Fall 1-1-2017

Is the Law of Treaties an Obstacle or a Conduit for the Reform of Investor-State Dispute Settlement?

Brian McGarry

Josef Ostřanský

IS THE LAW OF TREATIES AN OBSTACLE OR A CONDUIT FOR THE REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT?

Brian McGarry
Josef Ostřanský[*]

INTRODUCTION

Contemporary critiques of investor-state dispute settlement (ISDS) reflect the wide range of stakeholders with an interest in the efficacy of this system. Yet the complexity of practice under investment treaties belies their most fundamental common element: that as agreements between states, they are each governed by the same body of rules as all other treaties.[1] This must be borne in mind as governments begin to propose and adopt dramatic reforms to a decades-old paradigm.

The present Essay focuses its analysis on the conformity of bilateral treaty-based ISDS reforms with obligations under the most prevalent multilateral ISDS treaty currently in force, the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[2] Part I of this Essay briefly overviews the existing ISDS model, while Part II recalls recent criticisms of this system and the responsive efforts that have thus far taken root. Against this backdrop, Part III analyzes and applies the fairly elusive treaty modification rules codified in the 1969 Vienna Convention on the Law of Treaties (VCLT),[3] with emphasis on both express and implied elements of the ICSID Convention. The authors thereafter offer some brief conclusions regarding prospective ISDS treaty practice.

---

[*] The authors are Lecturers at the Geneva LL.M. in International Dispute Settlement, Graduate Institute of International and Development Studies and University of Geneva Faculty of Law, Switzerland. E-mail: brian.mcgarry@graduateinstitute.ch and josef.ostransky@graduateinstitute.ch.

[1] *See* ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 6 (Cambridge Univ. Press 2009).

[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter *ICSID Convention*].

[3] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *VCLT*].

I. SALIENT FEATURES OF THE CURRENT ISDS FRAMEWORK

Treaty-based international investment protection began in a purely bilateral form. The 1959 bilateral investment treaty (BIT) between Germany and Pakistan is often viewed as the inception of the era of modern investment treaties.[4] Yet the multilateralization of international investment practice began to take root shortly thereafter, most significantly in the form of the ICSID Convention, adopted under the auspices of the World Bank.[5] The Bank's General Counsel at the time, Aron Broches, is credited with successfully advocating for a multilateral convention that would provide for the effective and neutral settlement of international investment disputes without venturing into questions of the underlying substantive rules applied in such disputes.[6]

The initial impact of the ICSID Convention is evident in the Convention's entry into force the following year (upon the accession of twenty states). It presaged decades of proliferation of BITs providing for investor-state arbitration as a dispute settlement mechanism, beginning with a 1969 agreement between Chad and Italy.[7] Of the more than 3,000 BITs currently in force,[8] a large share of ISDS provisions expressly refer to ICSID as a dispute settlement forum.[9] Many treaties refer as well to the possibility of ad hoc investor-state arbitration, such as under the U.N. Commission on International Trade Law (UNCITRAL) Arbitration Rules.[10] Such provisions are particularly useful when one of the Contracting Parties to the treaty is not a Contracting Party to the ICSID Convention. For example, reference to the possibility of ad hoc arbitration in the investment chapter of the North American Free Trade

---

[4] *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 6 (Oxford Univ. Press, 2d ed., 2012).

[5] *Id.* at 9.

[6] *Id.*

[7] *Id.*

[8] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DISPUTE SETTLEMENT PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS: A LARGE SAMPLE SURVEY 7 (2012), http://www.oecd.org/investment/internationalinvestmentagreements/50291678.pdf.

[9] *See International Investment Agreements Navigator*, UNCTAD INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/IIA (last visited Nov. 16, 2017).

