) 180 days after the later of the last written or oral submission if the Award is rendered pursuant to Rule 44(3)(c); or
> (c) 240 days after the later of the last written or oral submission in all other cases.

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> (a) the outcome of the proceeding or any part of it;
> (b) the conduct of parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner;
> (c) the complexity of the issues; and
> (d) the reasonableness of the costs claimed.'

60 However, see ICSID's position on reducing arbitrators' fees in ICSID Secretariat (n 53), para 22:

> ICSID considered several alternative fee structures, including options that reduce fees for non-timely services. At this time ICSID does not propose to link the payment of the prescribed fees with timeliness for several reasons. First, the proposed amendments include numerous provisions that establish clear timeframes and ensure such timelines are met, and these should address the concern identified without reducing or withholding fees. Second, the time required to prepare an order, decision, report or Award may vary depending on the circumstances of each case, and the proposed rules account for case-specific timing factors. Third, to monitor compliance with time frames, ICSID will publish a list of pending Awards, decisions, reports and orders on the ICSID homepage once the proposed rules are in force. Such a list will also assist parties to research potential appointees' current ICSID workload and any previous delays.

61 See ICC Rules (n 59).

From a pure duration perspective, this development is likely to speed up the deliberation process. In accordance with the King's College London dataset, the average time between the last day of the oral phase and the rendering of an award (including potential post-hearing communications) is 463 days. The fastest delibration process was of only 43 days, the longest of 2305 days. Consequently, a strict enforcement of the above proposed Rule 57 would speed up the proceedings considerably.

### 5.4 *Expedited Arbitration Proceedings*

Probably the most significant development recorded by the proposed ICSID Arbitration Rules, and which is contemplated by the new generation of international investment agreements[62] (and by other institutional arbitration rules (e.g. ICC, Stockholm Chamber of Commerce) is the proposal for expedited arbitration proceedings, when the parties consented to it.[63] The proposed expedited arbitration proceedings are conducted by a sole arbitrator and promise lower fees and shorter time limits, increasing thus the efficiency of the proceedings. However, it is to be seen whether the nature of ISDS proceedings (where a variety of state measures might be at stake), as well as the complexity of the disputes thereof (often requiring adjudicators the analysis of entire sectoral legal frameworks of the host state), are suitable to expedited arbitration proceedings. In any case, a similar provision could make ISDS more attractive for small value claims (and thus improve access of small and medium size investors) before ICSID.

### 5.5 *Procedural Improvements Related to Bifurcation and Deadlines for Parties' Submissions*

Other areas of concern, as identified by ICSID during the current amendment process, are the length of the proceedings when bifurcation is granted (including under Rule 41(5) of the current ICSID Arbitration Rules concerning an objection that a claim is manifestly without legal merit); the lengthy periods for the submission of written proceedings[64] (and with this, the documentary evidence submitted to the tribunal), procedures for provisional measures,[65]

62 Comprehensive Economic and Trade Agreement Between Canada, of the One Part, and the European Union and Its Member States, of the Other Part (signed 30 October 2016, entered into force 21 September 2017) (CETA), art 8.23(5) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22017A0114(01)> accessed 12 February 2020.

63 See ICSID Secretariat (n 51), proposed Rules 74–85.

64 ICSID Secretariat (n 53) 901–04.

65 Although the request for provisional measures may be submitted with the Secretary General before the constitution of the arbitral tribunal (Rule 39(5) of the current ICSID Arbitration Rules), it is for the tribunal to decide on the suitability of the measures.

etc. These are all issues that could be addressed, either in the applicable arbitration rules or by the arbitral tribunal in its wide discretion in conducting the proceedings.

In light of the several empirical studies identifying bifurcation as a significant cause of delays,[66] one could also suggest that excluding bifurcation altogether or restricting the grounds for granting bifurcation could shorten the duration of the proceedings.[67] Bifurcation entails the risk of repeating evidentiary exercises for different aspects of the cases and having some overlaps in submissions. For example, an investor has to prove its economic loss during the liability stage, even if the tribunal has decided for birfurcation of liability and damages. Of course, the State will counterargue and attempt to show the contrary. Assuming the arbitral tribunal decides there was a violation, which triggers the liability of the State and there is a damages stage, the investor and the State will have to submit their arguments on damages, call damage experts and repeat the evidentiary exercise.

Proposed Rules 42 and 44 of the new ICSID Arbitration Rules, on bifurcation and bifurcation of preliminary objections respectively, provides that in deciding whether to bifurcate tribunals have to consider, among other relevant circumstances, whether: bifurcation would materially reduce the time and cost of the proceeding; the determination of the preliminary objection or other question to be bifurcated would dispose of all or a substantial portion of the dispute; and the preliminary objection (or other question to be bifurcated) and the merits are so intertwined as to make bifurcation impractical.

