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Christian Plewnia

The UNCITRAL Investor-State Dispute Settlement Reform: Implications for Transition Economies in Central Asia

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The UNCITRAL Investor-State Dispute Settlement Reform: Implications for Transition Economies in Central Asia

by

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A. Introduction

In 1904, *Sir Halford John Mackinder* wrote in his essay "The Geographical Pivot of History", that Central Asia (CA) represents the 'pivot' of world politics.[1] He argues that whatever nation controls this key region has the ability to become a dominant power in the world.[2] While today the theory seems to be an outdated narrative, it is still used to highlight the strategic magnitude of the region.[3] Since the collapse of the Soviet Union, CA is confronted with geopolitical competition over natural resources and the strategic position.[4] Various initiatives from Russia, the European Union, the United States, as well as China[5] might be indicators for a return of the "Great Game", as *Rudyard Kipling* referred to in his novel *Kim*.[6]

However, there seems to be a common trend that political influence is increasingly achieved by economic ambitions.[7] As a result, the inflow of foreign direct investment (FDI) in CA has grown significantly after the countries gained independence in the 1990s.[8] In addition, FDI is expected to increase in the future because the economic centre of gravity is continuously shifting towards Asia.[9] While CA countries managed to integrate into international investment regimes by signing numerous bilateral investment treaties (BITs) and becoming members of the New York Convention or the International Centre for Settlement of Investment Disputes (ICSID), the importance of effective investor-state dispute settlement (ISDS) mechanisms is likely to increase in the future.

In recent years, the ISDS system finds itself at a crossroads.[10] Since 2017, the United Nations Commission on International Trade Law (UNCITRAL) Working Group (WG) III is engaged in a reform process to address various concerns submitted by member states.[11] Until now, the engagement of CA countries has been rather marginal[12], contrary to the economic significance FDI has in the region.

Thus, this paper is taking the position of transition economies in CA and analyses the reform process to find answers to the following research questions:

1 *Mackinder*, The Geographical Journal 170 (1904), 298 (433).

2 *Knutsen*, The International History Review 36 (2014), 835 (843).

3 *Megoran*, The Geographical Journal 170 (2004), 347 (348).

4 Central Asia: Great Game or Graveyard?, available at: https://css.ethz.ch/en/services/digital-library/Art.s/article.html/102550/pdf (retrieved on 15. January 2020).

5 The countries are inter alia engaged in the region by the Commonwealth of Independent States and the Eurasian Economic Union (Russia), the *New Strategy on Central Asia* (EU), past plan for a *New Silk Road* (US), and the *Belt and Road Initiative* (China).

6 *Kipling*, Kim, 175.

7 *Gros*, Global Trends to 2035 Economy and Society, 44; The Past Decade and the Future of the Global Economy, available at: https://www.bbvaopenmind.com/en/articles/the-past-decade-and-the-future-of-the-global-economy/ (retrieved on 15. January 2020); *Wigell/Scholvin/Aaltola*, Geo-economics and Power Politics in the 21st Century: The Revival of Economic Statecraft, 17.

8 *Samruk-Kazyna*, Overview of investment attractiveness of Central Asian countries, 15.

9 *Abdimomunova/Boutenko/Chin/Nuriyev/Perapechka/Raji/Rueda-Sabater/Sokolova/Türpitz*, Investing in Central Asia: One region, many opportunities, 10.

10 *Schneidermann*, Loy. U. Chi. L.J. 49 (2017), 229 (232).

11 An Update on the ISDS Reform: the 37th Session of the UNCITRAL Working, Group III Investor-State Dispute Settlement Reform, available at: http://arbitrationblog.kluwerarbitration.com/2019/05/02/an-update-on-the-isds-reform-the-37th-session-of-the-uncitral-working-group-iii-investor-state-dispute-settlement-reform/ (retrieved on 12. December 2019).

12 Working Group III: Investor-State Dispute Settlement Reform, available at: https://uncitral.un.org/en/working_groups/3/investor-state (retrieved on 18. October 2019).

(i) Which concerns are particularly relevant for CA countries?

(ii) To which degree are reforms necessary, to meet the interests of CA countries?

To provide appropriate answers to the research questions, the paper is structured as follows. First, the article gives an introduction about the current ISDS regime in CA. Second, the UNCITRAL reform process is outlined by describing the main concerns as well as the respective proposals. Third, the article discusses implications for CA. Eventually, the conclusion will give a summary of the findings.

B. Legal framework and investment policies in Central Asia

An important pillar for attracting foreign capital is the ability to provide an effective legislative framework that guarantees the protection of investors' rights.[13] Various scholars argue that the main barriers of FDI in CA are the inadequate legal environment, an unfavourable institutional infrastructure and consequently the lack of governance and a rather high rate of corruption.[14] Although CA countries face similar challenges, they are characterised by diversified investment climates.[15] Since they gained independence, each state went through different reform processes on the national, bilateral, and multilateral level to attract higher and better quality FDI.

I. Multilateral level

As *Table 1* indicates, all nations seem to be well integrated in the most relevant institutions on a multilateral level. Besides Turkmenistan, all countries are part of the New York Convention, which is the legal basis for the recognition, and enforcement of foreign arbitral awards.[16] After the dissolution of the Soviet Union, Kyrgyzstan was the first CA country, which joined the World Trade Organisation (WTO).[17] In recent years, Kazakhstan and Tajikistan followed. Uzbekistan is currently in the accession process, while Turkmenistan is not a WTO member state. Furthermore, Kazakhstan, Uzbekistan and Turkmenistan are ICSID contracting states. Kyrgyzstan still needs to ratify the convention. Tajikistan has not become a signatory yet, but signed BITs that refer to ICSID Additional Facility Rules.[18]

13 *Howse*, IILJ Working Paper 1 (2017), 11; Howes notes that BITs support the development of state through incentivising foreign investment based on three premises (i) additional investment boosts economic growth and development, (ii) treaty protection will incentivise additional investment, (iii) treaty protection is cost-effective compared to other kinds of incentives a host state may have.

14 *Paswan*, India Quarterly 69 (2013), 13 (26); *Penev*, SEE Journal 2 (2007), 31 (38); UNCTAD, Investment Policy Review: Kyrgyzstan, 23; *Transparency International*, Corruption Perception Index, 3; In the 2019 corruption perception index published by Transparency International CA countries received rather low rankings. Out of 180 countries, Kazakhstan ranked at 113, Kyrgyzstan at 126, Tajikistan and Uzbekistan at 153, and Turkmenistan at 165.

15 *Abdimomunova/Boutenko/Chin/Nuriyev/Perapechka/Raji/Rueda-Sabater/Sokolova/Türpitz*, Investing in CA: One region, many opportunities, 15.

16 Contracting States, available at: http://www.newyorkconvention.org/countries (retrieved on 24. January 2020).

17 Members and Observers, available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (retrieved on 24. January 2020).

18 UNCTAD, Investment Policy Review: Tajikistan, 9.

	New York Convention	WTO member	ICSID Convention	Treaties with Investment Provisions (TIPs)
Kazakhstan	x	x	x	12
Kyrgyzstan	x	x	x*	9
Tajikistan	x	x	-	7
Turkmenistan	x	-	x	7
Uzbekistan	x	-**	x	5
*signed (not in force) **in accession process				

Table 1: Multilateral Investment Agreements in Central Asia

Own illustration based on data from the UNCTAD Investment Policy Hub.

In addition to the institutional affiliations, CA states signed several treaties that include investment provisions. For instance, all countries are signatories of the Energy Charter Treaty (ECT) and Kazakhstan, Kyrgyzstan and Tajikistan signed the Eurasian Investment Agreement with Russia and Belarus in 2008.[19]

II. Bilateral level

From an investor's perspective, developing countries indicate their disposition to protect the interest of foreign capital if they are actively engaged in BIT regime.[20] International investment agreements (IIAs) are considered as an essential tool to stimulate investment activities.[21] Since gaining independence, CA states have in total concluded 194 BITs. Especially, Uzbekistan (50) and Kazakhstan (47) have been active in providing legal protection to foreign investors due to IIAs. Tajikistan concluded BITs with 36 countries, Kyrgyzstan with 34, and Turkmenistan with 27. *Figure 1* illustrates the spatial distribution of CA BITs. The "spaghetti bowl" indicates that CA countries primarily concluded agreements within Eurasia. Especially, neighbouring superpowers like Russia and China as well as most of the European member states are engaged via IIAs in the region. Besides BITs with states from Central and Eastern Europe as well as from Southeast Asia, CA countries are less connected to developing economies in the global south, which is an indicator that CA countries are rather FDI recipients than suppliers.

19 International Investment Agreements Navigator, available at: https://investmentpolicy.unctad.org/international-investment-agreements/ (retrieved on 20. December 2019).

20 *Paswan*, India Quarterly 69 (2013), 13 (28).

21 OECD, OECD Investment Policy Reviews: Kazakhstan 2017, 92; *Puig/Shaffer*, AJIL 112 (2018), 361 (372).

Figure 1: BIT Spaghetti Bowl in Central Asia

Own illustration based on data from the UNCTAD Investment Policy Hub.

As *Figure 2* illustrates most of the investment treaties were signed in the 1990s. Thus, they could be categorised as first-generation BITs, which contain rather outdated dispute settlement chapters and considered as "toothless".[22] For example, IIAs in Kazakhstan are often missing specific language, which leaves room for interpretation in arbitral proceedings. Thus, chances are high that some provisions are not interpreted in the actual intent of governments.[23]

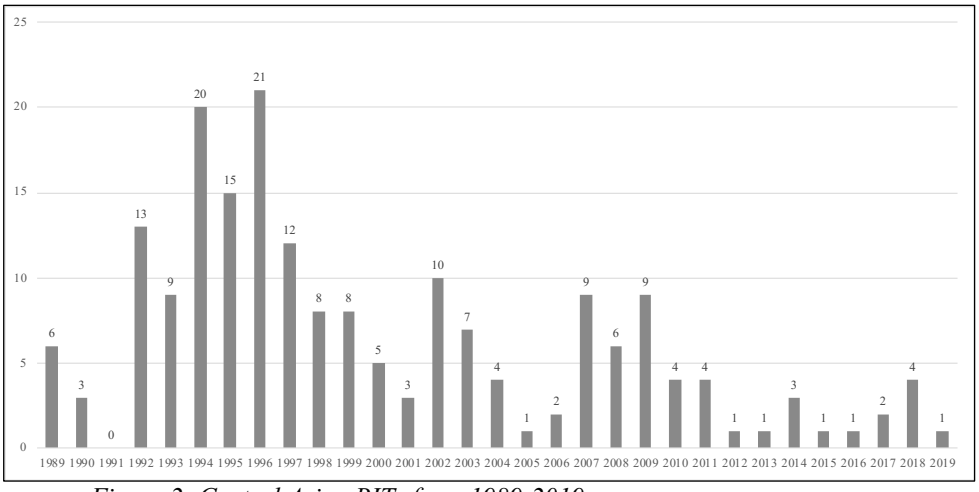

Figure 2: Central Asian BITs from 1989-2019

Own illustration based on data from the UNCTAD Investment Policy Hub.

In addition, IIAs often do not provide specific time limits and are not explicit about the appointment of arbitrators.[24] However, the preparation of a model investment treaty

22 ISDS As a Means of Addressing Challenges for the BRI in Central Asia, available at: http://arbitrationblog.kluwerarbitration.com/2019/07/05/isds-as-a-means-of-addressing-challenges-for-the-bri-in-central-asia/ (retrieved on 23 October 2010).

