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CHALLENGES OF ARBITRATION AS A METHOD OF INVESTMENT DISPUTE SETTLEMENT

abstract

The purpose of the paper is to question the challenges of arbitration as a method for settlement of foreign direct investment disputes and to provide answers to several important questions, such as: defining the challenges of the concept as an alternative to domestic courts decisions, determining its outline, explaining the basic advantages and disadvantages of arbitration, analyzing the arbitration systems and their features, the enforcement mechanisms, the way to reform the investor-state dispute settlement, arbitration institutions in the Western Balkan and the challenges of investment arbitration in North Macedonia. It discusses the legal remedies available to foreign investors if state conduct breaches those standards. The default rule usually is that the investor must bring the case to national courts in the host state. However, many states have allowed investors to bring disputes to international arbitration instead of (or in addition to) national courts, as part of strategies to promote foreign investment. In the paper is discussed the concept of arbitration as a procedure whereby both sides to a dispute agree to let a designated third party, the arbitrator or the arbitral tribunal, decide the outcome of a legal dispute. Arbitration serves a purpose of advancing the collaboration of the disputing parties, with an ultimate objective of effective and efficient settlement of legal issues. It explores dispute settlement in international investment law, evaluating the criticisms that it is undemocratic and non-transparent and at the same time seen as a major advantage to foreign firms because it ensures fairness and confidentiality. Use of investor-state arbitration has increased sharply since the late 1990s. By the end of 2014, there were over 600 known cases of international arbitration under investment treaties; while up to the year 2000, this number was below 50. Choosing arbitrators, as well as the desired characteristics of an arbitrator is an important step in any international arbitration. It will be reviewed the claim that the common practice in international arbitration is that disputes are decided by a three-arbitrator panel. The advantages of arbitration over conventional litigation are numerous and cover issues such as: highly-qualified arbitrators, better ratio cost and result, less adversarial system and confidentiality of the procedure. In general, it could be made difference between 2 arbitration systems: ad-hoc and institutional which is furtherly explained in this paper. One important difference of the available arbitration systems is in regards to the enforcement mechanism. For that purpose are being compared the enforcement mechanisms under the ICSID and under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Moreover, the reforming initiatives for investor-state dispute settlement are being presented. Next, arbitration institutions in the Western Balkan are being previewed.

Finally, the challenges of investment arbitration in North Macedonia are being presented.

Keywords: *Investor-state dispute, Investor, State, Arbitration, Arbitration Systems, UNCITRAL, ICSID, 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.*

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I. Introduction

Arbitration is a procedure whereby both sides to a dispute agree to let a designated third party, the arbitrator or the arbitral tribunal, decide the outcome of a legal dispute. It is questioned whether the decision will be legally binding and as such is it quite different from mediation or diplomatic dispute resolution, both of which are commonly used in the international context. Arbitration is based on the consent of the parties and in that sense it may be seen as a kind of contract. Consent to international investment arbitration can be obtained in one of three ways:
-in an investment contract between the state and the investor,
-in a treaty between two states or
-in a piece of domestic legislation such as an investment code[1]

II. The challenges of International arbitration as an alternative to domestic courts

The greatest advantage in international investment law to investors is access to neutral international dispute settlement and it is no overstatement to claim that. This procedure offsets one of the most significant risks involved in investing abroad – ineffective access to justice through the legal system of the host state. The protections in IIAs[2] would be immaterial if there was no way for investors to enforce them in order to receive remedies such as monetary compensation. This is why, IIAs also contain procedural guarantees for access to dispute settlement, in addition to substantive obligations. Through one of these mechanisms, investor – state arbitration, investors can seek direct redress against host states if the other substantive features of the IIA or investment contract are not honoured.[3]