### 5.6 *Impact of the Proposed Procedural Improvements on Duration of Investment Arbitration*

The proposed measures can lead to shorter proceedings without introducing major changes to the system, even though not all of the proposed measures are likely to have a large impact (for instance, obligations to act speedily are unlikely to yield results where such obligations are not enforced).

Some of the proposed measures involve, however, trade-offs. Speeding up the composition of the tribunal by triggering the default method of appointment can limit the rights of the parties to choose arbitrators. The introduction of measures such as time limits can, as stated in the introduction, have an impact on the quality of awards or the right to be heard.

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Thus, the process is closely linked to the appointment of the tribunal. In *Levi v Peru*, the claimant filed the request for provisional measures with the ICSID Secretariat on 9 September 2010 and the decision of the tribunal was issued on 17 June 2011. See, *Renée Rose Levy de Levi v Republic of Peru*, ICSID Case No ARB/10/17.

66 Langford, Behn and Létourneau-Tremblay (n 6).

67 Lucy Greenwood, 'Does Bifurcation Really Promote Efficiency?' (2011) 28 J Intl Arb 105–11.

Improvements focusing on efficiency, such as reducing time limits for the constitution of tribunals, written submissions (or even limiting the round of exchanges of submissions), document production, time for deliberation and rendering of the award could be reviewed periodically as to their impact on duration.

Given the limited nature of the changes to the system, the door would be left open to introduce additional changes such as fixed time limits or limited hearings as is the cases in some national supreme courts (e.g. US Supreme Court)[68] or international or regional courts (e.g. Court of Justice of the European Union).[69]

## 6 Adding an Appellate Mechanism

The discussion on the introduction of an appellate mechanism in investor-State arbitration is not new and it dates back at least to the 2004 proposal for the amendment of the ICSID Arbitration Rules, as already pointed out above in the introduction.[70] While the discussions at ICSID did not progress much in that direction, the new generation of international investment agreements (IIAs), starting with the Dominican Republic-Central America Free Trade Agreement in 2006, started to refer to an 'appellate body or similar mechanism', envisaging the implementation of an appellate mechanism for arbitral awards issued under the ISDS provisions.[71] Inconsistent decisions against Argentina dealing with the state of necessity defence (*LG&E, Enron, Sempra*, etc.)[72] certainly had an impact on the debate. At government level, in the period 2008–2010, there were also discussions initiated by Latin American States about the introduction of an optional protocol attached to the ICSID Convention and dealing with an appellate body. Similarly, an appeals

68 Typically oral hearings are limited to 60 minutes.

69 Speaking time at oral hearings before the CJEU, which are not held in every case, is severely restricted and as a rule is 15 minutes per party. See the CJEU, 'Practice Directions to Parties Concerning Cases Before the Court' (2014) OJ L331/1, para 52.

70 See supra (n 4).

71 Dominican Republic-Central America Free Trade Agreement (2006) art 10.20.10.

72 *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentine Republic*, ICSID Case No ARB/02/1; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, LP v The Argentine Republic*); *Sempra Energy International v The Argentine Republic*, ICSID Case No ARB/02/16.

mechanism was discussed in the UNASUR negotiations during the same period.[73]

As the purpose of this article is to review the duration of ISDS proceedings under the existing framework, as well as in different reform scenarios, we will only examine this aspect of the possible introduction of an appellate mechanism. It goes without saying that, as with other suggested reform options, the examination of the overall suitability and viability of the proposal requires an analysis of a multitude of other factors, including the impact of such a mechanism on the finality and consistency of arbitral awards in the quite fragmented investment regime.[74] Whether the mechanism would be fit to address all types of investment arbitral awards (including ICSID awards) is a further issue beyond the ambit of the present article.[75] With regard to the duration of proceedings it should be pointed out that the advantages and disadvantages of an appellate mechanism depend heavily on the way in which such a mechanism is constructed.

### 6.1 *Advantages*

If constituted as the only available (or as a consolidated) mechanism excluding other mechanisms, such as the annulment procedure under the ICSID Convention or the setting aside procedure for non-ICSID arbitral awards in domestic courts, an appellate mechanism could not excessively prolong the procedure, or be neutral. There are two main factors that may significantly

73 Katia Fach Gómez and Catharine Titi, 'International Investment Law and ISDS: Mapping Contemporary Latin America' (2016) 17 JWIT 515.

74 Katia Yannaca-Small summarises the advantages and disadvantages of an appellate mechanism in Katia Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement: The OECD Governments' Perspective' in Karl P Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 223, 224–25. On the fragmented nature of investment law and the impact of this on the future of ISDS, see Joost Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed?' (2014) 29 ICSID Review 372–418.