23 OECD, OECD Investment Policy Reviews: Kazakhstan 2017, 118.

24 *Ibid.*, 127.

indicates that Kazakhstan aims to improve treaty language and is trying to adapt investment regulations to current developments.[25]

Kyrgyz BITs facing similar issues. Besides providing comprehensive protection for investors, the treaties often lack crucial definitions of legal terms like "fair and equitable treatment" and "indirect expropriation". Especially, latter seems to be symptomatic for CA IIAs.[26] Furthermore, BITs contain umbrella clauses, which expand the scope of treaties and grant investors additional non-treaty rights. Automatic renewals and sunset clauses, where provisions succeed the termination of treaties for a certain period, have the potential to increase inconsistencies in the interpretation of IIAs.[27]

BITs concluded by Tajikistan contain the most common clauses about expropriation, most-favoured nation and national treatment, as well as fair and equitable treatment. However, the BITs seem outdated without limiting the definition of legal entities and unclear provisions about expropriation. Additionally, there are almost no limits to the scope of ISDS, for example in the public policy area.[28]

Almost all BITs concluded in CA contain ISDS provisions.[29] 86% of BITs contain clauses referring to ICSID procedures. UNCITRAL arbitration is included in 74% of treaties. Only half (52%) of BITs provide the option to bring the case in front of domestic courts. Especially, IIAs from the 1990s do not contain such provisions. Finally, four BITs include obligations for the exhaustion of local remedies[30] and seven contain so-called "Fork in the Road" clauses, whereby parties are not permitted to change the forum if they agreed on a dispute mechanism already.[31]

III. National level

On the domestic level, CA countries are primarily concerned with the realisation of policies that promote economic development and support administrative institutions rather than focusing on areas related to the rule of law.[32] In terms of FDI, assessments concluded that reform policies have high standards. Nevertheless, the implementation of various investment promotion activities is considered as rather poor.[33]

The Law on Investments (2003), the Customs Code (2003) and the Tax Code (2008) are the main sources of domestic law related to FDI in Kazakhstan. In almost all sectors foreign investor are granted the same rights as domestic investors.[34] However, foreign investors are restricted to own more that 49% in new oil exploration and production, and 20% in media and telecommunication companies respectively.[35] In terms of dispute settlement, Art. 9 (1) Law on Investments states, that disputes should be resolved through negotiation or other settlement procedures agreed by the parties. If the dispute cannot be

25 *Ibid.*, 16.
26 See Appendix.
27 UNCTAD, Investment Policy Review: Kyrgyzstan, 8.
28 UNCTAD, Investment Policy Review: Tajikistan, 9.
29 An exception is the Egypt – Uzbekistan BIT (1992) which does not contain any provisions for the settlement of investment disputes.
30 A detailed overview about the features of Central Asian BITs can be found in the Appendix.
31 UNCTAD, UNCTAD IIA Mapping Project, 22.
32 *Efegil*, The Turkish Yearbook 38 (2007), 115 (117).
33 OECD, Competitiveness and Private Sector Development: Central Asia 2011, 26.
34 OECD, OECD Investment Policy Reviews: Kazakhstan 2017, 62.
35 OECD, Competitiveness and Private Sector Development: Central Asia 2011, 131.

settled, Art. 9 (2) provides, that parties should refer to provisions in international agreements, to domestic courts, or to international arbitration. In addition, Art. 9 (3) Law on Investments stipulates that disputes, which are not related to investments, are subject to the domestic law of Kazakhstan. In addition to the Law on Investments, the Kazakh government implemented the *National Investment Strategy 2018-2022*, which aims to attract investment in non-primary sectors. Special emphasis was laid on the protection of foreign investors' rights. Especially, the role of investment ombudsmen[36] is promoted as well as institutional arbitration within the framework of the *Astana International Financial Centre*.[37] Another important institution is the state company *Kazakh Invest*. The organisation was established by the Kazakh government to stimulate FDI inflows by offering a "single window" into the region. This includes assisting the investment process, providing relevant information for investment opportunities and acting as a networking platform.[38] Furthermore, in 2019 the *Coordination Council for Attracting Foreign Investment* has been created to manifest the focus on foreign investment as an important pillar of economic growth in Kazakhstan.[39]

The Kyrgyz Republic went through the most liberal reform process in CA.[40] Especially, the Law on Investments provides key provisions. In general, foreign investors are not discriminated from certain sectors. However, in practice, the application of these provisions remains vague and not transparent. Foreign investors need to register for work permits and must participate in further screening procedures.[41] However, the definition of FDI can differ among laws and regulations. Depending on the applied provision, the same subject might be referred to as foreign legal entity or as local investor.[42] In terms of dispute settlement, consultation and negotiation are prioritised. Nevertheless, if such procedures fail to resolve the dispute within three months, Art. 18 Law on Investments states that parties have the choice to refer to domestic courts or apply arbitration procedures in compliance with ICSID or UNCITRAL rules. In 2014, the Kyrgyz government established the *Centre of Legal Representation of the Government*. The institution is responsible for the coordination of disputes brought against the government and collaborates with different national institutions to represent the interest of the Kyrgyz Republic more appropriately.[43] Until now, investment promotion programmes are rather marginal in Kyrgyzstan.[44] One example is the *Investment Promotion and Protection Agency* of the Kyrgyz Republic. The initiative offers similar services like *Kazakh Invest* and provides a one-stop-shop for foreign investors.[45]

36 The role of the investment ombudsman is regulated in Art. 12 (1) Law on Investment of Kazakhstan, which regulates that the ombudsman is an intermediary between investors and the state, who inter alia raises issues to the government and recommends improvements for the legislation.

37 National Investment Strategy: How will investments be increased (Overview), available at: https://strategy2050.kz/en/news/47431/ (retrieved on 28. January 2020).

38 How we help, available at: <https://invest.gov.kz/about-us/how-we-help/> (retrieved on 28. January 2020).

39 EBRD, Transition Report 2017-18 Central Asia, 3.

40 *Pomfret*, in: Roland (Ed.), Economies in Transition: The Long-Run View, 410.

41 OECD, Competitiveness and Private Sector Development: Central Asia 2011, 131.

42 UNCTAD, Investment Policy Review: Kyrgyzstan, 6. According to Art. 1 (2) (a) Law on Investments foreign ownership applies when an investor holds at least 30% of stocks of a legal entity. According to Art. 1 (10) (e) Land Code the threshold is defined at 20%.

43 *Ibid*., 7.

44 OECD, Competitiveness and Private Sector Development: Central Asia 2011, 138.

45 About IPPA, available at: https://invest.gov.kg/about-ippa/about/ (retrieved on 28. January 2020).

After becoming independent, Tajikistan struggled the most to implement liberal policies.[46] On a national level the primary code providing investment regulations is the Law on Investment (2007) and the Law on Investment Agreements (2013).[47] Art. 4 Law on Investment provides a non-discrimination clause that guarantees foreign investors the same rights as domestic investors. According to Art. 22 (1) Law on Investment, disputes are settled depending on the contractual provisions concluded between the parties. If no choice has been made, parties should use consultation to settle the dispute. If consultations fail, parties decide by consent for domestic or international arbitration courts. Tajik investment law does not include the exhaustion of local remedies neither is there any provision that prioritises domestic procedures.[48]

Turkmenistan is seen as the most autocratic country in the region.[49] The economy is characterised as market-oriented, but with significant elements of central planning.[50] According to the Law on Investment (1993), foreign capital is restricted in some sectors and strategic projects. Personal contacts to government officials seem to be beneficial for foreign and domestic investors.[51] Major provisions on foreign investments are regulated in the Law on Foreign Investment (2008). According to Art. 32 Law on Foreign Investment, disputes are either subject to domestic courts or to arbitration if agreed by the parties. However, international treaties with dispute resolutions clauses prevail individual agreements.

After gaining independence, Uzbekistan adapted market-economy principles. Nonetheless, governmental restrictions were key in the development process and economic reforms have been implemented rather carefully.[52] Thus, foreign investors face restrictions in various industries.[53] Key provisions are regulated in the Law on Foreign Investment and the Law on Guarantees and Measures of Protection of Foreign Investors' Rights. Art. 10 Law on Guarantees and Measures of Protection of Foreign Investors' Rights stipulates that disputes, which are directly or indirectly connected to foreign investment, are subject to consultation if agreed upon by the parties. If no solution can be found, disputes are subject to national courts or arbitration provided in international investment agreements. In 2018, the Uzbek government established the *Tashkent International Arbitration Centre* to further improve the investment climate in the country.[54]

IV. Case Law

Case law is an essential indicator to reflect the implementation of ISDS mechanisms. It illustrates how actively and successfully governments can be challenged by the respective

46 *Pomfret*, in: Roland (Ed.), Economies in Transition: The Long-Run View, 412.

47 UNCTAD, Investment Policy Review: Tajikistan, 6.

48 *Ibid.*, 8.

49 *Pomfret*, in: Roland (Ed.), Economies in Transition: The Long-Run View, 407.

50 *Ibid.*, 413.

51 OECD, Competitiveness and Private Sector Development: Central Asia 2011, 132.

52 *Pomfret*, in: Roland (Ed.), Economies in Transition: The Long-Run View, 414.

53 OECD, Competitiveness and Private Sector Development: Central Asia 2011, 132.

54 Establishment of the Tashkent International Arbitration Centre (TIAC) under the Chamber of Commerce and Industry of Uzbekistan, available at: https://www.dentons.com/en/insights/alerts/2018/november/14/establishment-of-the-tashkent-international-arbitration-center (retrieved on 31. January 2020).

investment regimes.[55] In total, CA countries participated in 62 ISDS procedures.[56] In 51 cases (82%) CA states had to act as respondent. Only in eleven cases investors from CA countries were claimants. However, in ten of these disputes the other party was also from CA. The outcomes of the cases seem to be balanced. 15 cases were decided in favour of the investor, while in eleven cases states succeeded. In nine cases settlements have been reached and two cases were decided in favour of neither party. The majority of cases (22) is still pending. As *Figure 3* illustrates, nine cases are pending for five years or longer.

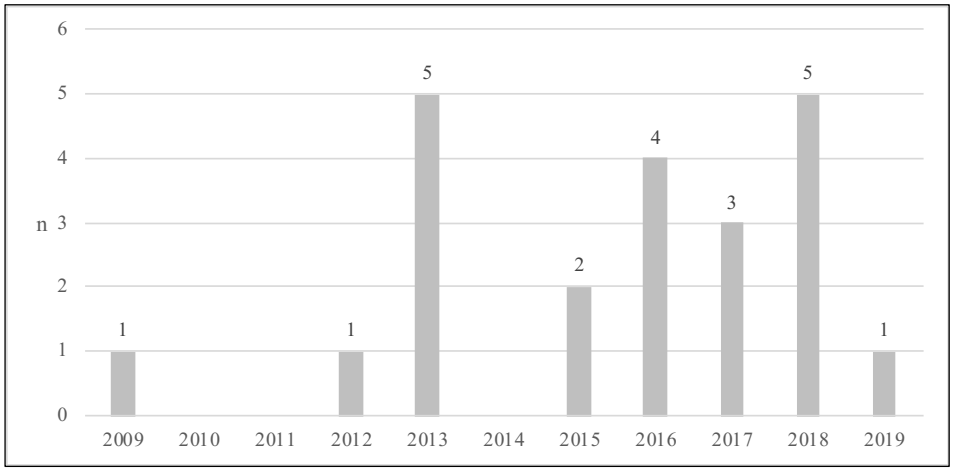

Figure 3: Pending ISDS cases in Central Asia

Own illustration based on data from the UNCTAD Investment Policy Hub.

Figure 4 gives an overview on the sectoral distribution of the cases. Similar to the amount of FDI inflows,[57] disputes primarily occurred in the natural resources and energy sector (25). A number of cases have been conducted in the construction and real estate industry (17) as well as in the banking and finance sector (8). A minority of disputes took place in agriculture (4), telecommunication (3), and tourism (2).