In the article I explore the benefit that it is seen as a major advantage to foreign firms because it ensures fairness and confidentiality. On the other hand, at the same time there is criticism that dispute settlement in international investment law is undemocratic and non-transparent. In order to understand these contrasting stances it should be outlined perhaps the most popular system of investor–state dispute settlement in the world today, the ICSID, exploring some of its key procedural features and trends as well as consider UNCITRAL Arbitration Rules as the pressing procedural matters in these fora such as costs. What is more, it should be taken into consideration state-to-state and alternative systems of dispute resolution along with the important procedural issue of cost allocation

According to Collins, "the international adjudication of investment disputes is seen as a major threat to national sovereignty as it often bypasses local courts, giving foreigners greater procedural rights than are available to local investors". In this context, some form of investor–state dispute settlement is provided for in almost every IIA. Indeed, it is the single most important feature associated with the IIA phenomenon because almost everything else (for example FET, guarantees against expropriation without compensation, transparency) was arguably already captured by customary international law. There is growing scepticism across many segments of society towards investor–state arbitration, often tied to the perception that the process undermines national sovereignty at the behest of profit-driven multinational enterprises and is synonymous with the global back-room deal-making between avaricious corporations and corrupt governments.While there are many lively issues in international investment law, this is without question the most controversial aspect of IIAs.

The multiplicity of claims brought by investors in numerous fora, massive damages awards against states, lack of consistency among decisions and confidentiality (or as many say,

[1] Collins (2017), pp.372-373
[2] International Investment Agreements, hereafter:IIAs
[3] Collins (2017) p.368

secrecy) of the arbitration process underlie this concern about a major threat to national sovereignty. Investor-state arbitration is essentially patterned from private commercial arbitration, which occurs without public participation in private offices and is adjudicated by party-selected arbitrators who often lack an appreciation of public international law rather than by appointed or elected judges with a deeper awareness of the impact of their decisions on the lives of citizens in host states.

Arbitrators consist of a relatively small number of specialists in international investment law. Although there is no formal system of precedent in international arbitration they are aware of the published decisions made by earlier tribunals and published decisions typically contain numerous cross-references to other decisions. The observed tendency of tribunals to refer to earlier decisions is both the cause as well as the effect of the increasing publication of decisions which has allowed these materials to become studied and interpreted as a distinct field of law. As such, it could be said that there is already a de facto system of persuasive precedent in international investment law as arbitrators attempt to render decisions that are justifiable through their consistency

1. Domestic Courts and International Arbitration

Due to the risks of political interference in the judicial process or cumbersome and lengthy procedures investors tend to value international arbitration because it offers an alternative to resolving disputes in the courts of the host state.

Investor-state arbitration creates a unique space for international review of state conduct. It empowers arbitral tribunals, usually comprising three private individuals, to review the conduct of (often democratically elected) governments or legislatures, or of national courts.[4]

For these reasons, some states have taken steps to limit their exposure to investor-state arbitration. Investor-state arbitration provisions is excluded by some states in their recent investment treaties, and some states have dropped investor-state arbitration from their investment codes.

There should be made clear distinction between when to pursue claims in the courts of the host state like normal litigants or engaging in investment arbitration. David Collins claims that “The first issue to come to terms with when evaluating investment arbitration is the nature of the procedural advantage that it accords to investors as distinct from the alternative, namely pursuing claims in the courts of the host state like normal litigants.” We can make a difference when the case will be resolved in the domestic courts as the courts with the closest connection to the matter if there is no clause in an investment contract or an IIA which specifies a particular forum for the resolution of disputes. The problem with this solution is that the investor could become nervous about entering a foreign state, particularly one where there is no tradition of judicial independence.What is more, investors will often have the serious concern that the courts of the host state may lack the expertise to deal with technical issues which often arise in international investment law. Clearly IIAs contain highly specialized provisions, the interpretation of which may be beyond the understanding of conventional judges”.

From the host state's point of view the courts of the investor's home state, which have a reasonably close connection to the dispute through the nationality of the claimant, are unsuitable fora for similar reasons as previously stated. The home state will be biased in favour of the investor, or lack an understanding either of IIAs or of the particular legal environment in which the challenged laws have been enacted.

Jurisdictional issues are another reason why domestic courts will be disfavoured as fora for the resolution of investment claims.