75 Accordingly, this article will not assess whether there is room for such an appellate mechanism under the ICSID Convention, given the provisions of art 53(1) of the ICSID Convention, which reads: '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.' In the ICSID context an appellate mechanism could be introduced by way of a separate treaty or protocol or through a potential lengthy and onerous revision of the ICSID Convention. See Jan Paulsson, 'Avoiding Unintended Consequences' in Karl Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (OUP 2018) 241, 259: 'The ICSID Convention does not contemplate an appellate mechanism. To the contrary, being internationally enforceable ICSID awards are inherently unable to accommodate the intrusion of an appellate mechanism.'

have an impact on the duration of appellate proceedings. The first factor is the constitution of the appellate panel. The constitution of ICSID annulment committees, albeit quicker than that of arbitral tribunals, took an average of 103 days (in between 28 and 229). If the appellate panel is constituted in a similar way as annulment committees, there would not be any positive change. If the appellate panel belongs to a standing body similar to the Investment Court System, the process would be accelerated. There would not be any constitution procedure, being the adjudicators pre-elected, but just the much faster assignement of cases to the different sections of the appellate body. The second factor is the scope of review. As such, the system could consider as grounds for appeal both well-defined errors of law, and the procedural errors falling under Article 52 of the ICSID Convention. Including errors of fact in the review (within a narrow definition, arguably) would likely lengthen the proceedings. Depending on the structure of the appellate facility/body (for instance, permanent vs. ad-hoc nature), the constitution of the panel that would hear the appeal as well as the time in which it would reach a solution would arguably take longer than annulment proceedings because of the enlarged scope of review, especially if an ad-hoc mechanism, such as the ICSID annulment mechanism, is maintained. Appeal proceedings could, however, arguably be shorter than setting aside proceedings before competent domestic courts, at least in certain cases.[76]

The appellate mechanism could, however, save significant time to the benefit of both disputing parties, if, where it admits the appeal in part or in full, the appellate body would be entrusted with the power to retain the case and render a new arbitral award. No remedy against the decision of the appellate body or against the new award rendered following the appeal could be contemplated. This might be a major advantage of such an appellate mechanism

76 For instance, in the *Yukos Cases* (*Yukos Universal Ltd v Russian Federation*, PCA Case No AA227; *Hulley Enterprises Ltd v Russian Federation* PCA Case No AA226; and *Veteran Petroleum Trust v Russian Federation* PCA Case No AA228), the arbitral tribunal rendered the award on 18 July 2014 and the Respondent commenced the setting aside proceedings in The Hague, with the Hague District Court rendering the decision on 20 April 2018. The judgment of the Hague District Court is under appeal by the investors and the proceedings are pending in the Hague Court of Appeal. The judgment of the Court of Appeal is subject to appeal, on limited grounds, before the Supreme Court. See also *Renta v Russia* (*Renta 4 SVSA, Ahorro Corporación Emergentes FI, Ahorro Corporación Eurofondo FI, Rovime Inversiones SICAV SA, Quasar de Valors SICAV SA, Orgor de Valores SICAV SA, GBI 9000 SICAV SA v The Russian Federation*, SCC No 24/2007), where the arbitral tribunal rendered the award on 20 July 2012, the Stockholm District Court dealt with the setting aside procedure by judgment of 14 September 2014 and the Svea Court of Appeal granted the appeal against the judgment of the District Court on 18 January 2016.

TABLE 3 Resubmission of Cases

| Case | Award | Decision of Ad Hoc Committee | Second Award | Second Decision of Ad Hoc Committee |
|---|---|---|---|---|
| *Amco Asia Corporation and others v Republic of Indonesia* (ICSID Case No ARB/81/1) | 20 November 1984 | 16 May 1986 | 5 June 1990 | 17 December 1992 |
| *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No ARB/81/2) | 21 October 1983 | 3 May 1985 | 26 January 1988 | 17 May 1990 |
| *Maritime International Nominees Establishment v Republic of Guinea* (ICSID Case No ARB/84/4) | 6 January 1988 | 22 December 1989 | – *Discontinued, 20 November 1990* | |
| *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* (ICSID Case No ARB/97/3) | 21 November 2000 | 3 July 2002 | 20 August 2007 | 10 August 2010 |
| *Víctor Pey Casado and President Allende Foundation v Republic of Chile* (ICSID Case No ARB/98/2) | 8 May 2008 | 18 December 2012 | 13 September 2016 | 8 January 2020 |
| *Enron Creditors Recovery Corporation v Argentine Republic* (ICSID Case No ARB/01/3) | 22 May 2007 | 30 July 2010 | – *Discontinued, 19 July 2018* | |
| *Sempra Energy International v Argentine Republic* (ICSID Case No ARB/02/16) | 28 September 2007 | 29 June 2010 | – *Discontinued, 3 April 2015* | |
| *TECO Guatemala Holdings, LLC v Republic of Guatemala* (ICSID Case No ARB/10/23) | 19 December 2013 | 5 April 2016 | – *pending* | |