[10] *See, e.g.*, Free Trade Agreement between the Commonwealth of Australia and the People's Republic of China, Austl.-China, art. 9.12–15, June 17, 2015 (entered into force Dec. 20, 2015), *available at* http://dfat.gov.au/trade/agreements/chafta/official-documents/Pages/official-documents.aspx.; *see also* G.A. Res. 65/22 (Jan. 10, 2011); Free Trade Agreement between New Zealand and the Republic of Korea, N.Z.-S. Kor., art.10.20–24, Mar. 23, 2015 (entered into force Dec. 20, 2015), *available at* https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-korea-free-trade-agreement/text-of-the-new-zealand-korea-fta-agreement/; G.A. Res. 65/22 (Jan. 10, 2011).

Agreement (NAFTA) reflects Mexico's status as a non-party to the ICSID Convention.[11]

The growth of BITs and free trade agreements (FTAs) incorporating investor-state arbitration was seen by many proponents as mutually beneficial to investor home state and investment host state, insofar as a direct right of investor recourse to an international tribunal served to reduce investor risk and thus increase foreign direct investment flows,[12] as well as to depoliticize disputes which might otherwise be addressed at the inter-state level through diplomatic protection.[13] However, starting in the 1990s, the proliferation of investor-state disputes gave rise to a tsunami of claims that not only has led to the dominance of ICSID in ISDS practice, but also has tested perceptions of the entire arbitral regime's objectiveness and systemic coherence.[14] Although stakeholders have addressed such perceptions in a number of ways, the most striking have been governments negotiating bilaterally to replace investor-state arbitration with a permanent investment court (e.g., the 2015 EU-Vietnam FTA,[15] 2016 Canada-EU Comprehensive Economic and Trade Agreement (CETA),[16] and draft text for the Transatlantic Trade and Investment Partnership (TTIP) negotiations)[17] and treaty practice envisioning the superimposition of an appellate mechanism onto the existing arbitral regime

---

[11] *See* August Reinisch & Loretta Malintoppi, *Methods of Dispute Resolution*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 691, 710 (Peter Muchlinski et al. eds., Oxford Univ. Press 2008).

[12] Aaron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, *in* 136 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 331, 343–44 (1972).

[13] *See generally* Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, *in* 1 THE WORLD BANK IN A CHANGING WORLD 5–6 (Franziska Tschofen & Antonio Parra eds., Martinus Nijhoff 1991). On the 19th century approach of "gun-boat diplomacy," see Muthucumaraswamy Sornarajah, *Power and Justice in Foreign Investment Arbitration*, 14 J. INT'L ARB. 103, 103 (1997).

[14] *See* DOLZER & SCHREUER, *supra* note 4, at 11; ANTONIO PARRA, THE HISTORY OF ICSID 9 (Oxford Univ. Press 2012).

[15] Free Trade Agreement between the European Union and the Socialist Republic of Vietnam, E.U.-Viet., *opened for signature* Dec. 2, 2015, [hereinafter *EU-Vietnam FTA*] *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437.

[16] Comprehensive Economic and Trade Agreement between Canada and the European Union, Can.-E.U., art. 8.29, Oct. 30, 2016, 2017 OJ L11 23 (provisionally entered into force Sept. 21, 2017) [hereinafter *CETA*].

[17] *See* Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-Commerce, European Commission draft text, Ch. II, Sec. 3 (2016), *available at* http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

(e.g., the 2015 Australia-China FTA,[18] 2015 Korea-New Zealand FTA,[19] and 2016 Trans-Pacific Partnership Agreement (TPP)).[20]

II. SETTING THE DEBATE: THE APPEALS MECHANISM IN CONTEXT

In the simplest terms, the establishment of standing investment courts and appellate mechanisms are reactions to the increased criticism of the current ISDS framework. Although initially the criticism of investor-state arbitration was mainly academic,[21] currently one cannot doubt that the backlash against this ISDS mechanism is a real public concern. Over the last few years, ISDS has gained increased media attention, which has portrayed it in no enviable colors. ISDS has been painted as a system of secret commercial courts in which multinational corporations sue governments for billion-dollar damages while bypassing the national judicial system.[22]

In less emotive words, criticism of the current ISDS system has questioned its compatibility with the rule of law in light of some of its procedural aspects. These include the use of ad hoc arbitration as a mechanism for deciding disputes which involve the public interest—and thus raise concerns about a lack of transparency[23] and the independence and impartiality of arbitrators[24]—

---

[18] Free Trade Agreement between the Commonwealth of Australia and the People's Republic of China, *supra* note 10, art. 9.23.