[4] Cotula (2016), p.36

III. Investor-state arbitration in outline

1. Introduction

Many bilateral investment treaties provide for the resolution of disputes arising from the foreign investment by specifying arbitration in a neutral forum as the method of resolution of the dispute.[5]

Sornarajah differentiates 2 contrasting types of clauses for arbitration. At the lowest level, the arbitration is treated as a kind of prescription as a method of settlement of disputes. At the highest level, the treaties entitle the foreign investor unilaterally to initiate proceedings before an ICSID tribunal.

In this section of the paper I discuss the legal remedies available to foreign investors if state conduct breaches those standards. The default rule usually is that the investor must bring the case to national courts in the host state. However, many states have allowed investors to bring disputes to international arbitration instead of (or in addition to) national courts, as part of strategies to promote foreign investment.[6]

Key issues in investor-state arbitration are outlined in this section. It also briefly touches on recent debates that could potentially transform investor-state dispute settlement.

2. Investor-state arbitration in outline

Definition: According to A. Redfern and M. Hunter arbitration is "private method of dispute settlement chosen by the parties themselves as an efficient method to end their dispute and avoid the court."[7] In addition, M. L. Moses defines arbitration as a "private system of adjudication."[8]

Arbitral award: The decision of the arbitral tribunals is referred to as an arbitral award. If the arbitral tribunal decides in favour of the investor, the award usually orders the state to pay the investor compensation.

Every arbitral award has 2 important characteristics;

1. Arbitral tribunals are not bound by precedent, that is by previous judgments or arbitral awards.

2. Also, there is no centralised system for appeals against awards, so different tribunals have often followed different approaches, although tribunals usually do refer to earlier awards to support their reasoning.

The Law on International Commercial Arbitration of the Republic of Macedonia (hereinafter LICA) defines arbitral award as a "decision of the arbitral court about the case."[9]

During the arbitral procedure, despite the meritorial arbitral decision, the arbitral court brings and huge amount of other decisions relating to questions of procedural character.[10]

Use of investor-state arbitration: Use of investor-state arbitration has increased sharply since the late 1990s. By the end of 2014, there were over 600 known cases of international arbitration under investment treaties (UNCTAD, 2015b); up to the year 2000, this

[5] Sornarajah (2010), p.216
[6] Cotula (2016), p.33
[7] Zoroska-Kamilovska (2015), p.4
[8] Zoroska-Kamilovska (2015), p.5
[9] Zoroska-Kamilovska (2015), p.245
[10] Zoroska-Kamilovska (2015), p.248

number was below 50 (UNCTAD, 2012d). Natural resource investment features heavily in the overall case load. For example, 30 per cent of arbitrations administered by the International Centre for Settlement of Investment Disputes (ICSID) relate to extractive industries and agriculture, fishing and forestry (ICSID, 2015)[11]

Domestic litigation and arbitration: There exist several possible ways to bring investment dispute to adjudication

1.Investment treaties commonly include provisions that enable investors to bring investment disputes to arbitration. Most treaties do not require investors to pursue the dispute through the domestic courts before filing a notice of arbitration, although some do (Calvo doctrine).

2.Other treaties feature different requirements – for instance, by asking investors to attempt amicable settlement or domestic litigation for a given period of time.

3.In yet other cases, investors can choose between international arbitration and national litigation – but once they have chosen, the other option is precluded ('fork-in-the-road' clauses).

Cases of arbitration primacy: The investor could bring disputes to arbitration which is allowed in many national laws and investment contracts. In these cases, the arbitral tribunal would apply the contract and/or relevant law, rather than treaty standards. However, several national investment codes and sectoral natural resource laws do not contain an unequivocal offer of consent to arbitration, and some states have dropped reference to arbitration in their national legislation.