SOURCE: Compilation by the authors.

over the current ICSID system.[77] In that system the authority of ICSID annulment committees is limited under Article 52(6) of the ICSID Convention.[78] As such, an annulment committee may decide to annul the award in full or in part or reject the annulment only. A committee does not have the competence to retain the case and issue a new arbitral award. If an award is annulled, whether in full or in part, the concerned party has to resubmit the case to a new arbitral tribunal, which will render a new arbitral award. This new award in turn can be annulled in full or in part and the dispute resubmitted and a new arbitral award issued, and so on.

As shown in Table 3, the resubmission of the case after the annulment proceedings has the potential to add between 5 and 10 years. This duration could be reduced if an appellate mechanism is added and is constructed as to be the only available mechanism excluding any annulment mechanisms.

An appellate mechanism could also ensure the expeditious enforcement of arbitral awards. The design of the appellate mechanism could deal with issues of enforcement of an arbitral award pending the appeal and ensure, for the sake of a timely resolution of the dispute, that the relevant party provides the financial security in the amount of the award, while the appeal is pending.[79] Furthermore, if the appellate mechanism is designed as a limited and final second instance within the ISDS system, enforcement ought to be automatic. Finally, an appellate body is likely to contribute to the clarity of investment law, and its correct identification and precise application.[80]

### 6.2 *Disadvantages*

If the proposed appellate mechanism is considered as an addition to the existing remedies against arbitral awards, i.e. setting aside proceedings in the courts at the place of arbitration, annulment under the ICSID Convention, etc., it will

77 Supporting this position, see Barton Legum, 'Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-US FTA?' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill Nijhoff 2015) 437, 441–42; Gabriel Bottini, 'Reform of the Investor-State Arbitration Regime: The Appeal Proposal' in Kalicki and Joubin-Bret, ibid, 455, 471–72.

78 ICSID Convention, art 52(6) reads: 'If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.'

79 See the current proposal for the amendment of the ICSID Arbitration Rules and, in particular, proposed Rule 72 of the new Arbitration Rules, which lay down a detailed procedure for the stay of enforcement of arbitral award during the annulment proceedings.

80 See the discussion in Anna De Luca and others, 'Responding to Incorrect Decision-Making in Investor-State Dispute Settlement: Policy Options' (2020) 21(2-3) JWIT 374–409.

necessarily add significant delays in obtaining a final resolution of the dispute. It would become a *de facto* third instance in ISDS proceedings.

Furthermore, the larger the scope for the possibility of appeal, the longer the proceedings are likely to take. For example, a review on error of facts, no matter how narrowly defined, will likely slow down the overall process. Widening the jurisdiction could imply a full re-hearing of the case unduly lengthening the proceedings.

If an appellate mechanism is appropriately designed, abolishes alternative routes to attack awards, such as annulment and setting aside processes, introduces clear time-limits, limits itself to legal issues, does not allow a re-hearing of the evidence and allows a tribunal to retain a case after appeal and issue a final ruling, it could have a neutral impact on the ISDS system regarding the duration of proceedings (but a positive impact on the quality and correctness of ISDS decision-making),[81] significantly shortening proceedings in case of resubmission.

## 7 The Multilateral Investment Court

The next proposal to scrutinise with respect to the duration of proceedings is the proposal to establish a Multilateral Investment Court (MIC). The analysis of the proposal's effect on the duration of proceedings is not entirely straightforward, as it is difficult to predict precisely how a MIC would work in practice. It is not unreasonable to assume that the MIC would share at least some features of the Investment Court System (ICS) currently included in some European Union (EU) free trade agreements, being the EU and its counterparties among the supporters of the structural reform. Thus, a glance at relevant provisions of the Comprehensive Economic and Trade Agreement (CETA) Between Canada and the EU (CETA) and the EU–Vietnam Investment Protection Agreement,[82] which can be found in Chapter 8 of CETA and Chapter 3 Section B of the EU-Vietnam Investment Protection Agreement, is helpful.

The duration of proceedings of a MIC can be addressed in the treaty that creates the MIC. The prospective Parties to the MIC, for example, can make the proceeding time efficient through setting strict time limits for each stage, as the WTO Members did in the DSU.[83] However, states may be less interested

81 ibid 404–05.

82 The European Commission, 'The Multilateral Investment Court Project' (Brussels, 21 December 2016 – Latest update on 10 October 2018) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608> accessed 16 October 2018.