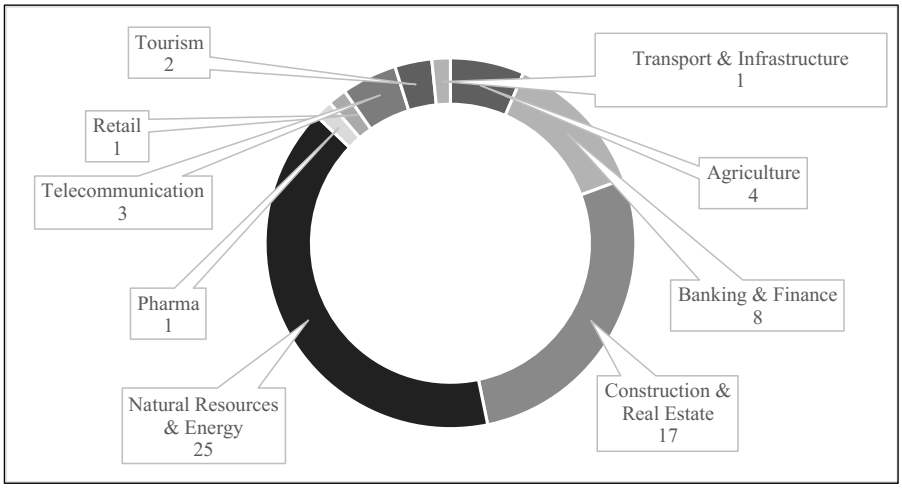

Figure 4: Sectoral overview of ISDS cases in Central Asia

Own illustration based on data from the UNCTAD Investment Policy Hub.

55 OECD, OECD Investment Policy Reviews: Kazakhstan 2017, 129.

56 Kazakhstan (24), Kyrgyzstan (14), Turkmenistan (13), Uzbekistan (9), Tajikistan (2). Cases were counted twice, if both parties were from CA states.

57 ADBI, Connecting Central Asia with Economic Centers, 47

Looking at the main matters in dispute, alleged expropriation has been in the centre of arbitral proceedings (22). In addition, in 17 disputes claims were raised about the alleged termination of contracts, especially in terms of licenses for the exploration of oil and gas. In 13 cases, other alleged unlawful measures, like unjustified criminal investigations, wrongful assessment of taxes, or general misappropriation, were addressed. Finally, ten proceedings were based on alleged contract violations mostly non-payments or granting certain licenses.

C. The UNCITRAL ISDS reform process

In 2017, UNCITRAL WG III received a mandate to reform ISDS procedures.[58] The WG is composed of 60 member states with voting rights and 103 non-voting observers, including 40 states, two state entities, six inter-governmental organisations, as well as 55 non-governmental organisations.[59] The main objectives of the reform process are to

> "(i) enhance the legitimacy of the ISDS system, (ii) enhance the contracting parties' control over the interpretation of their treaties, and (iii) streamline the process and make it more efficient".[60]

The main challenge of the WG is to find a balance in already on-going unilateral, bilateral and regional reform approaches and transform them into multilateral consent.[61] To achieve these goals, the reform process is structured into three stages. First, the WG identifies current issues in the ISDS system. Second, they assess if reforms are desirable for individual concerns. Finally, the WG develops relevant solutions for areas where reforms are desirable.[62] The current status of the reform process is illustrated in *Table 2*.

58 An Update on the ISDS Reform: the 37th Session of the UNCITRAL Working Group III Investor-State Dispute Settlement Reform, available at: http://arbitrationblog.kluwerarbitration.com/2019/05/02/an-update-on-the-isds-reform-the-37th-session-of-the-uncitral-working-group-iii-investor-state-dispute-settlement-reform/ (retrieved on 12. December 2019).

59 *McBrayer*, CIArb at UNCITRAL Working Group III on ISDS Reform: Efficiency, Decisions, and Decision Makers, 2.

60 UNCTAD, World Investment Report 2015: Reforming International Investment Governance, 148.

61 *Alschner*, AJIL 112 (2018), 237 (242).

62 UNCITRAL, A/CN.9/930/Rev.1, para. 6.

Date	Session	Place	Stage	Notes
27. Nov. - 1. Dec. 2017	34th	Vienna	I	Procedural Issues, esp. costs and duration Transparency Other procedural issues (early dismissal mechanism, counterclaims) Outcomes (coherence, consistency
23. Apr. - 27. Apr. 2018	35th	New York	I	Coherence and consistency Appointment of arbitrators and decision makers
29. Oct. - 2. Nov. 2018	36th	Vienna	II	Desirability for lack of consistency, coherence, predictability and correctness Desirability for appointment of arbitrators and decision makers Desirability for cost and duration
1. Apr. - 5. Apr. 2019	37th	New York	I, II	Desirability for third-party funding Identification of additional concerns Proposal for future workplan
14. Oct. - 18. Oct. 2019	38th	Vienna	III	Establishment of an advisory centre Implementing a Code of conduct Solutions for third-party funding
20. Jan. - 24. Jan. 2020	38th (resumed)	Vienna	III	Establishment of an appellate body or a standing multilateral investment court (enforcement, financing and appointment of arbitrators

Table 2: UNCITRAL Working Group III ISDS reform sessions

Own illustration based on data available at: https://uncitral.un.org/en/comm/wg/working_group_III (retrieved on: 18. October 2019).

I. Concerns regarding the current ISDS system

Many scholars and practitioners see the current ISDS system in a legitimacy crisis.[63] This crisis can be assessed from two different perspectives. Based on the idea that FDI is under constant threat by state interventions, in particular in long term capital positions, [64] investors are in a disadvantaged position compared to the host states. Thus, ISDS might increase the attractiveness of host states with rather unfavourable legal and political environments.[65] On the contrary, states might fear a loss of sovereignty, because international investors could use international arbitration to intervene in domestic legislation.[66] As a consequence, some states either withdrew individual ISDS clauses, threatened to leave, or left the ISDS system completely.[67] No matter which side is perceived, the elimination of

[63] *Arcuri/Violi*, Diritti umani e diritto internazionale 2019, Forthcoming, 1; *Krajewski*, in: Ludwigs/Remien (Ed.), Investitionsschutz, Schiedsgerichtsbarkeit und Rechtsstaat in der EU, 115; *Langford/Behn/Lie*, JIEL 20 (2017), 301 (305); *Schill*, Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward, 2; *Schneidermann*, Loy. U. Chi. L.J. 49 (2017), 229 (232); *Van Harten/Kelsey/Schneidermann*, All Papers 328 (2019), 1 (15).

[64] *Puig/Shaffer*, AJIL 112 (2018), 361 (369); *Vernon*, Foreign Aff. 47 (1968), 120 (120); *Woodhouse*, N.Y.U. Int'l L. & Pol. 38 (2006), 121 (123).

[65] *Puig/Strezhnev*, EJIL 28 (2017), 731 (736).

[66] *Van Harten/Kelsey/Schneidermann*, All Papers 328 (2019), 1 (10).

[67] *Saha*, Legal Issues J. 4 (2016), 39 (41); *Schill*, Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward, 662; *Vincentelli*, The Uncertain Future of ICSID in Latin America, 454.

those power imbalances seems to be the central approach to restore legitimacy in the system.[68] In stage one, the UNCITRAL WG categorised procedural issues into four general categories which are discussed in the following subparagraphs.

1. Consistency, coherence, predictability, and correctness of arbitral awards

A central concern that has been identified by the UNCITRAL WG III are issues related to consistency, coherence, predictability, and correctness of arbitral awards. The ad-hoc nature of arbitral proceedings as well as the fragmentation of protection standards in investment treaties result in varying interpretations by arbitral tribunals.[69] Hence, uncertainty within the ISDS system has increased in recent years.[70] In addition, the principle of *stare decisis* is not mandatory in investment arbitration, which means that tribunals are not obliged to consider previous decisions.[71] While a stronger consideration of prior rulings might increase the predictability in the system, WG III found that uniformity of awards should not be an objective of the reform process.[72] Depending on the evidence and facts of individual cases, interpretations can differ while provisions are applied correctly.[73] According to Art. 31 (1) Vienna Convention on the Law of Treaties, tribunals are expected to interpret similar provisions distinctively depending on the initial intent of the parties. Consequently, WG III agreed that only inconsistency in the interpretation of a provision in a single treaty should be perceived as a concern and not the inconsistent interpretation of similar provisions in different treaties.[74] This includes instances that are identical in terms of facts, parties, treaty provisions and applicable arbitration rules but ultimately lead to different outcomes.[75]

Inconsistent application of international rules on treaty interpretation and customary international law also raised concerns.[76] Examples for inconsistent arbitral awards range from the application of most-favoured nation (MFN) clauses, divergences in the scope of umbrella clauses, as well as varying definitions of terms like "investment" and "expropriation".[77] Inconsistencies in the application of MFN clauses are based on the inability to decide on the "scope, extent and requirement of application of the rule."[78] For instance, the tribunal in the *Maffezini* case came to the conclusion that a party could rely on a more favourable dispute resolution provision from another BIT, reducing the waiting period to submit a case to international arbitration from 18 to six months.[79] In subsequent tribunals, arbitrators chose to either adapt or reject the approach. For instance, the tribunal in the

68 *Puig/Strezhnev*, EJIL 28 (2017), 731 (761); *Saha*, Legal Issues J. 4 (2016), 39 (40); *Schill*, Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward, 2.

69 *Schill*, Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward, 2; UNCITRAL, A/CN.9/WG.III/WP.142, para. 35.

70 UNCITRAL, A/CN.9/WG.III/WP.142, para. 9.

71 *Ibid.*, para. 37.

72 *Ibid.*, para. 41.

73 UNCITRAL, A/CN.9/935, para. 21.

74 UNCITRAL, A/CN.9/930/Add.1/Rev.1, para. 26.

75 *Ibid.*, para. 14.

76 *Ibid.*, para. 13.

77 *Pirbhai*, GroJIL 6 (2018), 286 (287); UNCITRAL, A/CN.9/935, para. 31.

78 *Pirbhai*, GroJIL 6 (2018), 286 (290).

79 ICSID, *Emilio Agustin Maffezini v. The Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction on 25. January 2000, ARB/97/7, para. 39.

Impregilo case essentially decided to adapt the broad scope of the MFN clause.[80] However, one arbitrator explicitly disagreed with the decision, stating "an MFN clause can only concern the rights that an investor can enjoy, it cannot modify the fundamental conditions for the enjoyment of such rights".[81] In other cases, the approach was even expanded. The tribunal in the *Rosinvest* case allowed the investor to import access to arbitration from another BIT.[82] On the contrary, the tribunal in the *Plama* case rejected access to dispute resolution mechanisms from other BITs based on MFN clauses.[83] A similar situation emerges in the interpretation of umbrella clauses. While some tribunals restrict the scope of umbrella clauses,[84] others broadly apply them without any conditions.[85]

These examples only represent a small glimpse of widespread inconsistency issues in ISDS.[86] WG III noticed that the current system offers only limited answers to address the mentioned flaws.[87] Art. 52 ICSID Convention provides the possibility for annulment of an award. However, the scope of the mechanism seems to be rather limited.[88] An example for this is the *CMS Gas Transmission Company v. Argentina* case. Argentina requested annulment of the award, because it believed that the tribunal manifestly exceeded its power and failed to state reason.[89] Although the Annulment Committee outlined that, the tribunal had made "manifest errors of law" and that it "suffered from lacunae and elisions", it concluded that, because of its limited jurisdiction, it was not in the position to annul the award.[90] The inability to address procedural flaws and the lack of an efficient appeal mechanism contribute to the decline of confidence in the system.[91]

In general, a more consistent system would not only restore legitimacy and credibility of the ISDS system, but also would promote the rule of law and enhance the investment climate as well as the public opinion about ISDS in general.[92] Additionally, predictive interpretation of treaty provisions would improve the domestic legislative environment of

80 ICSID, *Impregilo S.p.A. v. Argentine Republic*, Award on 21 June 2011, ARB/07/17, para. 99.

81 ICSID, *Impregilo S.p.A. v. Argentine Republic*, Dissenting Opinion of Professor Brigitte Stern on 21 June 2011, ARB/07/17, para. 47.