Parties to the dispute: Investor-state arbitration based on contracts is primarily confined to disputes between the parties to the contract – that is, an identified investor and a state or a state entity. On the other hand, investment treaties and laws contain unilateral advance offers of consent to arbitration on the part of the states. Many investors covered by the treaty or law could pick up this unilateral offer of consent. As such, arbitration clauses in treaties and laws can expose governments to arbitration claims from an unknown and potentially large number of investors.[12]

IV. *The challenge of selecting arbitrators*

1. Arbitrator selection

Arbitral adjudication is conducted by arbitrators.[13] An important step in any international arbitration is choosing arbitrators. Selection of arbitrators is governed by the applicable arbitration rules while most treaties are silent in that regard. A few recent treaties have included more specific details about the kinds of characteristics an arbitrator should possess, but this is still the exception rather than the rule.[14]

2. Nomination procedures

Three-arbitrator panel is the common practice in international arbitration to decide a dispute. Each disputing party appoints an arbitrator and then — depending on the applicable arbitration rules — either the parties (e.g. ICSID Rules) or the party appointed arbitrators (e.g. UNCITRAL Rules) agree on a presiding arbitrator. In the event the parties cannot agree on the presiding arbitrator, the IIA may name an appointing authority to make the selection, often, but

[11] Cotula (2016), p.33
[12] Cotula (2016), p.34
[13] Zoroska-Kamilovska (2015) p.120
[14] UNCTAD (2014), p.91

not always, from a specified roster of panelists. The appointing authority will likely have the authority to appoint a disputing party's arbitrator in the event the disputing party has not named its own arbitrator within the requisite time period"[15]

The Canada-Panama FTA (2010) contains the following provision, which supplements (and overrides, in case of inconsistency) the applicable arbitration rules:
"*Article 9.25: Arbitrators*
1. Except in respect of a Tribunal established under Article 9.27 ["Consolidation"], and unless the disputing parties agree otherwise, the Tribunal shall be composed of three arbitrators. One arbitrator shall be appointed by each of the disputing parties and the third, who will be the presiding arbitrator, shall be appointed by agreement of the disputing parties.

[...]
3. If the disputing parties do not agree on the remuneration of the arbitrators before the constitution of the Tribunal, the prevailing ICSID rate for arbitrators shall apply."[16]

Regarding the arbitrators' remuneration, arbitrator fees can be very high. The ICSID Rules cap the arbitrators' remuneration rate (currently at US$3,000 per day per arbitrator) absent the permission of the Secretary-General to increase the rate. By contrast, the UNCITRAL Rules do not, leaving the issue of remuneration for negotiations between the parties and the arbitrators. Setting a fee schedule that will apply in the absence of party agreement helps avoid prolonged negotiations with the disputing parties or with the arbitrators themselves.[17]

3. Arbitrator qualifications

Most treaties do not specify the desired characteristics of an arbitrator. Article 14(1) of the ICSID Convention requires that arbitrators be "*persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment*"[18]

Regarding the arbitrator's qualifications, in contemporary arbitral law there are no specific requirements for the qualifications which should have the nominated arbitrator.[19]

One of the advantages of arbitration has always been that arbitrators are competent for deciding a particular case in a effective and timely manner. Investment arbitrations frequently involve matters relating to the public interest — such as the propriety of government regulations — and involve the application of, inter alia, public international law. Thus, a few recent treaties have laid out general qualities that should guide the selection of arbitrators. For example, Article 9.25 of the Canada-Panama FTA (2010) provides:

"*2. Arbitrators shall have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements. They shall be independent of, and not be affiliated with or take instructions from, either Party or the disputing investor.*"

[15] UNCTAD (2014), p.91
[16] UNCTAD (2014), pp.91-92
[17] UNCTAD (2014), p.92
[18] UNCTAD (2014), p.92
[19] Zoroska-Kamilovska (2015), p.126

Some treaties have laid down particular qualifications — an expertise in financial services law or practice — for arbitrators deciding disputes relating to financial institutions.[20]

4. Ethical standards of impartiality and independence

When the state enables the use of the services of its bodies for enforcement of arbitral awards, in the same time insists arbitral procedure, as well as the arbitrator selection, to fulfill some minimum standards which are irreplaceable criteria for just adjudication. There are 2 such minimum procedural standards of justice: a) respect of the principle for party hearing (auditem et alteram partem) and b) nobody can be a judge in its own case (nemo debet esse judex in propria causa).[21]

Next, we will explain the second of those standards. Two conditions apply to arbitrators, including party-appointed arbitrators. Those are that they should be independent and impartial. These requirements apply regardless whether they are specifically mentioned in a treaty.