[19] Free Trade Agreement between New Zealand and the Republic of Korea, *supra* note 10, art.10.26.9,

[20] *See* Trans-Pacific Partnership Agreement, art. 9.23(11), Feb. 4, 2016.

[21] *See, e.g.*, GUS VAN HARTEN, INVESTMENT TREATY: ARBITRATION AND PUBLIC LAW (Oxford Univ. Press 2007); MICHAEL WAIBEL ET AL., THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Kluwer Law Int'l 2010); Olivia Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT´L L. 953 (2007); Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT´L L. J. 491 (2009).

[22] *See, e.g.*, PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM, (Corporate Europe Observatory & Transnational Institute 2012), https://www.tni.org/files/download/profitingfrominjustice.pdf; Anthony De Palma, *Nafta's Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say*, N.Y. TIMES (Mar. 11, 2001); Sonya Faure, *Le Traité Transatlantique Crée-t-il une Justice Qui Court-circuite les Etats?*, LIBÉRATION (May 16, 2014); George Monbiot, *The Real Threat to the National Interest From the Rich and Powerful*, GUARDIAN (Oct. 15, 2013); Frédéric Viale & Marlon Lagaillarde, *Trait. . . Transatlantique : un Système D'arbitrage Toujours Aussi 'Anti-démocratique*, LE MONDE (Oct. 22, 2015); *The Arbitration Game*, ECONOMIST (Oct. 11, 2014).

[23] *See* UNCTAD, ISSUES NOTE NO. 2, REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT: IN SEARCH OF A ROADMAP, INTERNATIONAL INVESTMENT AGREEMENT 3 (2013); Sarah Anderson & Sara Grusky, *Challenging Corporate Investor Rule: How the World Bank's Investment Court, Free Trade Agreements, and Bilateral Investment Treaties Have Unleashed a New Era Of Corporate Power and What to Do About It*, INST. FOR POL'Y STUD. 1, 8 (2007), http://www.ipsdc.org/reports/challenging_corporate_investor_rule; Lucas Bastin, *The Amicus Curiae in Investor-State Arbitration*, 1 CAMBRIDGE J. INT´L & COMP. L. 208, 223–24, 227

as well as the perceived inconsistency of arbitral decisions,[25] lack of appropriate control mechanisms,[26] and excessive length and costs of the proceedings.[27] Observers of ISDS have also raised substantive critiques of this system, perceiving a structural bias in vague investment treaty obligations that allegedly favor free market neo-liberalism and privatization.[28]

Regardless of the validity of these criticisms, politicians around the globe and other actors of global governance could no longer avoid reacting to increased public pressure. In July 2017, state delegations to UNCITRAL agreed to place the discussion of ISDS reform on the organization's formal agenda.[29] Certain states have opted to exit the existing ISDS system,

---

(2012); Gus van Harten et al., *Public Statement on the International Investment Regime*, YORK UNIV. (2010), http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/.

[24] *See* EBERHARDT & OLIVET, *supra* note 22, at 8, 34–55, 64–69; Noah Rubins & Bernhard Lauterburg, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration*, *in* INVESTMENT AND COMMERCIAL ARBITRATION—SIMILARITIES AND DIVERGENCES 153, 171–79 (Christina Knahr et al. eds., 2010); Sornarajah, *supra* note 13, at 118; VAN HARTEN, *supra* note 21, at 167–75; *see also* UNCTAD, *supra* note 23, at 3–4; Gus van Harten, *Perceived Bias in Investment Treaty Arbitration*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 433, 441, 445 (Michael Waibel et al. eds., 2010); Public Citizen's Global Trade Watch, *Setting the Record Straight: Debunking Ten Common Defenses of Controversial Investor-State Corporate Privileges* 1, 13–14 (2015), https://www.citizen.org/sites/default/files/ustr-isds-response.pdf.