82 SCC, *RosInvestCo UK Ltd. v. The Russian Federation*, Award on Jurisdiction in October 2007, V/079/2005, para. 75.

83 ICSID, *Plama Consortium Limited v. Republic of Bulgaria*, Decision on Jurisdiction on 08. February 2005, ARB/03/24, para. 184.

84 ICSID, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision of the Tribunal on Objections to Jurisdiction on 06. August 2003, ARB/01/13; ICSID, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction on 29. January 2004, ARB/02/6.

85 ICSID, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, Award on 10. February 2012, ARB/07/29; ICSID, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. The Republic of Argentina*, Award on 11. June 2012, ARB/03/23.

86 UNCITRAL, A/CN.9/WG.III/WP.150 para. 16-18 (For further examples for inconsistencies in the interpretation of protections standards, jurisdiction and admissibility, as well as procedural inconsistencies).

87 UNCTIRAL, A/CN.9/WG.III/WP.150, para. 21.

88 *Pirbhai*, GroJIL 6 (2018), 286 (292).

89 ICSID, *CMS Gas Transmission Company v. The Republic of Argentina*, Decision on the Application for Annulment of the Argentine Republic on 12. July 2007, ARB/01/8, para. 42

90 *Ibid*., para. 158.

91 *Pirbhai*, GroJIL 6 (2018), 286 (293); *Puig/Shaffer*, AJIL 112 (2018), 361 (370); *Schill*, Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward, 3.

92 *Gaukrodger/Gordon*, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, 58; UNCITRAL, A/CN.9/930/Add.1/Rev.1, para. 11; UNCITRAL, A/CN.9/935, para. 35.

states, who often have difficulties to assess if new regulation might interfere with investment treaty obligations, which eventually lead to regulatory chill.[93] For investors more predictability translates into a better calculation of risks and hence increases investment activities in general.[94]

2. Selection and appointment of arbitrators and decision-makers

Party-appointment of arbitrators is a key procedural feature of investment dispute mechanisms.[95] Statistics indicate that the disputing parties appoint 84% of arbitrators in investment disputes.[96] By being able to appoint decision-makers, parties are provided with a certain flexibility and select arbitrators based on their experience, qualifications and specialisations, as well as their reputation and availability.[97] However, in recent years the practice has faced broad criticism.[98] WG III outlined concerns about the independence and impartiality, repeated appointment of arbitrators and lack of transparency in the selection process.[99]

Impartiality describes judgements, which are not influenced from external factors, which are not deriving from the facts and evidence of the respective case itself.[100] This would especially hold true if arbitrators are pre-judging certain aspects.[101] On the downside, independence is described as an appropriate distance between arbitrators and parties, especially, when it comes to business, financial, or other personal relationships either individually or institutionally.[102] Independence and impartiality are two fundamental features that can guarantee fairness and due process of the ISDS system.[103]

3. Lack of diversity

Reasons for lack of impartiality and independence are manifold. One issue that was raised during the WG III sessions is the lack of diversity among arbitrators. Based on ICSID statistics in 68% of registered cases under the ICSID Convention and Additional Facility Rules, decision-makers were from Western Europe or North America.[104] Related to that, arbitrators from developing countries seem to be underrepresented.[105] Frameworks

93 UNCITRAL, A/CN.9/930/Add.1/Rev.1, para. 15; UNCITRAL, A/CN.9/935, para. 36.
94 UNCITRAL, A/CN.9/935, para. 37.
95 UNCITRAL, A/CN.9/WG.III/WP.142, para. 43
96 UNCITRAL, A/CN.9/WG.III/WP.146, para. 11.
97 UNCITRAL, A/CN.9/935, para. 51.
98 *Kaufmann-Kohler/Potestà*, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, para. 173.
99 UNCITRAL, A/CN.9/WG.III/WP.142, para. 44.
100 *Kaufmann-Kohler/Potestà*, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, para. 69
101 UNCITRAL, A/CN.9/WG.III/WP.151, para. 11.
102 *Kaufmann-Kohler/Potestà*, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, 69; A/CN.9/WG.III/WP.151 para. 11, 14.
103 UNCITRAL, A/CN.9/964, para. 67.
104 ICSID, The ICSID Caseload – Statistics Issue 2020-1, 17.
105 UNCITRAL, A/CN.9/WG.III/WP.152, para. 26.

like the WTO DSU demand a broad geographical representation of its members.[106] Although gender diversity is considered to be improving in recent years,[107] less than 10% of decision-makers in ISDS have been female.[108] A pioneer for greater gender balance is the ICC. According to Art. 36 (8) (a) (iii) ICC Statute, male and female judges should be fairly represented. Consequently, six out of 18 judges at the ICC are female.[109] In terms of age diversity, opinions vary. Some argue that younger arbitrators are more motivated to make a name for themselves and because of that perform better in arbitration. Others consider experience, especially in investment arbitration, as essential and hence do not believe that younger generations necessarily improve the quality of decision-making.[110] Diversity among arbitrators can increase the quality of the decision-making process by considering a broader range of aspects.[111] Moreover, diversity also benefits the legitimacy of ISDS by providing a more balanced representation and resolving conflicts of interests.[112] Especially, the geographic distributions of arbitrators seems to contradict with the origin of respondent states.[113] Missing representation of arbitrators from certain regions could have negative effects on retracing issues of developing countries and providing sufficient expertise on specific national laws.[114]

4. Repeat appointment

Related to the lack of diversity, the frequent appointment from a limited number of arbitrators was identified as a major concern.[115] Research from a sample of 263 ICSID disputes shows that 12 arbitrators have been appointed in 60% of the analysed cases.[116] Based on past proceedings, arbitrators are repeatedly appointed depending on their attitude towards investors and states, or when it comes to certain legal issues.[117] Because of that, the level of polarisation in tribunals is growing, which could lead to ambiguity in the ISDS system.[118] In addition, recurring appointments makes it more difficult for aspiring arbitrators from various backgrounds to be nominated. Nevertheless, repeat appointment

[106] According to Art. 17 (3) WTO DSU members of the Appellate Body should broadly represent WTO members.

[107] *Friedland/Brekoulakis*, 2018 International Arbitration Survey: The Evolution of International Arbitration, 18.

[108] *Kaufmann-Kohler/Potestà*, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, para. 61; *Puig/Strezhnev*, EJIL 28 (2017), 731 (754); UNCITRAL, A/CN.9/WG.III/WP.152, para. 24.

[109] Current Judges, available at: https://www.icc-cpi.int/bios-2 (retrieved on 02. March 2020).

[110] *Friedland/Brekoulakis*, 2018 International Arbitration Survey: The Evolution of International Arbitration, 17.

[111] *Kaufmann-Kohler/Potestà*, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, para. 27-28.

[112] *Kaufmann-Kohler/Potestà*, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, para. 27, 50; UNCITRAL, A/CN.9/WG.III/WP.152, para. 23.

[113] *Gaukrodger/Gordon*, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, 44; UNCITRAL, A/CN.9/WG.III/WP.180, para. 14.

[114] UNCITRAL, A/CN.9/935, para. 70; UNCITRAL, A/CN.9/964, para. 92.

[115] UNCITRAL, A/CN.9/935, para. 73.

[116] *Gaukrodger/Gordon*, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, 45.

[117] *McBrayer*, CIArb at UNCITRAL Working Group III on ISDS Reform: Efficiency, Decisions, and Decision Makers,19; UNCITRAL, A/CN.9/WG.III/WP.151, para. 22.

[118] UNCITRAL, A/CN.9/935, para. 54.

in itself does not always lead to a lack of independence. In *Tidewater Inc. and others v. Venezuela,* members of the tribunal negated the assumption that numerous appointments could influence independence.[119] In the *Opic Karimum Corporation v. Venezuela* case, decision-makers stated that previous appointments could be an indicator for lack of independence, but the respective circumstances of the challenge need to be considered in detail to provide a conclusion.[120] The decision is reflecting the IBA Guidelines, which specify that doubts should arise if arbitrators acted as counsel or as an affiliate to one of the parties within three years before the case.[121]

5. Double-hatting

Further concerns were raised related to the practice of double-hatting. Also paraphrased as 'revolving door' in arbitration, double-hatting refers to individuals, who play various roles within the ISDS system whether it be as arbitrators, counsels, experts, or as tribunal secretaries.[122] While empirical research confirms the phenomenon,[123] double-hatting has the potential to provoke conflict of interests and pose threats for the overall legitimacy of the system, especially, when individuals are appointed in parallel proceedings.[124] On the contrary, future arbitrators get the opportunity to gain valuable experience by acting as counsel or secretary in arbitral proceedings.[125] Art. 8 (1) WTO DSU even welcomes prior experience as a counsel or representative of a contracting party, when it comes to the assembly of dispute settlement panels. The ICSID Convention, UNCITRAL Arbitration Rules as well as the IBA guidelines do not contain provisions that prohibit double-hatting either.[126] Permanent judicial institutions are clearer in restricting the confusion of roles. Art. 16 (1) and 17 (1) ICJ Statute prohibit judges to engage in administrative or political functions or act as counsel or in similar roles. According to Art. 40 (3) ICC Statute judges are not allowed to serve "in any other occupation of a professional nature". Until now, there is only one case, where double-hatting lead, at least indirectly, to the disqualification of an arbitrator. In *Telekom Malaysia Berhad v. Ghana* it was ordered that the arbitrator appointed by the claimant had to choose between his position in the tribunal and the role as counsel in a parallel ICSID annulment proceeding. Consequently, the arbitrator withdrew from his role as counsel, although the court did not identify significant bias.[127]

119 ICSID, *Tidewater Inc. and others v. Bolivarian Republic of Venezuela*, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator on 23. December 2010, ARB/10/5, para. 64; para.

120 ICSID, *Opic Karimum Corporation v. Bolivarian Republic of Venezuela*, Decision on the Proposal to Disqualify Professor Philippe Sands on 05. May 2011, ARB/10/14, para. 47.

121 IBA, IBA Guidelines on Conflicts of Interest in International Arbitration (Orange List), para. 3.1.1.

122 *Langford/Behn/Lie*, JIEL 20 (2017), 301 (301).

123 *Ibid.,* 328. From a database of 1039 investment arbitration cases and 3910 involved individuals, Langford et al. concluded that there is a small but significant group of influential and powerful individuals, who are rather extensively involved in double-hatting.

124 *McBrayer*, CIArb at UNCITRAL Working Group III on ISDS Reform: Efficiency, Decisions, and Decision Makers, 19; UNCITRAL, A/CN.9/935, para. 78.; UNCITRAL, A/CN.9/WG.III/WP.156, para. 14.

125 UNCITRAL, A/CN.9/935, para. 81.

126 UNCITRAL, A/CN.9/WG.III/WP.151, para. 29.

127 *Langford/Behn/Lie*, JIEL 20 (2017), 301 (324).