What does it mean the arbitrator to be independent and impartial?

1. The requirement that arbitrators be independent means that they must not have a relationship with either of the disputing parties or related persons or entities— whether social, economic or otherwise — that suggests some dependence.

2. The requirement of impartiality relates to the ability of the arbitrator to come to the case without favouring one of the parties and without preconceptions in relation to the subject-matter of the dispute

5. Challenges to arbitrators

Specific challenge procedures in general are governed by the applicable arbitral rules and are not included in most investment agreements. For example, the UNCITRAL Rules (1976 and 2010) provide that arbitrators can be challenged *"if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence*".

The question arrises when a challenge can be made? The answer is that challenges must be made within a certain number of days of the arbitrator's appointment or, in the case of later-acquired knowledge, within a specified period — often 15 or 30 days from the date that the challenging party learns of the facts supporting the challenge. An arbitrator in some cases will resign when faced with a challenge, though that resignation does not imply acceptance of the validity of the challenge.

A challenge may allege, for example, that an arbitrator has some kind of financial link to an affiliate of one of the parties or that an arbitrator has made public statements that allegedly demonstrate bias and to date, challenges have not often been successful.

V. The advantages and disadvantages of investment arbitration

The advantages of arbitration over conventional litigation are numerous. First, as alluded to above, arbitrators are usually experts in the field of investment law, and it can be expected that they will render thoughtful and informed decisions reflecting an understanding of the commercial and ideally the public matters involved in the dispute. Second, arbitration is often cheaper and faster than normal litigation which can take many years to resolve. This

[20] UNCTAD (2014), pp.92-93
[21] Deskoski (2016), pp.214-215

aspect of investment arbitration is perhaps somewhat less evident than its speed. Modern investor–state arbitration can be very expensive, with legal fees and other costs regularly amounting to several million dollars. Third, arbitration is said to be less adversarial than court hearings, helping preserve the relationship between parties who wish to continue to do business with each other. This can be very important in the case of international investment as one of the criteria for satisfying the definition of investment, as indicated earlier, is that it has a long-term dimension. Finally, arbitration is normally confidential, meaning that it is not open to the public, and pleadings as well as judgments are not automatically made public. This can be advantageous if commercially sensitive information is being discussed. While this aspect of investment arbitration tends to be cited as an advantage for investors, it can clearly also be attractive to states which seek to avoid the negative publicity associated with claims of expropriation and other kinds of adverse behaviour, which can unquestionably affect their chances of attracting more FDI.[22]

In addition, the other benefits from arbitration are: less procedure expenses, neutrality and impartiality of the arbitrators and simplified system of awards recognition and enforcement.[23]

VI. Challenging arbitration systems

Investor-state arbitration can be conducted under different sets of rules. Regarding that we can differentiate 2 main types and one additional type of arbitration systems.

1. A large portion of investment arbitration is ad hoc, which means that the tribunal is constituted for that particular dispute at hand outside an institutional framework. Adjudicators are selected and assembled by the parties for the purpose of deciding upon that particular matter, often by reference to a specific set of procedural rules; the most well-known for the purposes of international investment law are those developed by UNCITRAL (the United Nations Commission on International Trade Law).[24]

Following the rules adopted by the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules), arbitrations are carried out outside any standing institutions (so-called ‘ad hoc arbitration’)

2. As an alternative to ad hoc arbitration for the settlement of investment disputes there is also institutional arbitration, in which a specific system of procedural rules will be used which will govern the arbitration along with its own administrative structure to assist in the process. Some common arbitration institutions are the LCIA and the ICC. The most popular institutional arbitration forum in international investment law is the World Bank-hosted ICSID as one prominent example. It was established through a multilateral treaty in 1965 specifically to administer investor-state arbitrations (the ICSID Convention). ICSID sees dozens of arbitrations per year.[25]

ICSID only deals with disputes between investors and states where both home and host states are parties to the ICSID Convention while the ICSID ‘Additional Facility’ Rules extend the application of most ICSID rules to cases where either the host state or the home state is not a party to the ICSID Convention.