[25] *See* Andreas Bucher, *Is There a Need to Establish a Permanent Reviewing Body?*, *in* THE REVIEW OF INTERNATIONAL ARBITRAL AWARDS 285, 285 (Emmanuel Gaillard ed., 2010); Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT'L L. REV. 465, 517–18 (2005); Rudolf Dolzer, *Perspectives for Investment Arbitration: Consistency as a Policy Goal?*, 9 TRANSNAT'L DISP. MGMT 1, 2 (2012). *See generally* Frank Spoorenberg & Jorge E. Viñuales, *Conflicting Decisions in International Arbitration*, 8 L. & PRAC. INT'L CTS. & TRIBUNALS 91 (2009).

[26] *See* Anderson & Grusky, *supra* note 23, at 27; Chung, *supra* note 21, at 967–68; Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 340–47 (2004); Julia Hueckel, *Rebalancing Legitimacy and Sovereignty in International Investment Agreements*, 61 Emory L.J. 601, 621 (2012); Public Citizen's Global Trade Watch, *supra* note 24, at 4–7, 17; Jacques Werner, *Limits of Commercial Investor-State Arbitration: The Need for Appellate Review*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 115 (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni eds. 2009).

[27] *See* Garcia, *supra* note 26, at 355–56; Public Citizen's Global Trade Watch, *supra* note 24, at 7–8; UNCTAD, *supra* note 23, at 4.

[28] *See* JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 75–93 (BRILL 2011); KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 115–16 (Cambridge Univ. Press 2015); MUTHUCUMARASWAMY SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 79, 81 (Cambridge Univ. Press 2015); Anderson & Grusky, *supra* note 23, at 4–5; Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 44–59 (2003); *see, e.g.*, DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE 25–45 (Cambridge Univ. Press 2008); *van Harten et al.*, *supra* note 23.

[29] Press Release, U.N. Information Service, UNCITRAL to Consider Possible Reform of Investor-State Dispute Settlement, UNIS/L/250 (July 14, 2017).

denouncing the ICSID Convention and/or their BITs.[30] Other states have made strides towards a reform of this system.[31] Most notable are the recent attempts of the EU to create an innovative system of permanent investment tribunals with a built-in appellate mechanism; for instance, CETA and the EU-Vietnam FTA provide for a standing bilateral tribunal with a superimposed appeals tribunal.[32]

If we assume that a reform of ISDS at the international level will retain the direct access of individuals to dispute settlement against host states, a permanent investment tribunal or a self-standing appeals mechanism present themselves as the two most viable options.[33] The former option, a permanent investment tribunal, suggests a wholly new permanent dispute settlement body (a court or tribunal) with tenured or on-call judges who will hear disputes brought by investors against host states.[34] The most notable feature in comparison to the current regime is that the establishment of a permanent tribunal may remove the institution of ad hoc party-appointed arbitrators.[35] A permanent investment court may feature a built-in appeals mechanism as well, as the EU treaties have shown.[36]

The latter option, an appeals mechanism, is perhaps less radical in that it preserves the current system of ad hoc party-appointed arbitral tribunals. This

---

[30] Among the states recently terminating their participation in the ICSID Convention are Bolivia (2007), Ecuador (2009), and Venezuela (2012). States that have taken steps towards terminating some or all of their BITs include Ecuador (2008), Venezuela (2008), South Africa (2012), Indonesia (2014), and, more recently, India (2017). It should be noted that due to so-called "sunset clauses," which may provide for continuing investment protection for five to twenty years after treaty termination, this termination does not imply that no investment claims may be brought under the treaty after the termination date.