Besides broad criticism, it was also noted that potential solutions should not lead to a politicisation of ISDS and hence nullify a key advantage of the system.[128] Reforms should be carefully balanced to avoid a decrease in the quality of arbitrators.[129]

6. Costs and duration of ISDS

The broadest concerns towards arbitration are costly and lengthy procedures, which provoke practical challenges for respondent states and claimant investors.[130]

a) Costs

According to a survey conducted by *Queen Mary / White & Case* within the international arbitration community, respondents considered costs as the most unfavourable element in international arbitration.[131] On average, financial expenses amount to US$8 million per investment dispute and increased up to US$30 million in certain proceedings.[132] Around 90% of costs are connected to legal fees.[133] Between 2013 and 2017 tribunal costs increased by almost 50 %.[134] Especially, for developing countries and small and medium-sized enterprises (SMEs) high costs have the potential to prevent access to the system.[135] High costs also discourage claimants to pursue smaller claims.[136] WG III identified various aspects that can lead to an excess of cost in arbitral proceedings. Particularly, factors like the complexity of cases, treaties and proceedings, the volume of evidence, ineffective case management, and further procedural challenges[137] were named as relevant reasons for increasing costs.[138] Additionally, the high demand for individual arbitrators, who are involved in numerous parallel proceedings, can increase fees significantly.[139] Further concerns were raised regarding the allocation of costs. In general, parties in ISDS proceedings are responsible for their own costs ("pay your own way").[140] Art. 40 (1) UNCITRAL Arbitration Rules (1979) provides another approach, where the succeeding parties can recover costs of arbitration ("costs follow the event"), while Art. 40 (2) regulates that the

[128] UNCITRAL, A/CN.9/935, para. 63.

[129] UNCITRAL, A/CN.9/935, para. 75.

[130] *McBrayer*, CIArb at UNCITRAL Working Group III on ISDS Reform: Efficiency, Decisions, and Decision Makers, 4; A/CN.9/930/Rev.1 para. 37.

[131] *Friedland/Brekoulakis*, 2018 International Arbitration Survey: The Evolution of International Arbitration, 8.

[132] *Kim*, ICSID Review 27 (2012), 399 (408); *Gaukrodger/Gordon*, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, 19.

[133] UNCITRAL, A/CN.9/930/Rev.1, para. 36.

[134] Damages and costs in investment treaty arbitration revisited, available at: https://www.allenovery.com/global/-/media/sharepoint/news/news/news/sitecollectiondocuments/14-12-17_damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf?la=en- (retrieved on 02. March 2020).

[135] UNCITRAL, A/CN.9/930/Rev.1, para. 64; UNCITRAL, A/CN.9/964, para. 11.

[136] *Gaukrodger/Gordon*, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, 23.

[137] *Inter alia* the translation of documents, preparation of defences, and the number of hearings.

[138] UNCITRAL, A/CN.9/930/Rev.1, para. 45.

[139] *Gaukrodger/Gordon*, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, 20.

[140] UNCITRAL, A/CN.9/930/Rev.1, para. 53.

arbitral tribunal can determine if and which side should bear party costs. WG III also referred to Art. 42 UNCITRAL Arbitration Rules (rev. 2010) which does not differentiate between party costs and costs of arbitration anymore, but provides, that the unsuccessful party should bear the cost of arbitration. Recent provisions in CETA and the EU-Singapore FTA have been following the approach for the allocations of costs.[141] Related to that, the security of costs has been identified as another issue. Recovering costs become in particular important when parties are faced with frivolous claims. Investors might have problems to bear the costs or prevent access to capital by using overseas companies.[142] Therefore, the ability to sanction frivolous claims becomes impossible.[143] There are few regulations in the ISDS system that provide a basis for the security of costs. Art. 26 (2) UNCITRAL Arbitration Rules enables tribunals to take interim measures and obligate parties to provide necessary assets to satisfy potential awards. Additionally, according to Art. 47 ICSID Convention tribunals can take provisional steps to secure the rights of the parties, which could also be interpreted as foundation for the security of costs.

b) Duration

Costs correlate with the duration, because lengthy arbitral proceedings will eventually result in higher costs.[144] On average, arbitral proceedings under ICSID last 3.6 years from the initial request to the final award.[145] In another study, researchers indicate that the duration of ISDS proceedings increased from 3.7 years before 2012 to 4.3 years from 2013 onwards.[146] In comparison, an average case under the ICJ takes two years[147] and disputes in front of the WTO DSB last about 28 months.[148] In regards to the duration of ISDS proceedings, the WG highlighted the appointment of arbitrators, the assembly of relevant documents as well as the issuance of awards as primary time consumers.[149] Due to the ad hoc nature of ISDS, tribunals are not bound to strict time limits like WTO DSB panels. In terms of the selection of arbitrators, parties tend to choose from a limited number of arbitrators, which might have negative impacts on the availability and hence impede the proceedings in total.[150] In addition, because previous decisions are not necessarily binding in investment arbitration, parties might submit a wide range of arguments whether or not previous tribunals accepted them.[151] The complexity of cases as well as the assessment of

141 UNCITRAL, A/CN.9/WG.III/WP.153, para. 32.

142 A/CN.9/WG.III/WP.153 para. 33.

143 UNCITRAL, A/CN.9/WG.III/WP.153, para. 36.

144 UNCITRAL, A/CN.9/930/Rev.1, para. 38.

145 ICSID arbitration: how long does it take?, available at: https://www.goldreserveinc.com/wp-content/uploads/2016/01/ICSID-arbitration-How-long-does-it-take.pdf (retrieved on 02. March 2020).

146 Damages and costs in investment treaty arbitration revisited, available at: https://www.allenovery.com/global/-/media/sharepoint/news/news/news/sitecollectiondocuments/14-12-17_damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf?la=en- (retrieved on 02. March 2020).

147 List of all cases, available at: https://www.icj-cij.org/en/list-of-all-cases (retrieved on 02. March 2020).

148 *Reich*, EUI Working Paper LAW 11 (2017), 1 (22).

149 UNCITRAL, A/CN.9/930/Rev.1 para. 65.

150 UNCITRAL, A/CN.9/WG.III/WP.153, para. 89.

151 *Pirbhai*, GroJIL 6 (2018), 286 (290); UNCITRAL, A/CN.9/WG.III/WP.153, para. 84.

individual investment treaties, previous arbitral awards and other sources of law could further delay decision-making processes.[152]

7. Other concerns

In addition to the main emphasis of the ISDS reform process, WG III identified further issues, which have not been addressed so far. Considerations range from alternative dispute resolution (ADR) mechanisms and dispute prevention methods, exhaustion of local remedies, allowing counterclaims by states, regulatory chill, the calculation of damages, as well as third party participation.[153] However, the WG noted that the issues are more or less interrelated to the previously described concerns. Hence, they should be taking into account in the development of solutions but should not play a central role.[154]

An aspect that has been assessed in more detail is third party funding. The practice refers to financial support from entities other than the parties to the dispute.[155] Funding can target either individual proceedings or a portfolio of claims.[156] Sources of founding could be the counsel of the disputing party, various forms of insurances, or as equity investments.[157] The perception of external financial support has been mixed. Some voices argue that third party funding could be an appropriate instrument to facilitate access for developing countries and SMEs.[158] On the downside, third party funding raises ethical concerns and could lead to excessive influence over the arbitral proceedings, which might result in frivolous claims.[159] Conflicts of interests could arise if arbitrators have direct (as advisors) or indirect relations (over the law firm) to funding sources.[160] In addition, there is a debate on whether confidentiality can be guaranteed if parties exchange information about the proceedings with third parties, who could use these insights in other disputes as well.[161] In general, third party funding leads to structural imbalances, because respondent states are not able to access similar financial sources.[162] Furthermore, third party funding raises questions if the external financial support can be considered as recoverable costs or in case the funded party does not succeed, if entities other than the disputing parties could become liable.[163]

II. Proposed solutions by the UNCITRAL working group

After assessing if reforms are desirable, the WG developed various proposals to resolve the respective issues. The following section outlines the proposed solutions briefly. WG

[152] *Gaukrodger/Gordon*, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, 59; UNCITRAL, A/CN.9/WG.III/WP.153, para. 79.
[153] UNCITRAL, A/CN.9/970, para. 29-38.
[154] *Ibid.*, para. 39.
[155] UNCITRAL, A/CN.9/WG.III/WP.157, para. 5.
[156] *Ibid.*, para. 6.
[157] UNCITRAL, A/CN.9/WG.III/WP.172, para. 12.
[158] UNCITRAL, A/CN.9/935, para. 91; UNCITRAL, A/CN.9/WG.III/WP.157, para. 36.
[159] UNCITRAL, A/CN.9/935, para. 89.
[160] UNCITRAL, A/CN.9/WG.III/WP.157, para. 18.
[161] *Ibid.*, para. 25.
[162] UNCITRAL, A/CN.9/WG.III/WP.172, para. 4.
[163] UNCITRAL, A/CN.9/WG.III/WP.157, para. 28-29.

III separated the reform options into seven broad categories with 16 reform options illustrated in *Figure 5*.

A. Tribunals, ad hoc and standing multilateral mechanisms
1. Multilateral advisory centre 2. Stand-alone review or appellate mechanism 3. Standing first instance and appeal investment court, with full-time judges
B. Arbitrators and adjudicators appointment methods and ethics
1. ISDS tribunal members' selection, appointment and challenge 2. Code of conduct
C. Treaty Parties' involvement and control mechanisms on treaty interpretation
1. Enhancing treaty Parties' control over their instruments 2. Strengthening the involvement of State authorities
D. Dispute prevention and mitigation
1. Strengthening of dispute settlement mechanisms other than arbitration (ombudsman, mediation) 2. Exhaustion of local remedies 3. Procedure to address frivolous claims, including early dismissal 4. Multiple proceedings, reflective loss and counterclaims by respondent states
E. Cost management and related procedures
1. Expedited procedures 2. Principles / guidelines on allocation of cost and security for cost 3. Other streamlined procedures and tools to manage costs
F. Third-party funding
G. Other possible reform options

Figure 5: Summary of potential ISDS reform options

Own illustration based on UNCITRAL, A/CN/WG.III/WP.166/Add.1.

In consideration of the scope of this paper, not all potential solutions will be comprehensively discussed. Based on the framework of *Roberts,* the proposals are categorised into incremental, systemic, and paradigmatic reforms. By summarising the different positions into three groups, *Roberts* created guidelines to understand and compare the different approaches.[164] Nevertheless, the categories are not exhaustive. Depending on the level of implementation, measures could vary in their magnitude. Thus, there might be intermediate strategies that can be described as 'semi-systemic' or 'semi-paradigmatic'.[165] To get a general overview about the attitudes towards the different categories, *Figure 6* assigns the member states to the framework based on their respective submissions.[166]

[164] *Roberts*, AJIL 112 (2018b), 191 (191).

[165] *Roberts*, AJIL 112 (2018a). 410 (413).

[166] The assumptions are supported by the general attitude towards investment arbitration and not on the proposed solutions in the submissions.

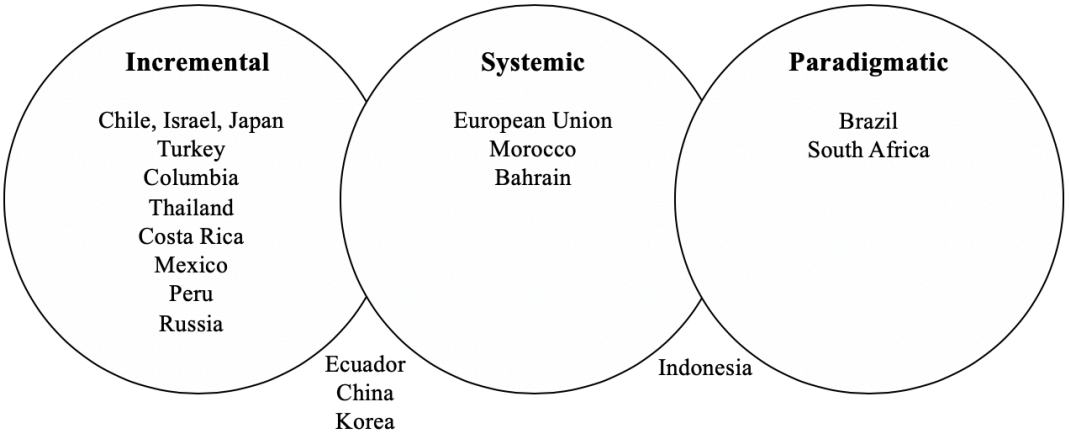

Figure 6: Attitudes towards the ISDS reform process

Own illustration based on government submissions during the reform process.