3. Also, there are other private bodies like the International Chamber of Commerce, the London Court of International Arbitration, the Stockholm Chamber of Commerce or the Hong Kong International Arbitration Centre which administer other arbitration rules. Unlike ICSID,

[22] Collins (2017), p.373
[23] Zoroska-Kamilovska (2015) p.11
[24] Collins (2017), pp.396-397
[25] Cotula (2016), p.34

these institutions are mainly concerned with business disputes between private parties, but are also used for investor-state disputes. Each institution has its own procedural rules.

The key procedural features of ICSID will be examined.

1. ICSID as an example of institutional arbitration

ICSID provides for the settlement of disputes between host states and foreign investors from other states through arbitration as well as conciliation, addressing a gap that had existed in international law where private parties could not bring claims against states for breach of international obligations. The Convention on the Settlement of Investment Disputes Between States and the Nationals of Other States (the ICSID Convention, also known as the Washington Convention) entered into force on 14 October 1966. The seat of ICSID is in Washington DC at the offices of the World Bank, although the seat does not necessarily determine the place of proceedings. The parties may decide on another place for it and frequently do so. ICSID was created by the World Bank as a tool of international economic development with the rationale that the availability of neutral dispute settlement for investment disputes would help make developing states more attractive to foreign firms. As a consequence of ICSID's popularity in the last few decades it is now regularly used as a forum for the resolution of disputes involving developed states, so much so in fact that ICSID has become a household name, certainly among lawyers. ICSID enjoys wide membership among developed and emerging economies and is specified as the procedural mechanism to resolve investor–state disputes arising under many IIAs and investment contracts worldwide. Its dominant status can be attributed to its flexible rules that enable parties to structure the arbitration process to fit their needs combined with the degree of certainty for consistency and predictability. Many of the accusations that have been levied against ICSID as a forum, including its alleged bias against developing states in favour of investors, have been dispelled following recent empirical studies.[26] Over the years, Argentina has been the dominant respondent state in ICSID arbitrations. Most disputes have been brought under BITs, and the most common sector for disputes is oil and gas.

There are several key features of ICSID.

"First, under Art 25 of the ICSID Convention, the jurisdiction of ICSID extends to any legal dispute arising directly out of an investment between a Contracting State (a signatory of the ICSID Convention) and a national of another Contracting State. With respect to the parties, ICSID's jurisdiction over contracting states and nationals of other contracting states has been extended through its Additional Facility rules, which allow claims to be brought where only one party has a connection to ICSID (either the host state has ratified ICSID or the investor comes from a state which has done so)."[27] The relevance of the Additional Facility rules has diminished somewhat, given that ICSID Convention membership is near universal (165 states as of 2025).

Secondly, the ICSID Convention itself does not define 'investment', leaving it up to parties to set their own definition of this concept in their IIAs or investment contracts. ICSID tribunals normally defer to definitions contained in these instruments.

Next, ICSID will only concern itself with a genuine legal dispute, not diplomatic or political ones. Simple differences of views on certain issues that do not have a bearing on enforceable legal rights are outside ICSID's purview.