[31] Brazil, a country with no BITs in force that include modern ISDS provisions, concluded BITs with Mozambique and Angola in 2015. These treaties differ from modern BITs insofar as they focus more on cooperation and investment facilitation, and their dispute settlement mechanisms do not provide for investor-state arbitration. Rather, they provide for dispute prevention and amicable means to settle investment disputes (such as Focal Points and Joint Committees), with state-to-state dispute settlement provided as a back-up option. South Africa, on the other hand, moved towards a system of domestic statutory protection, with domestic remedies serving as a mechanism for the settlement of investment disputes.

[32] *See* CETA, *supra* note 16, Chapter 8, Section F; *see also* EU-Vietnam FTA *supra* note 15, Chapter 8.

[33] *See* GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTÀ, CAN THE MAURITIUS CONVENTION SERVE AS A MODEL FOR THE REFORM OF INVESTOR-STATE ARBITRATION IN CONNECTION WITH THE INTRODUCTION OF A PERMANENT INVESTMENT TRIBUNAL OR AN APPEAL MECHANISM 16–17 (Ctr. for Int'l Dispute Settlement, Geneva 2016), http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

[34] *See id.* at 37–38.

[35] *See id.*

[36] *See* CETA, *supra* note 16, Chapter 8, Section F; *see also* EU-Vietnam FTA *supra* note 15, Chapter 8.

option would treat such arbitrations as first-instance proceedings, which would be subject to appeal before a permanent body.[37]

Both of these options present a plethora of technical issues, such as the legal feasibility of integrating the mechanisms into the existing regime of more than 3,000 international investment agreements.[38] They also raise a host of political questions, such as the composition and mechanism of selecting adjudicators to the bench.[39] These will have to be carefully negotiated by all stakeholders before any such reformed ISDS system will be put in place.

Although the prospect of an appeals mechanism constitutes a less radical departure from the status quo than would the replacement of arbitration with adjudication, it raises more pressing questions concerning the modification and potential breach of existing ISDS treaties. One such legal issue warrants heightened scrutiny: whether an appeals mechanism would be compatible with rights and obligations under the ICSID Convention, one of the backbones of the current ISDS regime.

In analyzing this specific issue below, we will not discuss the merits and demerits of the establishment of an appeals mechanism in responding to the systemic criticisms of ISDS. Equally, we will not address other legal issues connected with the eventual operation and effectiveness of an appeals mechanism, such as the enforceability of its decisions in states that are not Contracting Parties to the appeals mechanism's constitutive treaty.

III. MODIFYING THE ICSID CONVENTION UNDER THE LAW OF TREATIES

The ISDS model found in recent EU treaty texts (CETA, EU-Vietnam FTA, and draft TTIP)[40] raises the question of whether ICSID Members may establish an appellate mechanism *inter se*. This question's importance extends beyond the EU model, as it concerns the broader feasibility of any appellate mechanism with multilateral aspirations. The authors consider that such modification is permitted by Article 41(1)(b) of the VCLT, under which contracting states may agree to treaty modification *inter se* if:

---

[37] *See* Bucher, *supra* note 25, at 289.

[38] See U.N. CONFERENCE ON TRADE AND DEV., WORLD INV. REPORT 2017, 111, UNCTAD/WIR/2017, U.N. Sales No. E. 17.II.D.3 (2017).

[39] *See* KAUFMANN-KOHLER & POTESTÀ, *supra* note 33, at 60.

[40] *See* CETA, *supra* note 16, Chapter 8, Section F; European Union textual proposal in the Transatlantic Trade and Investment Partnership, Chapter II, Section 3, July 14, 2016 (http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf); *see also* EU-Vietnam FTA *supra* note 15, Chapter 8.

> the modification in question is not prohibited by the treaty and:
>
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.[41]

Whereas the *chapeau* concerns an express textual prohibition, the respective conditions in sub-clauses (i) and (ii) encompass prohibitions which may be implied in the relationship between the modified provision and other aspects of the treaty. The three conditions must be satisfied cumulatively.