83 See supra Section 4.

in strict timelines for ISDS proceedings, in which they are respondents, than in the trade law context, where they are both complainants and respondents.[84] Moreover, investment law provides for compensation as a remedy whereas the remedies in WTO law are only prospective. Thus, the duration of proceedings has less of an impact in terms of a party's ultimate remedy in investment law.

### 7.1 *Advantages*

The MIC model, shortening or eliminating some of the stages of investment arbitration proceedings, would likely speed up ISDS proceedings. In particular, being the adjudicators pre-elected, the assignment of cases to judges would likely be more expeditious than the constitution of an arbitral tribunal. For instance, provisions in both CETA and the EU–Vietnam Agreement establish that the president of the tribunal must appoint 3 members to constitute the tribunal within 45 days. In arbitral proceedings, the constitution of the tribunal, in contrast, takes an average of roughly 6 months, as described above.

Furthermore, IIAs typically do not regulate party challenges to appointed arbitrators. In practice, such challenges can last 4 months on average for ISDS proceedings. The ICS in both CETA and the EU–Vietnam Free Trade Agreement reduces the time for such challenges to 45 days.[85] Similarly, the members of the MIC would already be pre-approved and as members of a standing judicial body subject to fewer grounds for challenges.

Moreover, most IIAs only regulate the first phase of ISDS arbitral proceedings, including the request of consultations and the notice of intent before submitting a claim. They leave it to the applicable arbitration rules, such as the ICSID or UNCITRAL Rules, to determine specific time limits for the proceedings. However, since these procedural rules do not provide for specific time limits, this practice can result in delays. The MIC could address duration of proceedings across the board and set time limits for the various stages of the proceedings. This could speed up the proceedings. As noted in Section 1, ISDS proceedings take 3.73 years on average (although arbitral proceedings infrequently can last less than 2 years). In comparison, CETA provides that the ICS must issue its final award within 24 months, in EU–Vietnam the ICS has to present a 'provisional' award within 18 months from the date the claim is submitted.[86]

84 The empirical data finding that it is parties themselves, especially states, that are largely responsible for longer proceedings (eg bifurcation, arbitrator challenges, and arbitrator replacement) support this proposition.

85 CETA, art 8.30.3; EU–Vietnam Free Trade Agreement (signed 30 June 2019) (EUVFTA), art 14.3, ch 8, sec 3.

86 CETA, art 8.39.7; EUVFTA, art 24.6, ch 8, sec 3.

Similarly, the time limits for appeals – compared to annulment proceedings – will be shorter. Today, (decided) annulment proceedings take 1.91 years or 697 days on average. In contrast, the EU-Vietnam Agreement sets the time limit for the appeal to be between 180–270 days from the date of notification of appeal, which in turn must be within 90 days of the issuance of the award.[87] Therefore, in theory, these provisions should result in more expeditious proceedings.

However, as the example of the WTO illustrates, the time limits set in the agreement, as detailed in Section 4, might well turn out to be unrealistic. Simply setting strict time limits does not automatically reduce the duration of proceedings. This holds true even where the time limits as such are not unrealistic. Where cases are complex and the caseload of a tribunal is significant, delays will occur, and the imposed time limits might be neither practical nor desirable due to the implications for the award's quality and the ability of under-resourced countries to participate effectively.

### 7.2 *Disadvantages*

On the other hand, there are also factors that could lead a MIC to lengthen proceedings. In theory, a MIC has a pre-set number of members. As a result, it is less flexible to adapt to an increasing caseload involving complex cases unlike ad hoc arbitrations. However, in practice, many ISDS arbitrators are assigned to multiple cases under the current system, which also reduces the flexibility of the system and leads to delays. Moreover, the duration of proceedings in the MIC will depend to a large extent on the quality of the administration of the court. Finally, the appointment process of the judges of a MIC is likely to be politicised,[88] potentially leading to political conflicts or even vetoes (especially if consensus governs the appointment process) with a negative impact on the effective and efficient resolution of disputes, as the case of the blocking by the United States of the appointment procedure of WTO Appellate Body's members indeed shows.