Lastly, Art 25 of the ICSID Convention specifies that the parties to the dispute must consent in writing to submit the dispute to the Centre, as all arbitration is based on consent. "Mere ratification of the Convention does not satisfy this requirement. When the parties have

[26] S. Franck, 'The ICSID Effect? Considering Potential Variations in Arbitration Awards' **51**:4 *Virginia Journal of International Law* 977 (2011).
[27] Collins (2017), pp.397-398

given their consent, no party may withdraw its consent unilaterally. Whether or not formal consent has been tendered is often itself the subject of a dispute, with ICSID tribunals maintaining the power to determine their own jurisdiction in this matter."[28]

VII. The challenges of enforcement mechanisms

It could be differentiated 2 models of enforcement mechanism, the first one allows national courts to refuse enforcement of arbitral awards and the second one which requires to recognise awards issued as binding and to enforce them.

1. Widely ratified multilateral treaties facilitate the enforcement of pecuniary awards. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards requires states parties to recognise awards as binding and to enforce them within their jurisdiction. Most states have ratified the New York Convention. This widespread ratification makes arbitral awards easier to enforce than court judgements.[29]

However, the New York Convention allows national courts chosen as the 'seat' for the arbitration to refuse enforcement on narrowly defined grounds – for example, if major defects affected the arbitral proceedings, or where enforcement would be contrary to the public policy of the country. While enforcement proceedings are typically initiated by the investor, states can initiate annulment proceedings.

Although the New York Convention determines the formal conditions for recognition and enforcement of foreign arbitral awards, it does not regulate the procedure for recognition and enforcement of foreign arbitral awards.[30]

2. The ICSID Convention does not contain exceptions like the New York Convention that allow national courts to review awards. This treaty commits states parties to recognise awards issued by an ICSID tribunal as binding and to enforce them within their jurisdiction as if they were final judgements issued by their own courts. Rather, it provides some narrowly defined grounds for the annulment of an ICSID award through a special procedure before an international 'ad hoc committee'.

If a host state fails to comply with an award covered by one of these multilateral treaties, the investor may seek enforcement in any signatory country where the host state holds interests, for instance by seizing goods or freezing bank accounts (see Example 1).

Example 1. Seizing the prince's plane: how arbitral rulings are enforced

"In 2011, mechanisms to enforce arbitral awards made the headlines as an international construction firm seeking to enforce an arbitral ruling against the Thai government reportedly seized the plane used by the Thai crown prince after it landed in Germany (Jolly and Fuller, 2011). The Thai government reportedly claimed that the plane was owned by the prince in a personal capacity, rather than the government, but the plane was only released after the government offered a substantial bank guarantee (Isermann, 2011)"[31]

VIII. The international debate about reforming investor-state dispute settlement

There is growing international debate about ways to reform investor-state dispute settlement in systemic terms. Many have raised concerns about the functioning of investor-state arbitration in recent years.

[28] Collins (2017), pp.399-400
[29] Cotula (2016), p.35
[30] Zoroska-Kamilovska (2015), p.305
[31] Cotula (2016), p.36

Key concerns include:

1. the emergence of a restricted club of arbitrators. This means that the number of arbitrators which are engaged in the arbitral procedures is limited and many of them are being selected to participate in more than one arbitral procedures.

2. potential conflicts of interests (for example where an individual serves as arbitrator in one case, and as legal counsel in another suit that may deal with similar issues of law). There have also been proposals on possible ways to address potential conflicts of interest in arbitral proceedings.

3. inadequate mechanisms to challenge arbitral awards (there is no appeal system and applicable treaties usually allow for awards to be reviewed only on very narrowly defined grounds). Suggestions for reforming the investor-state dispute settlement system, including the creation of a standing court or at least an appeal mechanism that can remedy errors of law and promote more uniform interpretation of treaty standards have put forward legal specialists (van Harten, 2007). In 2015, the European Commission proposed the establishment of an international investment court – a development that could transform investor-state dispute settlement.[32]