Recently, some authors have asserted not only that the *chapeau* of VCLT Article 41(1)(b) encompasses implied prohibitions, but also that ICSID Convention Article 53 prohibits modification *inter se* for the purpose of establishing an appellate mechanism.[42] However, as discussed in the next section, both the drafting history and commentaries regarding VCLT Article 41(1)(b) confirm that its *chapeau* concerns only express prohibitions on treaty modification. Indeed, were the *chapeau* of Article 41(1)(b) intended to cover implied prohibitions, sub-clauses (i) and (ii) would be redundant, having emerged stillborn from the ILC's prolonged deliberations. As to ICSID Convention Article 53, as discussed below, it is far from clear that modification of this provision is even impliedly prohibited.

A. Express Prohibition in the Treaty: The Chapeau of VCLT Article 41(1)(b)

It is telling that a 1964 ILC draft of what would be the *chapeau* of Article 41(1)(b) included the phrase "expressly or impliedly prohibited,"[43] qualifiers which were eventually dropped in favor of the provision's final text. In this context, Verdross stated at the ILC that "a prohibition could hardly be implied."[44] The sole example of prohibited modification given in the 1966 Draft Articles Commentary is Article 20 of the 1908 Berlin Act for the

---

[41] VCLT, *supra* note 3, art. 41(1)(b).

[42] *See, e.g.*, Jansen N. Calamita, *The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime*, 18 J. WORLD INV. & TRADE 585, 605–13 (2017); *see also* Jansen N. Calamita, *The Challenge of Establishing a Multilateral Investment Tribunal at ICSID*, ICSID REV. (forthcoming 2017).

[43] *Summary Records of the 16th Session*, [1964] Y.B. Int'l L. Comm'n 1, 271, para. 73, U.N. Doc. A/CN.4/SER.A/1964.

[44] *Id.* at 272, para. 81.

Protection of Literary and Artistic Works, which clearly prohibits modification with certain characteristics.[45]

The Draft Articles listed the three conditions of Article 41(1)(b) separately, with the terms of the present-day *chapeau* appearing third.[46] At the Vienna Conference, however, an amendment proposed jointly by Bulgaria, Romania, and Syria suggested shifting the third condition to the *chapeau* position, resulting in the final text of Article 41(1)(b).[47] Viewing the proposal as logical and having the "further merit of underlining the primacy of the text of the treaty," Mr. Bolintineanu for Romania submitted that "if the treaty prohibited such an *inter se* agreement, there was no occasion to examine the application of the other two requirements set forth in [the other two] sub-paragraphs."[48] Mr. Strezov for Bulgaria also submitted that express allowance of modification (under Article 41(1)(a)) and prohibition under the *chapeau* of Article 41(1)(b) together "state the two outside limits," while the two remaining sub-clauses "would define the conditions which the agreement must fulfil."[49] Commentaries have since affirmed that the *chapeau* concerns clear textual prohibitions.[50] Villiger concludes that such prohibition must be stated expressly, as implied prohibition may be derived from Article 41(1)(b)(ii).[51]

The express terms of ICSID Convention Article 53, which provides that ICSID awards "shall not be subject to any appeal or to any other remedy except those provided for in this Convention," appear to contain a rule from which *disputing parties* cannot depart, rather than one which *Contracting States* may not modify.[52] This finds support in the broader context of Chapter IV, Section 6 of the ICSID Convention, which takes pains in provisions such as Article 54 to clearly direct specific enforcement obligations to *Contracting*

---

[45] *See Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session including the Reports of the Commission to the General Assembly*, [1966] Y.B. Int´l L. Comm´n 1, 235, para. 2, U.N. Doc. A/CN.4/SER.A/Add.1.

[46] *See Summary Records of the 16th Session*, *supra* note 43, at 271, para. 73.

[47] U.N. Conference on the Law of Treaties, 1st Sess. 37th plen. mtg. at 205–06, U.N. Doc. A/CONF.39/11 (April 24, 1968).