## 8 Abolition of ISDS

This section looks at the effects of the proposal to abolish ISDS entirely and, accordingly, examines the likely duration of alternative binding, adjudicative

87 EUVFTA, arts 28.1 and 28.5, ch 8, sec 3.

88 José Manuel Álvarez Zárate, 'Legitimacy Concerns of the Proposed Multilateral Investment Court' (2018) 59 BCLRev 2765.

proceedings to resolve foreign investment disputes in the absence of ISDS. In particular, the section will examine (1) State-to-State arbitration under investment treaties, (2) investor-State arbitration under investment contracts and (3) litigation against the host state in domestic courts, eventually followed by interstate proceedings as a consequence of the resort by an investor's home state to diplomatic protection. It should be pointed out that the actual availability of these three alternatives depends on the case at hand. In some situations, all three options might be, in the abstract, available in relation to the same underlying dispute, even though some of them can require exhaustion of local remedies. None of them is, however, directly available to investors, with the exception of litigation before domestic judges and contract-based arbitration. Absent specific agreements, disputes between foreign investors and host states, turning into highly sensitive political interstate controversies, usually come before international courts and tribunals for resolution via diplomatic protection exercised by investors' home states[89] Diplomatic protection is in turn a discretionary right of a State: there is no duty or obligation under international law for a state to exercise diplomatic protection on behalf of a national.[90] The abolition of ISDS, entailing a return to a world of diplomatic protection (an instrument of classical international law still mantaining its bargaining power features)[91] and litigation in domestic courts, is unlikely to constitute a panacea for the problems haunting ISDS.

### 8.1 *State-to-State Arbitration Under Investment Treaties*

There are only three known State-State arbitrations under investment treaties.[92] These arbitrations provide some rough guidance on the duration of such

89 *Anglo-Iranian Oil Co* (*United Kingdom v Iran*) (Preliminary Objection) [1952] ICJ Rep 93; *Barcelona Traction, Light and Power Company Limited* (*Belgium v Spain*) (Judgment) [1970] ICJ Rep 3; *Ahmadou Sadio Diallo* (*Guinea v Congo*) (Preliminary Objections) [2007] ICJ Rep 1; *Ahmadou Sadio Diallo* (*Guinea v Congo*) (Merits) [2010] ICJ Rep 1. See also A Pellet, 'The Case Law of the ICJ in Investment Arbitration' (2013) 28 ICSID Review 223–40. As opposed to the ICJ's case listed above, the case *Elettronica Sicula SpA* (*ELSI*) (*United States v Italy*) (Judgment) [1989] ICJ Rep 15 concerned claims against Italy advanced by the US on behalf of United States shareholders in a company incorporated in Italy under the Treaty of Friendship, Commerce and Navigation between the United States and Italy of 1948.

90 *Barcelona Traction, Light and Power Company Limited* (*Belgium v Spain*) (Judgment) [1970] ICJ Rep 3, 44.

91 Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 257 ('Compared with the traditional system of diplomatic protection, the introduction of a private right of action for foreing investors, therefore, constitutes a "change in paradigm in international investment law"…')

92 *Peru v Chile*, in connection with *Lucchetti SA and Lucchetti Peru SA v Republic of Peru* ICSID Case No ARB/03/4) as reported by UNCTAD, 'Latest Development in Investor

proceedings, but care should be taken in drawing conclusions from such a small number of cases. It should also be pointed out that State-to-State investment arbitrations involves diplomatic protection: the State makes a claim because of injury suffered by an investor. Admitting that an investor's home State decides to exercise diplomatic protection in its favour, thus resorting to an available interstate proceedings, domestic remedies need, as a rule, to be exhausted (unless provided otherwise). Exhaustion of domestic remedies adds significantly to the duration the case takes to be resolved even where the State-to-State arbitration itself is conducted with adequate speed.

The first of the three known cases, a dispute between Peru and Chile, was discontinued, so provides little insight into the duration of such proceedings.[93] The second was an arbitration between Ecuador and the United States concerning the interpretation of the BIT between the two States. In that case, the tribunal handed down its award rejecting jurisdiction one year and three months after Ecuador lodged its request for arbitration.[94] The third was an arbitration between Italy and Cuba concerning Italy's claim under the BIT between the two States. In that case, the final award was issued four and a half years after Italy lodged its request for arbitration.[95]

While technically not claims under an investment treaty, the set of arbitrations between the United States and Canada under the United States–Canada Softwood Lumber Agreements raised investment-related issues that had previously been the subject of investor-State arbitration under NAFTA's Chapter 11.[96] These disputes provide further guidance on the duration of analogous State-State arbitrations. The United States request for arbitration in relation to the Quebec and Ontario softwood lumber programs was issued on 18 January 2008.[97] The tribunal's final award was issued on 20 January 2011,

State Dispute Settlement: IIA Monitor No 4' (2005) 2, note 3. <https://unctad.org/en/Docs/webiteiit20052_en.pdf> accessed 12 February 2020; *Republic of Ecuador v United States of America*, PCA Case No 2012–5 (29 September 2012); *Italian Republic v Republic of Cuba*, ad hoc state-state arbitration, Award (1 January 2008).