IX. Arbitration institutions in the Western Balkans

Each of the Western Balkan States has at least one arbitration institution except for Albania. While the first arbitration institution in Sarajevo dates back to 1909, there are currently two permanent arbitration institutions: the Arbitration Court at the Foreign Trade Chamber of Bosnia and Herzegovina in Sarajevo and the Foreign Trade Court of Arbitration in the Republic of Srpska in Banja Luka. In Croatia, there is one main arbitration institution, which is the Permanent Arbitration Court at the Croatian Chamber of Commerce in Zagreb with a long history of institutional arbitration dating back to 1853. In Kosovo, there is an Alternative Dispute Resolution Center within the American Chamber of Commerce in Kosovo. In North Macedonia, there is the Permanent Court of Arbitration attached to the Economic Chamber of North Macedonia, same as in Montenegro with an Arbitration Court at the Chamber of Commerce of Montenegro. In Serbia, there are two permanent arbitral institutions: Permanent Arbitration at the Chamber of Commerce and Industry of Serbia (Permanent Arbitration) and the Belgrade Arbitration Center (BAC).[33]

X. Investment Arbitration in North Macedonia

(a) General Background of Investment Arbitration in the Republic of North Macedonia

In the Republic of North Macedonia, investment arbitration is regulated by laws, bilateral and regional investment treaties concluded by the country, as well as relevant multilateral conventions.

With respect to domestic regulations, the following laws are most relevant:

- The Law on International Commercial Arbitration of the Republic of Macedonia (LICA);[34] and
- The Private International Law Act (hereinafter PILA).[35]

[32] Cotula (2016), pp.37-38

[33] Bungenberg et al. (2025), p.9

[34] Law on International Commercial Arbitration of the Republic of Macedonia (Official Gazette of Republic of Macedonia, No. 39/2006).

[35] Private International Law Act (Official Gazette of RN Macedonia, No.32/2020, 110/08, 83/09, 116/10 and 124/15).

The PILA applies to investment arbitration with respect to the procedure for recognition and enforcement of investment awards in the Republic of North Macedonia. The LICA defines foreign arbitral awards, which applies to investment awards.
The country is also party to important regional investment treaties, such as the Energy Charter Treaty. The Republic of North Macedonia is party to the ICSID Convention, as well as to the New York Convention.
The country uses a model BIT determined in 2009, but is currently preparing a new model BIT. With respect to investment arbitration practice, as of today, there is publicly available information regarding 10 (ten) investment arbitration cases brought against North Macedonia, most of them initiated in recent years and one still ongoing. ICSID arbitration is most commonly commenced against the country, with ICC arbitration also proving popular among claimants. No investor from North Macedonia has even initiated investment arbitration.[36]

Case	Year	Arbitration rules	Outcome	Breaches found
Swisslion v. Macedonia	2009	ICSID	Decided in favour of investor	Fair and equitable treatment/Minimum standard of treatment, including denial of justice claims
EVN v. Macedonia	2009	ICSID	Settled	n/a – settled before decision
Guardian Fiduciary v. Macedonia	2012	ICSID	Decided in favour of State	None – declined jurisdiction
Tasev v. Macedonia	2017	UNCITRAL	Settled	Decided in favour of State
Cunico v. Macedonia	2017	ICSID	Discontinued	None – discontinued before decision
Binani v. Macedonia (I)	2017	UNCITRAL	Discontinued	None – discontinued before decision
Skubenko and others v. North Macedonia	2019	ICSID	Settled	Decided in favour of State
Binani v. North Macedonia (II)	2020	UNCITRAL	Pending	n/a
GAMA Güç Sistemleri Mühendislik ve Taahhüt A.Ş. v. North Macedonia	2021	ICC	Settled	Decided in favour of State

XI. Conclusion

[36] Legal Framework for Arbitration and Mediation in North Macedonia and Germany – Executive Summary (2025), pp.103-105 and INVESTinADR Final Report, updated with latest data on cases

Investment treaties aim to promote investment flows between the state parties by establishing obligations about how investments by nationals of one state will be admitted and protected in the territory of the other state. Most investment treaties also allow investors to bring disputes with the host state to international arbitration (investor-state arbitration). Arbitral awards as binding rulings are settled by arbitral tribunals by these disputes. In addition, most treaties allow states to file arbitrations against the other states parties (state-state arbitration), though this mechanism has had relatively little use so far.

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