1. Incremental reforms

On the first level, states assess the broad criticism of the ISDS system as exaggerated and view investor-state arbitration as the best option to resolve international investment disputes. However, they are also aware of specific concerns and thus favour moderate reforms.[167] Changes in investment treaties do not result in a new generation of BITs, but in updated versions (*BIT 2.1 to BIT 2.2.*).[168] During the reform process, incremental actors highlight the benefits of the current system and criticise comprehensive reform options.[169] They argue that not all states are facing the same concerns,[170] and hence seek for flexibility, whereby member states are free to choose to adopt individual reforms depending on their specific interests and needs. This also referred to as "suit" approach or "menu" of solutions.[171] Suitable measures are adopted by means of model laws, freestanding codes, soft law and best practices.[172] In addition, this includes more detailed specifications and limitations of controversial provisions.[173] Incremental reforms would also accelerate the reform process, allowing states to apply individual provisions more rapidly, without excluding the possibility for more systemic reforms in the future.[174] Therefore, procedural rules emphasising costs and duration, third party funding, a code of conduct, and the establishment of an advisory centre would be appropriate reform options in this cluster.

167 *Roberts*, AJIL 112 (2018a), 410 (410).

168 *Roberts*, AJIL 112 (2018b), 191 (192).

169 The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecideds, available at: https://www.ejiltalk.org/the-shifting-landscape-of-investor-state-arbitration-loyalists-reformists-revolutionaries-and-undecideds/ (retrieved on 8. March 2020).

170 UNCITRAL, A/CN.9/WG.III/WP.182, 2.

171 UNCITRAL, A/CN.9/WG.III/WP.163, 3; UNCITRAL, A/CN.9/WG.III/WP.164, para. 5; UNCITRAL, A/CN.9/WG.III/WP.173, para. 5; UNCITRAL, A/CN.9/WG.III/WP.182 p. 2.

172 UNCITRAL, A/CN.9/WG.III/WP.163, 5.

173 *Roberts*, AJIL 112 (2018b), 191 (193).

174 UNCITRAL, A/CN.9/WG.III/WP.164, para. 4; UNCITRAL A/CN.9/WG.III/WP.179, 3.

a) Procedural rules referring to costs and duration

The WG made suggestions to strengthen the application of existing provisions and developing new tools to streamline procedural aspects to reduce costs and duration.[175] Additionally, fixed schedules and more transparency in the cost structure were mentioned as beneficial for the efficiency of the system.[176] It could be mandatory for tribunals to agree on procedural budgets in coordination with the disputing parties.[177] Submissions also referred to ADR like mediation and conciliation to avoid costly arbitral proceedings.[178] To improve allocation and security of costs, it was suggested to establish a cost-sharing mechanism and introduce a loser-pay rule.[179] Additionally, a tool should be developed, whereby investors are obligated to provide information, that they are able to compensate costs of arbitration.[180] As a side effect these measures would also benefit the avoidance of frivolous claims.[181]

b) Code of conduct

Currently, arbitral tribunals are confronted with multiple ethical standards. However, if disputes arise, it is not always clear which norms apply.[182] Hence, arbitrators themselves are responsible to apply relevant standards and conduct appropriate assessments.[183] In the reform process WG III aims to (i) enhance harmonisation and clarification among the already existing norms, including ICSID and UNCITRAL, (ii) ensure that everybody is aware of the respective thresholds, (iii) establish rules for the qualification of arbitrators, (iv) develop mechanisms for disclosure, including sanctions, and (v) clarify the roles of decision-makers when it comes to double-hatting and repeat appointments.[184] The code of conduct should consider issues like independence and impartiality, integrity, diligence and efficiency, confidentiality, competence, and disclosure obligations.[185] In another proposal, it was suggested to cap the fees of arbitrators.[186] Additionally, in case of violations potential sanctions should be included.[187] A code of conduct would be applied as a soft law instrument, either included in treaties or by consent of the disputing parties.[188]

175 UNCITRAL, A/CN.9/WG.III/WP.164, 4; UNCITRAL, A/CN.9/WG.III/WP.166, para. 52-53.
176 UNCITRAL, A/CN.9/WG.III/WP.166, para. 60.
177 UNCITRAL, A/CN.9/WG.III/WP.162, para. 16.
178 UNCITRAL, A/CN.9/WG.III/WP.163, 7.
179 *Schill*, Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward, 9; UNCITRAL, A/CN.9/WG.III/WP.161, para. 14; UNCITRAL, A/CN.9/WG.III/WP.166, para. 57.
180 UNCITRAL, A/CN.9/WG.III/WP.161, para. 33.
181 UNCITRAL, A/CN.9/WG.III/WP.166, para. 58
182 UNCITRAL, A/CN.9/WG.III/WP.167, para. 9.
183 *Ibid.*, para. 10.
184 UNCITRAL, A/CN.9/WG.III/WP.167, para. 13.
185 *Ibid.*, 15-53.
186 UNCITRAL, A/CN.9/WG.III/WP.162, para. 21.
187 UNCITRAL, A/CN.9/WG.III/WP.164, 4.
188 UNCITRAL, A/CN.9/WG.III/WP.167, para. 64.

c) Third Party Funding

Reform options that cover third party funding include the overall prohibition of external funding or the introduction of norms to increase transparency, impose sanctions, and rules for cases were third party funding would be permitted. Prohibiting third party funding would require a clear definition of inadmissible forms of financial support. In situations of non-compliance, regulations could be provided that temporarily suspend or cancel proceedings, or shift costs to the party that breached the obligations.[189] In case third party funding would stay admissible, rules should be developed that limit the access, regulate disclosure requirements, and point out in which cases funds should be considered as costs of arbitration or for security of costs.[190] Counsels and arbitrators should also have the opportunity to review the respective funding contracts.[191] The provisions could be implemented either by arbitration rules, model clauses or by means of an opt-in convention.[192]

d) Advisory centre

An advisory centre would be in particular beneficial for developing and least developed countries.[193] Similar to the Advisory Centre on WTO Law, the institution could provide support (i) during ISDS proceedings and (ii) organising the defence, (iii) offering ADR and advisory services, as well as (iii) capacity building and sharing best practices.[194] In addition, the advisory centre could act as financial relief for developing and least developed countries by offering respective services at lower costs.[195]

2. Systemic reforms

Actors in this group view the current ISDS system as seriously flawed. However, resolving disputes on an international level is still perceived as the most favourable option for investment claims.[196] Systemic solutions result in a new generation of BITs (*BIT 3.0*), requiring structural or institutional reforms.[197] Structural change is evaluated as the "only type of reform, which can effectively respond to all the concerns identified".[198] Moreover, systemic reforms might turn away from the principle of depolitisation. Tribunals could broaden their scope and review further values concerning environmental issues or labour standards.[199] Potential solutions in this category include systematic approaches to appoint

189 UNCITRAL, A/CN.9/WG.III/WP.172, para. 16.
190 UNCITRAL, A/CN.9/WG.III/WP.161 para. 29; UNCITRAL, A/CN.9/WG.III/WP.172, para. 20.
191 UNCITRAL, A/CN.9/WG.III/WP.174, 3.
192 UNCITRAL, A/CN.9/WG.III/WP.172, para. 42.
193 UNCITRAL, A/CN.9/WG.III/WP.159/Add.1, para. 38; UNCITRAL, A/CN.9/WG.III/WP.161, para. 18.
194 *Schill*, JIEL 20 (2017), 649 (670); UNCITRAL, A/CN.9/WG.III/WP.162, para. 26-27; UNCITRAL, A/CN.9/WG.III/WP.168, para. 8-23.
195 UNCITRAL, A/CN.9/WG.III/WP.166, para. 14.
196 *Roberts*, AJIL 112 (2018a), 410 (410).
197 *Roberts*, AJIL 112 (2018b), 191 (191).
198 UNCITRAL, A/CN.9/WG.III/WP.159/Add.1, 2.
199 *Roberts*, AJIL 112 (2018b), 191 (193).

arbitrators, a standing appellate mechanism, and a permanent multilateral investment court.

a) Alternative methods for the appointment of arbitrators

Depending on the scope of the proposals, measures related to the appointment of arbitrators could be defined as incremental or systemic. The WG considers three reform options with different impacts on party-appointment. First, it was suggested to introduce an independent appointing authority as well as improvements of the current system, especially with respect to greater diversity.[200] Second, it was proposed to implement pre-established lists of arbitrators or to extend the role of ISDS institutions as appointing authorities.[201] Rosters should contain experienced decision-makers and provide opportunities for younger arbitrators to gather experience in ISDS. Selection criteria should include aspects of gender balance, geographical distribution, the level of economic development, and specialised knowledge in certain fields.[202] While it would be preferable to select arbitrators with high-level of qualifications, the requirements should not be too strict to avoid a narrow pool of decision-makers.[203] Furthermore, it should be decided if the disputing parties remain in control of the selection and appointment process (open) or if the selection from a roster should be conducted by a third party (closed).[204] The former would adhere to the ad hoc nature of the current ISDS system.[205] Nevertheless, a roster model might also encourage repeat appointment of arbitrators, because of the selection from a limited pool of alternatives.[206] A third option would be to establish a standing mechanism, where states would retain control over the appointment of judges and parties could lose their influence over the composition of the panel.[207] However, it is also possible to combine the standing mechanism with a roster model allowing disputing parties to choose the adjudicators.[208]

b) Appellate mechanism

As mentioned previously, current options to review an award are limited. An appellate mechanism is likely to improve consistency, coherence and predictability in the ISDS system.[209] In detail, it would benefit the standardisation and clarification of proceedings, enhance legal expectations, limit the conduct of arbitrators, and prevent abuses.[210] Proposals that were submitted in the WG included a procedure that enables parties to file written

200 UNCITRAL, A/CN.9/WG.III/WP.169, para. 20.
201 *Ibid.*, para. 21.
202 UNCITRAL, A/CN.9/WG.III/WP.162, para. 20; UNCITRAL, A/CN.9/WG.III/WP.169, para. 26.
203 UNCITRAL, A/CN.9/1004/Add.1, para. 98.
204 UNCITRAL, A/CN.9/WG.III/WP.169, para. 31, 34.
205 *Ibid.*, para. 11.
206 *Kaufmann-Kohler/Potestà*, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, para. 96.
207 UNCITRAL, A/CN.9/WG.III/WP.169. para. 58.
208 *Ibid.*, para. 11.
209 UNCITRAL, A/CN.9/WG.III/WP.185, para. 7.
210 UNCITRAL, A/CN.9/WG.III/WP.177, 4.

comments about the award before it is finally decided[211] and the establishment of an appellate mechanism as higher authority to review alleged errors of law.[212] Depending on the outcome, the appeal could affirm, reverse or modify the previous decision.[213] Related to that the appeal committee would get the authority to temporarily suspend the underlying award.[214] An appellate body could be introduced either by treaty provision, on an ad hoc basis, or institutionalised by facilities, who are engaged in ISDS cases.[215] Furthermore, the mechanism could be established as a stand-alone body or as part of a two-tier multilateral investment court.[216] A disadvantage of an appellate mechanism would be the potential increase in costs and duration of the proceedings.[217] On the downside, it was noted that costs decrease in the long run, because the system would be more predictable.[218]

c) Multilateral investment court

Based on the assumption that all concerns outlined during the reform process are interrelated and can only be resolved by an overarching systemic approach,[219] the EU and Canada introduced the idea to establish a multilateral investment court.[220] Submissions emphasise a two-tier system. At the first stage, an arbitral tribunal would hear disputes by conducting fact finding and applying relevant law.[221] On the second level, the permanent body would serve as an appellate mechanism and review fundamental errors in the evaluation of facts and the application of law.[222] Adjudicators would be full-time employees with fixed incomes and without any external occupations.[223] Independence would be guaranteed by long-term non-renewable terms of office and transparent selection processes.[224] In addition, diversity in terms of gender and geographic origin should be implemented.[225] However, concerns were raised that the appointment of judges could become politically charged, particularly, by developed countries, which would reverse previous efforts to depoliticise the system.[226] The permanent body would be financed by fees from

211 UNCITRAL, A/CN.9/WG.III/WP.166, para. 18.

212 *Ibid*., para. 19.