93 The interstate procedure was discontinued after the *Lucchetti* Tribunal, rejecting Respondent State's request, declined to suspend its own proceedings, *Lucchetti* (n 92) paras 7 and 9.

94 *Republic of Ecuador v United States of America,* PCA Case No 2012–5, Final Award (29 September 2012).

95 *Italian Republic v Republic of Cuba* (n 92).

96 See the statement by the Canadian Government on the background of the Canada-US Softwood Lumber Trade (modified 25 July 2017) <www.international.gc.ca/controls-controles/softwood-bois_oeuvre/background-generalites.aspx?lang=eng> accessed 28 January 2020.

97 *United States of America v Canada,* LCIA Case No 81010 (issued 2008, final award 2011).

almost exactly three years later.[98] In 2013, the parties jointly lodged a request for clarification of the award. This additional stage of proceedings took a further 6 months.[99]

Taken together, these examples suggest that the resolution of investment disputes through State-State arbitration is roughly comparable in duration to the resolution of those disputes through investor-State arbitration. However, it should be born in mind that since domestic remedies have to be exhausted, this adds significant delay to the process.

### 8.2 *Investor-State Arbitration Under Investment Contracts*

Investors and host States can give advance consent to investor-State arbitration of disputes arising under an investment contract between them. In the pre-BIT era, investor-State arbitration was mostly resorted to on the basis of arbitral clauses inserted in agreements concluded by host States with foreign investors with the view to attracting specific investments and regulating their operations.[100] Recent ICSID case-load statistics show that 16% of ICSID arbitrations have been based on contractual consent to arbitration.[101] Of course, investor-State arbitration under investment contracts is also possible outside the ICSID system under other procedural rules. Such arbitrations do not necessarily become public knowledge. This evidences that investment treaty arbitration has not replaced *tout court* investor-State arbitration under investment contracts.

While the substantive law in investor-State arbitration under an investment contract may differ from the substantive law to be applied in investor-State arbitration under investment treaties, the process of arbitration in each case is essentially the same. For example, the ICSID Convention itself and the ICSID Arbitration Rules enacted under the ICSID Convention apply equally regardless of whether consent to arbitration is established through a contract or a treaty. However, and despite these obvious similarities, an empirical analysis shows that contract-based ISDS proceedings are slightly shorter in duration – and that in most models the difference was statistically significant. The difference in duration, albeit not very large,[102] cannot be explained solely

98 ibid.

99 *United States of America v Canada,* LCIA Case No 81010B, clarification (2013).

100 See Anna De Luca and Giorgio Sacerdoti, 'Investment Dispute Settlement' in Markus Krajewski and Rhea T Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar 2019) 173, 196–99.

101 See the ICSID Caseload Statistics (Issue 2019–1) 10 <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019–1(English).pdf> accessed 8 July 2019.

102 See Behn and others (n 36).

by the fact that contract-based proceedings dominated during the first period of investment arbitrations. Other factors, such, for instance, shorter pre-arbitration periods, less jurisdictional objections, and more stratforward legal arguments, can explain the above difference.

### 8.3 *Litigation Against the Host State in Domestic Courts*

Comparing the duration of investor-State arbitration to litigation in domestic courts (assuming that such option actually exists) raises considerable conceptual and empirical challenges. A major conceptual challenge is identifying the type of domestic litigation that investor-State arbitration should be compared to.[103] In domestic legal systems, different causes of actions may engage different domestic courts or tribunals, which operate under different procedures. This has implications for the duration of proceedings. Whichever court might ultimately have jurisdiction, the applicable law will differ substantially from that applicable in international investment cases. A different conceptual challenge concerns accounting for the possibility of appeal in domestic proceedings. The decisions of arbitral tribunals are not subject to appeal, but they can be, and often are, challenged through annulment or set-aside proceedings.

There are also empirical challenges. Among these is the fact that the duration of domestic court proceedings appears to vary enormously depending on the State in question, the specific domestic court or tribunal involved, the cause of action and the complexity of the case. A comparison of the duration of proceedings is therefore only of limited use.

The challenges are illustrated by examples in which domestic court proceedings and investor-State arbitration have examined the same underlying factual situation. For example, foreign tobacco companies challenged Australia's Tobacco Plain Packaging Act through both Australian court proceedings and investor-State arbitration. Domestic court proceedings were initiated on the day the legislation entered into force. A final judgment was rendered by Australia's highest court less than a year later.[104] Faced with essentially the same measure, the arbitral tribunal in *Philip Morris Asia v Australia* took over four years from the notice of arbitration to render an award on jurisdiction, and

103 Proceedings brought in national courts can involve a whole number of relevant legal rules – including constitutional law, administrative law and contract law (including the legal provisions governing State contracts in jurisdictions in which the regulation of State contracts differs from that of ordinary private law contracts).