[48] *Id*. para. 34,

[49] *Id*. at 206, para. 37.

[50] MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 534, para. 6-7 (2009); *see also* KERSTIN ODENDAHL, *Article 41, in* VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 719, 724, para. 13-14 (Oliver Dörr & Kirsten Schmalenbach eds., 2012); ANNE RIGAUX ET AL., *Article 41: Convention of 1969, in* THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 986, 994–95 (Olivier Corten & Pierre Klein eds., 2011).

[51] VILLIGER, *supra* note 50**,** at 534, para. 6–7.

[52] ICSID Convention, *supra* note 2, at art. 53. *See generally* Antonio R. Parra, *The Limits of Party Autonomy in Arbitration Proceedings under the ICSID Convention*, 10 ICC Int´l Court Arb. Bulletin 27 (1999).

States.[53] The same conclusion arises through comparison to ICSID Convention Article 27(1) ("No Contracting State shall give diplomatic protection . . .")—a prohibition clearly and specifically directed toward *Contracting States* rather than disputing parties.[54]

The foregoing confirms that the *chapeau* of VCLT Article 41(1)(b) is exclusively concerned with express prohibition in the treaty text, and that ICSID Convention Article 53 states no such prohibition. As initially canvassed in the report submitted by the Geneva Center for International Dispute Settlement to UNCITRAL and explored further below, neither of VCLT Article 41(1)(b)'s sub-clauses suggest that the ICSID Convention impliedly prohibits a modification establishing an appellate mechanism *inter se*.[55]

B. Implied Prohibition in the Treaty: Sub-Clauses (i) and (ii) of VCLT Article 41(1)(b)

In order to construe an implied prohibition of modification, the reader must interpret the treaty. However, as the objective of this interpretative task is not to determine the meaning of a treaty provision but rather to determine whether its modification is prohibited, this task must be guided by considerations beyond the general rule of interpretation (i.e., VCLT Articles 31–33). The conditions in Articles 41(1)(b)(i) and (ii) guide this interpretative task.

1. Sub-Clause (i)

Apart from express prohibition in the ICSID Convention, modification thereof is also prohibited if it may be inferred that such modification would affect the enjoyment by other ICSID Members of their rights under treaty or performance of their obligations.[56] This condition in VCLT Article 41(1)(b)(i) should be applied to the ICSID Convention in light of its status as a "reciprocal" treaty.[57] Unlike "absolute" treaties such as human rights conventions—wherein effectiveness relies upon Members' adherence to every provision—*inter se* modification of reciprocal treaties is presumed to not affect the rights and obligations of other Members.[58] Because the establishment of an

---

[53] *See* ICSID Convention, *supra* note 2, Chapter IV, Sec. 6.

[54] *See id*. art. 27(1).

[55] *See* KAUFMANN-KOHLER & POTESTÀ, *supra* note 33, at 84–85.

[56] *See* VCLT, *supra* note 3, art. 41(1)(b)(i).

[57] *See* RIGAUX ET AL., *supra* note 50, at 1003–04, para. 35–37.

[58] *Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi*, [2006] 157, U.N. Doc. A/CN.F/L.682; *see* ODENDAHL, *supra* note 50, at 725, para. 18; RIGAUX ET AL., *supra* note 50, at 1003–04, para. 35–37.

appellate mechanism by some ICSID Members would not impede other Members and nationals thereof from utilizing the existing ICSID annulment regime, such modification *inter se* would not prejudice those third states under VCLT Article 41(1)(b)(i).[59]

Pursuant to VCLT Article 34, a treaty establishing an appellate mechanism cannot itself impose burdens on third states.[60] Thus, the EU treaties discussed above (which purport to give rise to certain awards "under the ICSID Convention") are incapable of creating enforcement obligations for ICSID Members—a situation which would hold true even if the EU were itself an ICSID Member.