213 UNCITRAL, A/CN.9/1004/Add.1, para. 40.

214 *Ibid*., para. 43.

215 UNCITRAL, A/CN.9/WG.III/WP.185, para. 40.

216 *Ibid*., para. 45.

217 UNCITRAL, A/CN.9/1004/Add.1, para. 22.

218 UNCITRAL, A/CN.9/1004/Add.1, para. 23.

219 UNCITRAL, A/CN.9/WG.III/WP.159/Add.1, para. 10, 40.; *Schill*, JIEL (2017), 20 (657).

220 *Krajewski*, in: Ludwigs/Remien (Ed.), Investitionsschutz, Schiedsgerichtsbarkeit und Rechtsstaat in der EU, 116; *Schill*, Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward, 8; UNCITRAL, A/CN.9/WG.III/WP.166, para. 21.

221 UNCITRAL, A/CN.9/WG.III/WP.159/Add.1, para. 13; UNCITRAL, A/CN.9/WG.III/WP.166, para. 22.

222 UNCITRAL, A/CN.9/WG.III/WP.159/Add.1, para. 14; UNCITRAL, A/CN.9/WG.III/WP.166. para. 22.

223 *Saha*, Legal Issues J. 4 (2016), 39 (53).

224 UNCITRAL, A/CN.9/WG.III/WP.159/Add.1, para. 16-19; UNCITRAL, A/CN.9/WG.III/WP.185, para. 55.

225 UNCITRAL, A/CN.9/WG.III/WP.159/Add.1, para. 21.

226 *Alvarez*, MegaReg Forum Paper 2 (2016), 4; Alvarez for instance refers to the on-going crisis in the ICJ and WTO DSU, where states chose to refuse reappointment of certain judges to reinforce their individual political agenda; *McBrayer*, CIArb at UNCITRAL Working Group III on ISDS Reform: Efficiency, Decisions, and Decision Makers, 14; *Saha*, Legal Issues J. 4 (2016), 39 (50); UNCITRAL, A/CN.9/WG.III/WP.180, para. 29.

contracting members in consideration of the respective level of economic development. Another alternative would be to charge disputing parties directly for the use of the system.[227] Latter would increase the accountability and could prevent parties to submit frivolous claims.[228] Beside concerns about a repolitisation of ISDS,[229] proposals were submitted to incorporate non-disputing parties in the proceedings such as stakeholders that have been affected by the dispute.[230] Disputes would apply either by states accessing the multilateral court or due to opt-in clauses in investment treaties.[231] A permanent juridical body would ensure independence, especially, in structural terms, increase the accountability, and would serve as better protection from external influences.[232] Besides primary roles, the standing body could also sanction violations against a code of conduct, serve as mechanism for the early dismissal of frivolous claims, or as authority for counter-claims by states.[233]

3. Paradigmatic reforms

From a paradigmatic point of view, the ISDS system is irreversibly flawed and needs to be replaced in total. The fundamental principle, that private actors have the ability to bring claims directly to states, is rejected and hence ISDS should switch to new alternatives, which are characterised by comprehensive state control.[234] The approach goes hand in hand with the previously mentioned trend to terminate investment treaties altogether and replace it with domestic remedies.[235] Related to that the current distinction between domestic and foreign investors could be revoked.[236] Paradigmatic reformers are convinced, that the current ISDS system impairs the business environment and limits regulatory capabilities of states.[237] It was further criticised, that ISDS does not pay attention to the rule of law, democratic principles, human rights as well as to environmental protection standards.[238] A paradigmatic approach by UNCITRAL WG III seems unlikely, because states can withdraw from investment treaties individually without the consent of other parties.[239] Reform options that would avoid international arbitration are the stronger consideration of dispute prevention mechanisms such as ADR, the exhaustion of local remedies, and stronger state-to-state cooperation.

227 UNCITRAL, A/CN.9/WG.III/WP.159/Add.1, para. 33; UNCITRAL, A/CN.9/WG.III/WP.185, para. 58, 64.

228 UNCITRAL, A/CN.9/1004/Add.1, para. 89.

229 *Schneidermann*, Loy. U. Chi. L.J. 49 (2017), 229 (259).

230 UNCITRAL, A/CN.9/WG.III/WP.159/Add.1, para. 27, 29.

231 UNCITRAL, A/CN.9/WG.III/WP.185, para. 59.

232 *Kaufmann-Kohler/Potestà*, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, para. 23, 105; *Pirbhai*, GroJIL (2018), 6 (292).

233 UNCITRAL, A/CN.9/WG.III/WP.185, para. 70.

234 *Roberts*, AJIL 112 (2018a), 410 (410); UNCITRAL, A/CN.9/WG.III/WP.176, para. 13.

235 *Roberts*, AJIL 112 (2018a), 410 (417); *Roberts*, AJIL 112 (2018b), 191 (192).

236 *Roberts*, AJIL 112 (2018b), 191 (193); *Schill*, Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward, 3.

237 UNCITRAL, A/CN.9/WG.III/WP.171, para. 2.

238 *Van Harten/Kelsey/Schneidermann*, All Papers 328 (2019), 1 (15); UNCITRAL, A/CN.9/WG.III/WP.176, para. 9, 11.

239 *Roberts*, AJIL 112 (2018a), 410 (421).

a) Dispute prevention mechanisms

Preventing legal disputes in the first place could avoid unnecessary costs and damage of investor-state relationships.[240] Submissions emphasise the promotion of ADR mechanisms like mediation and ombudsmen. Proposals were submitted to create lists of conciliators and meditators, as well as to develop procedural frameworks and standard clauses for the application of such mechanisms.[241] Opinions were expressed that comprehensive consultation and mediation should be mandatory before forwarding the dispute to an arbitral tribunal.[242]

In its submission, the Brazilian government referred to its own two-stage dispute prevention mechanism. On the first stage, an ombudsperson would act as an intermediary between investors and the host country government.[243] He or she would be responsible for the assessment of complaints in coordination with state authorities, and issue recommendations to resolve the disputes.[244] On the second stage, parties have the ability to submit a written request to a committee, which considers the request in a strict procedural setting and will try an amicable solution.[245] Only after the exhaustion of all preventive measures, parties are able to refer the case to ad hoc arbitration. Even then, the Brazilian approach excludes subjects like security concerns, matters of domestic legislation, corporate social responsibility, provisions concerning the environment, labour affairs, and health.[246]

b) Exhaustion of local remedies

A further concern is the ability of arbitral tribunals to review domestic legislation from a commercial perspective without considering public interests.[247] Provisions for the exhaustion of local remedies regulate, that domestic courts need to be heard first before referring the case to international arbitration.[248] Domestic courts would get an opportunity to review cases as well as managing government conduct and thus could avoid incompatibilities with national laws.[249] Nonetheless, domestic judges might not have the necessary expertise to apply international law appropriately.[250] Failure of settling the dispute by national courts would only lead to a further increase in costs and duration. On the downside, domestic adjudication is perceived as less asymmetric and on-sided compared to international arbitration.[251]

240 UNCITRAL, A/CN.9/WG.III/WP.156, para. 19.
241 UNCITRAL, A/CN.9/WG.III/WP.166, para. 39, 41.
242 UNCITRAL, A/CN.9/WG.III/WP.156, para. 19.
243 UNCITRAL, A/CN.9/WG.III/WP.171, para. 7.
244 *Ibid.*, para. 8, 10.
245 *Ibid.*, para. 11-12.
246 *Ibid.*, para. 14.
247 UNCITRAL, A/CN.9/WG.III/WP.176. para. 45.
248 UNCITRAL, A/CN.9/WG.III/WP.166, para. 44.
249 *Van Harten/Kelsey/Schneidermann*, All Papers 328 (2019), 1 (7); A/CN.9/WG.III/WP.176 para. 43.
250 *Puig/Shaffer*, AJIL 112 (2018), 361 (406).
251 *Ibid.*, 407.

c) State-to-state cooperation

South Africa suggested to consider stronger state to state cooperation. By setting up joint interstate commissions, investor claims would be channelled through government agencies for review purposes. Investors would not be able to submit issues to the host state directly. Instead, they would get in contact with representatives from their home country first, which in turn would engage in consultations with the counterpart of the respective host state.[252] However, a prerequisite would be that states are willing to cooperate in the first place, even in case of a dispute.[253]

D. Discussion

So far, CA states participated rather passively in the reform process. Kyrgyzstan and Uzbekistan have been observers in the 36th,[254] 37th,[255] and 38th session of WG III,[256] while Kazakhstan joined the 35th session as observer[257] and submitted a proposal for a third party funding model clause.[258] Because of the limited commitment and marginal research, concerns and attitudes towards individual reform proposals can currently only be derived from the overall investment climate and legislative environment in CA as well as from experiences from other developing countries. However, it needs to be recognised that individual countries, also in CA, face differences in their economic conditions, political views, institutional background, and historical legacies, which eventually influences their institutional choice.[259] Hence, the following discussion is only an approximation to the future agenda of CA states.

I. Potential areas of concern

In general, CA countries tend to have a positive attitude towards FDI. Nonetheless, from the analysis in Chapter B various concerns can be identified.

First, a majority of CA BITs have been concluded in 1990s and are characterised as first-generation treaties. Therefore, treaty provisions are not specific and essential definitions are missing. Especially, in terms of fair and equitable treatment and expropriation, formulations are often inconclusive. In particular, CA BITs often contain provisions that refer to indirect expropriation, but at the same time do not provide any definition or limitations.[260] In the past, claimants challenged regulatory measures by states using indirect expropriation clauses.[261] Considering that, the majority of cases takes place in the resource sector and deals with claims connected to expropriation proceedings, underlines the need

252 UNCITRAL, A/CN.9/WG.III/WP.176, para. 48.
253 *Saha*, Legal Issues J. 4 (2016), 39 (47).
254 UNCITRAL, A/CN.9/964, para. 7.
255 UNCITRAL, A/CN.9/970, para. 7.
256 UNCITRAL, A/CN.9/1004, para. 6.
257 UNCITRAL, A/CN.9/935, para. 5.
258 A/CN.9/WG.III/WP.187.
259 *Puig/Shaffer*, AJIL 112 (2018), 361 (362).
260 Only two of the analysed BITs excluded indirect expropriation, while none of the other BITs contain any specific definition of the term (see Appendix).
261 UNCTAD, World Investment Report 2015: Reforming International Investment Governance, 138.

for action. As mentioned before, unspecific treaty language can lead to divergent interpretations, which might not reflect the initial intend of the IIAs. Thus, investors might use inconsistency and missing predictability in the system to submit frivolous claims, which would in turn burden state budgets.