104 *JT International SA v Commonwealth of Australia*, High Court of Australia, HCA 43 (5 October 2012) <www.austlii.edu.au/au/cases/cth/HCA/2012/43.html> accessed 8 July 2019.

a further eighteen months to render a final award on costs.[105] In contrast, the investor-State arbitration in *Chevron v Ecuador* arose out of the extreme delays in Chevron's attempts to resolve commercial disputes in Ecuadorian courts.[106] With these court cases unresolved after more than a decade, Chevron commenced investor-State arbitration. Within four and a half years of the notice of arbitration, the tribunal had rendered its final award.[107]

Bonnitcha, Poulsen and Waibel have attempted a more systematic comparison of the duration of investor-State arbitration to commercial litigation in domestic courts. (See Table 4):[108]

TABLE 4 Average Length of Litigation

| **Country (overall 'Doing Business ranking in brackets')** | **Average length (in years) to obtain and enforce final judgement (Doing Business 2016)** | **Average length (in years) to obtain first-instance decision (ICLG 2016)** | **Average length (in years) to obtain decision (2013 data)** | | |
|---|---|---|---|---|---|
| | | | **First** | **Second** | **Final** |
| England & Wales (33) | 1.2* | 1.5 | 0.9 | | |
| France (14) | 1.1 | – | 0.8 | 0.9 | 0.9 |
| Germany (12) | 1.2 | 0.8 | 0.5 | 0.6 | |
| Italy (111) | 3.1 | 3.5 | 1.5 | 3.0 | 3.3 |
| India (178) | 3.1 | 7.5 | – | – | – |
| United States (21) | 1.0 | 1.5** | – | – | – |
| Switzerland (46) | 1.1 | 1.5 | 0.4 | 0.4 | 0.3 |

* United Kingdom as a whole; ** denotes California only

SOURCE: Author compilation based on The World Bank, *Doing Business 2016* <www.doingbusiness.org>; International Comparative Legal Guides (ICLG) (2016) *Litigation and Disputes Resolution* <www.iclg.co.uk/practice-areas/litigation-and-dispute-resolution/litigation-and-dispute-resolution-2016>; and OECD, *What Makes Civil Justice Effective* (2013) <www.oecd.org/regreform/judicialperformance.htm> all accessed 1 June 2020.

105 *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012–12.

106 *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador*, UNCITRAL, PCA Case No 2009–23.

107 This final award was subject to several further years of litigation, during which Ecuador tried unsuccessfully to have the award set aside in Dutch courts.

108 Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017).

It is important to note the limits of this exercise and the reliance on different sets of data. The study considers only civil litigation, and not administrative litigation. Hovwever, disputes between individuals and public authorities related to property rights and economic interests are settled by admistrative judges in many civil law countries (including, for instance, Italy and Germany). In respect to the aforementioned countries the comparison between the duration of civil cases and investor-State arbitration can hardly be considered as relevant. Furtheremore, the three data-sets collated by Bonnitcha, Poulsen and Waibel measure the duration of disputes in which, on average, less money is at stake than the average investor-State arbitration. In any case, this exercise suggests that investor-State arbitration is, on average, significantly slower than domestic court proceedings in some countries (e.g. Switzerland or Japan), while being significantly quicker than domestic court proceedings in others (e.g. India).

## 9 Conclusion

Our analysis yields a nuanced outcome. Empirical studies of investment awards shows that the length of investment arbitration varies significantly depending on the specifics of each case. However, the presence of some procedural characteristics (such as bifurcation) predicts longer proceedings. Despite the perceived overly long duration of investment arbitration proceedings, none of the reform proposals are designed specifically to tackle this concern, except for 'IA improved'. Even in this case, the reform proposals, more often than not address inefficiencies in arbitration, rather than the length of ISDS proceedings *per se*. As opposed to the 'Investment Arbitration improved' scenario, the other two main reform proposals currently under discussion at UNCITRAL, i.e. the addition of an appellate mechanism and the creation of a multilateral investment court, are clearly intended as policy responses to concerns different from those related to the duration of proceedings, namely 'unjustified' inconsistencies, inaccuracies, and incorrectness in investment arbitration practice, and the impartiality, independence, and neutrality of adjudicators. It can, accordingly, hardly be a surprise that none of the afore-mentioend reform proposals is certain to cure inefficiensies in ISDS proceedings or unreasonable length thereof. All depends on the construction of each mechanism. While devices that speed up proceedings often come at a cost, adequate speed is an important aspect of effective dispute resolution. Regardless of the reform option ultimately preferred, mechanisms avoiding excessive delay (alongside safeguards of other aspects of due process) should be included. Finally, the abolition of ISDS would make no advance on duration.