Nevertheless, it is important to note that the conclusion or exercise of these EU treaties (or future agreements including similar language) does not itself amount to a breach of obligations under the ICSID Convention. Given that the apparent third-state obligation concerns only enforcement of appellate mechanism awards, only the act of compelling third-state enforcement as if these were awards "under the ICSID Convention" could amount to such a breach. Of course, the fact that these treaties cannot directly create such an obligation means that they are not capable of giving rise to a breach vis-à-vis third-state ICSID Members. The inclusion of this apparently ineffectual language in the EU treaties is thus legally significant, only if it were so central to the conclusion of these treaties that its nullity renders the entirety of the treaties void ab initio—an inference unsupported by their terms and context.

2. Sub-Clause (ii)

Turning to VCLT Article 41(1)(b)(ii)—and recalling our above conclusion that the terms of ICSID Convention Article 53 do not prohibit treaty modification—we note that there is little basis to conclude that derogation from Article 53 is incompatible with the effective execution of the Convention's object and purpose.[61] Those who would look to ICSID Convention Article 27 to draw the opposite conclusion conflate restrictions on

---

[59] KAUFMANN-KOHLER & POTESTÀ, *supra* note 33, at 84, para. 241; VILLIGER, *supra* note 50, at 534–35, para. 8.

[60] *See* VCLT, *supra* note 3, art. 34.

[61] Gabriel Bottini, *Reform of the Investor-State Arbitration Regime: The Appeal Proposal*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 455, 458–59 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

Contracting States—as found in this provision—and restrictions on specific capacities as disputing parties, as discussed *supra* concerning Article 53.[62]

The truest reflection of the ICSID Convention's object and purpose for treaty modification purposes is Article 1(2)'s statement that the Convention serves to facilitate dispute settlement between investors and states in an international forum.[63] In this light, a treaty among some ICSID Members removing investment disputes to national courts could be viewed as regressive and incompatible with this object and purpose. The same could not be said of a treaty establishing an appellate mechanism, which maintains and arguably furthers the ICSID Convention's aim of establishing a neutral international dispute settlement mechanism. Looking beyond the EU treaties—and perhaps the appellate mechanism as well—this neutrality objective would occupy the heart of any multilateral, multi-stakeholder ISDS reform, such as under the auspices of UNCITRAL.[64]

CONCLUSION

While we concluded that superimposing an appellate mechanism onto the existing framework of ICSID arbitration is permitted under the law of treaties, it is worth considering whether the legal intricacies of modifying the ICSID Convention *inter se* is preferable to replacing the existing arbitration framework with a self-standing international court (and applying the more straightforward denunciation provision in ICSID Convention Article 71).[65] Given that either reform prospect might increase perceptions of ISDS neutrality—and noting that any envisaged international court model may include an appellate tier to increase perceptions of legal correctness and consistency—the difficulties of enforcing appellate mechanism awards "under the ICSID Convention" (as noted above regarding the EU treaties) are thrown into sharp relief.

The EU and other stakeholders in the ISDS system have shown a willingness to think boldly and act relatively quickly,[66] seeking to achieve

---

[62] *See* ICSID Convention, *supra* note 2, art. 27; *see, e.g.*, Calamita, *The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime*, *supra* note 42, at 611–12, n. 115.

[63] *See* ICSID Convention, *supra* note 2, art.1(2).

[64] *See* UNCITRAL, *supra* note 29.

[65] *See* ICSID Convention, *supra* note 2, art.71.

[66] *See, e.g.*, European Commission, *Annex to the Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes*, at 2–3, COM (2017) 493 final (Sept. 13, 2017), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2017:493:FIN&from=EN (formally advocating the establishment of a multilateral

systemic reforms in a piecemeal fashion that would take far longer through multilateral diplomacy. Yet the fluid nature and potential success of ongoing discussions concerning ISDS reform require early and sober analysis of constraints and possibilities under the VCLT—a bedrock of public international law. As with any expansive construction, the architects would do well to first conclude whether their plans stand on solid ground.

* * *

investment court and publishing draft negotiation directives for what seems to be the first time in the EU Commission's history).