Second, as net receivers CA countries share the same general concerns as developing countries. This also includes concerns in regards to the appointment and selection of arbitrators. Especially, diversity issues and the limited choice from a small group of arbitrators, who might also play various roles in the system, should be a main focus. A majority of current arbitrators are geographically located in Western countries. Thus, a concern that has been raised repeatedly is the missing perspective of developing countries during arbitral proceedings. The reliance on a core of arbitrators impedes legal professionals from developing states to gain critical experience in international arbitration. Related to the limited representation in the ISDS system, government initiatives in CA try to direct investment disputes to domestic courts or try to promote own dispute resolution mechanisms with the help of institutions like the *Astana International Financial Centre* or the *Kyrghyz Centre of Legal Representation of the Government*. These approaches can be interpreted as ambitions to achieve greater state control over investment disputes in general and to gain valuable experience in ISDS.

Third, CA BITs often do not include procedural aspects or limitations, which results in enhanced costs and duration of proceedings. This is also reflected in the high number of pending cases. Half of these disputes have not been settled for five years or longer, which is above the average of three to four years. In addition, the allocation of costs does not always favour the financial background of developing countries. 86% of BITs in CA provide the option for ICSID arbitration. That means that parties are likely to be responsible to bear their own legal expenses regardless of the outcome of proceedings. This might result in imbalances, because investors can often rely on better capital resources and have access to third party funds. In general, prolonged proceedings represent financial liabilities for developing countries and exert pressure on their legislative environment, which could lead to regulatory chill.

Eventually, related to the cost of arbitration third party funding seems to be a central concern for CA. Kazakhstan submitted a proposal to provide solutions for the aforementioned structural imbalances as well as ethical and transparency concerns.[262]

II. Desirable reform options

After gaining independence, CA countries showed their commitment to provide an adequate investment environment by various initiatives on a national, bilateral and multilateral level. As an important pillar for the development in the region,[263] CA states have to find a compromise between attracting further investment and avoiding unnecessary exposure from investor claims, which have the potential to interfere with their sovereignty. So far, developing countries reacted differently to the ISDS legitimacy crisis. States either chose to terminate existing BITs completely, renegotiated certain provision, or maintained the status quo.[264] Besides some recent developments on a domestic level, CA countries

[262] UNCITRAL, A/CN.9/WG.III/WP.187.

[263] *Samruk-Kazyna*, Overview of investment attractiveness of CA countries, 3. From 2008-2016 FDI in non-primary sectors accounted for 18.2% of the region's annual GDP).

[264] *Berger*, Developing countries and the future of the international investment regime, 19.

seem to retain traditional approaches. The on-going UNCITRAL process could be a welcome opportunity for CA states to address flaws in their ISDS mechanisms. However, the question remains to which degree potential reforms should be implemented.

During the reform process most developing countries, who contributed submissions, argued for greater flexibility in the implementation of reforms. The incremental approach could also be suitable for CA countries. The majority of concerns in CA are connected to outdated provisions in BITs from 1990s. By applying relevant opt-in clauses, CA countries could update their BITs based on individual needs. Hence, existing treaties could add provisions that streamline proceedings, improve the selection of arbitrators (code of conduct), or lead to greater transparency in terms of third party funding. This would retain the principle of party-autonomy and would prevent the politicisation of investment arbitration. However, including such provisions would require consent among the parties of the treaties. As mentioned before, many CA BITs have been concluded with EU member states, which raises two problems. First, according to Art. 207 (1) TFEU individual member states do not have the necessary competence to renegotiate BITs unilaterally anymore. Second, in the WG sessions the European Union vouched for a multilateral investment court and possesses substantial leverage in the reform process.[265] Because of that, the implementation of individual opt-in clauses could be limited. However, if the WG would agree on certain "minimum standards" in a multilateral agreement, reforms could be incorporated in a single-step procedure into the BIT network.[266] Besides the consideration of individual provision, CA countries should put emphasis on the proposal for an advisory centre. Developing countries are often restricted in their financial capacities and legal expertise. Therefore, an advisory centre could offer necessary support for the preparation, handling, and management of investment disputes.[267]

Considering that CA countries are confronted with the same issues as identified by the WG, a systemic approach could also be a plausible alternative. As mentioned before, supporters argue that only systemic reforms could comprehensively cover all issues. Especially, an efficient appeal mechanism could benefit developing countries. The review of decisions could enhance consistency and predictability in the system. Because of that CA governments would gain more security for their legislative environment and regulatory chill could be avoided. In terms of the appointment of arbitrators, CA states could benefit from a roster model. This could improve the accessibility to international arbitration for experts and professionals in the region and provide opportunities to gain necessary international experience. Based on the submissions during the UNCITRAL reform process, the idea of a multilateral investment court seems to be less supported by developing countries. However, outside WG III, the EU actively promotes the idea of a multilateral framework in CA.[268] While developing countries could benefit from the independence of a standing committee as well as decisions that are more consistent, it is not clear to which degree they are able to participate in the establishment of the court. Developing countries might have

265 *Puig/Shaffer*, AJIL 112 (2018), 361 (376).

266 UNCITRAL, A/CN.9/WG.III/WP.173, para. 19-23. The Submission by Colombia specifically refers to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI), which used such a mechanism to modify provisions in bilateral treaties.

267 UNCITRAL, A/CN.9/WG.III/WP.161, para. 18.

268 European-Central Asian Working Group meets in Tashkent to envisage new ISDS rules, available at: https://eeas.europa.eu/delegations/uzbekistan/27041/node/27041_uk (retrieved on 23. October 2019).

little impact on the dispute settlement mechanism itself and would depend on the decisions made by leading nations, which already proved in the past how political power play can throw a system into crisis.[269]

Although paradigmatic approach seems to be rather unlikely, some proposals could be relevant for CA countries. Considering the recent developments on a national level, CA governments might be interested in promoting their own arbitration centres to resolve investment disputes. This would require a broader implementation of exhaustion of local remedies provisions. As mentioned before, until now only few BITs refer to the exhaustion of domestic judiciary. CA countries would have greater control over procedures and local decision-makers could be more familiar with the initial intent of treaty provisions and examine claims from the net receiver perspective of developing countries. However, if domestic proceedings fail, parties would still have to forward cases to international arbitration, resulting in even longer and more costly trials. In addition, to provide a flawless and independent institutional environment on a national level, CA states need to improve the rule of law in general. Otherwise, mistrust could politically charge domestic dispute settlement mechanisms and hence would contradict to a key advantage of the current ISDS system. Another semi-paradigmatic approach that is eligible for CA countries are exclusion clauses. These provisions would prohibit ISDS for matters of public policy like environmental, health and labour issues.[270] Nonetheless, claims could be rejected under the pretext of public policy concerns, which would foster further politicisation.

At the moment it is not clear which reforms the WG will implement. Scholars argue that the process, which is based on consensus, will probably result in moderate outcomes.[271] Incrementalists would rather have systemic over paradigmatic reforms, and paradigmatic reformers might prefer a balanced instead of a traditional approach.[272] Hence, it is likely that investor-state arbitration remains the primary mechanism complemented with an appellate mechanism and a roster model for the selection of arbitrators.[273] Based on this scenario and the proposed "suit" approach CA countries should vouch for the flexible implementation of additional model clauses (e.g. third party funding) and for the support via an advisory centre. A stronger emphasis on domestic remedies would also be desirable[274], but is probably not backed by developed countries. At the same time, exclusion clauses might be in the interest of Western countries, because they would support sustainable development in developing countries.

E. Conclusion

FDI is an important pillar for the development of CA economies. Since gaining independence, CA countries integrated into multi- and bilateral legal frameworks and developed various initiatives domestically to provide efficient IDSD mechanisms for investors.

ISDS was designed as an instrument to "depoliticise investment disputes and provide final and enforceable decisions through a swift, cheap and flexible process, over which

269 *Von Daniels/Dröge*, SWP Comment C46 (2019), 1. The United States are currently blocking the appointment of members of the WTO appellate body, which basically interrupts the functioning of the dispute settlement body as a whole.

270 *Saha*, Legal Issues J. 4 (2016), 39 (51).

271 *Roberts*, AJIL 112 (2018a), 410 (429).

272 *Alschner*, AJIL 112 (2018), 237 (242).

273 *Roberts*, AJIL 112 (2018a), 410 (429).

274 *Puig/Strezhnev*, EJIL 28 (2017), 731 (759).

parties would have considerable control."[275] In recent years, investor-state arbitration faced broad criticism and felt into a legitimacy crisis. Since 2017, the UNCITRAL WG III is engaged in a reform process to deal with several issues of the current system. In general, concerns were raised about the consistency, coherence, predictability of awards, the selection and appointment of arbitrators, costs and duration of arbitral proceedings, and other concerns like third party funding.

In terms of potential solutions, academia identified three groups. While incrementalists campaign for flexibility in ad-hoc arbitration, systemic reformers submitted proposals for permanent multilateral mechanisms. Paradigmatic reformers would like to turn away from ISDS completely by offering dispute prevention mechanisms on a domestic level.

Principally, CA states share the same concerns as other developing countries. Especially, provisions in outdated BITs from the 1990s, lengthy proceedings as well as a lack of diversity and missing representation have been identified as key issues in the region. CA countries have to find a balance between attracting further investment and sustaining sovereignty at the same time. Thus, the discussion concluded that CA decision-maker should consider a semi-systemic approach by supporting an update of the current system with opt-in clauses to retain flexibility. Additional institutions like an advisory centre and appellate mechanism would be able to support the ISDS framework in CA. The stronger consideration of local remedies would be desirable for the promotion of national arbitration centres, but the implementation seems less likely on a multilateral level.

Nevertheless, CA countries can only be heard if they actively engage in the reform process. To pursue their own agenda, CA governments should find a common voice and collaborate with other developing countries, who share similar objectives.

[275] *Saha*, Legal Issues J. 4 (2016), 39 (41).

Appendix

1. Central Asian BITs (in force & signed/ not in force), Own illustration based on data from the UNCTAD Investment Policy Hub.

Short title	ISDS included	Alternatives to arbitration	ISDS forum options				Exhaustion of local remedies	Indirect Expropriation	
			Domestic courts of the host state	ICSID	UNCITRAL	Other forums		Mentioned	Defined
Kyrgyzstan									
India - Kyrgyzstan BIT (2019)	-	-	-	-	-	-	-	-	-
Kyrgyzstan - Turkey BIT (2018)	-	-	-	-	-	-	-	-	-
Austria - Kyrgyzstan BIT (2016)	Yes	None	Yes	Yes	Yes	Yes	No	Yes	No
Kuwait - Kyrgyzstan BIT (2015)	Yes	None	Yes	Yes	Yes	Yes	No	Yes	No
Kyrgyzstan - Qatar BIT (2014)	Yes	None	Yes	Yes	Yes	No	“Fork in the road"	Yes	No
Kyrgyzstan - United Arab Emirates BIT (2014)	Yes	None	Yes	Yes	Yes	Yes	“Fork in the road"	Yes	No
Kyrgyzstan - Latvia BIT (2008)	Yes	None	No	Yes	Yes	No	No	Yes	No
Kyrgyzstan - Lithuania BIT (2008)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Korea, Republic of - Kyrgyzstan BIT (2007)	Yes	Voluntary ADR (conciliation / mediation)	Yes	Yes	No	No	No	Yes	No
Finland - Kyrgyzstan BIT (2003)	Yes	Voluntary ADR (conciliation / mediation)	Yes	Yes	Yes	Yes	No	Yes	No
Kyrgyzstan - Moldova, Republic of BIT (2002)	-	-	-	-	-	-	-	-	-
Kyrgyzstan - Sweden BIT (2002)	Yes	Voluntary ADR (conciliation / mediation)	No	Yes	Yes	Yes	No	Yes	No
Denmark - Kyrgyzstan BIT (2001)	Yes	None	No	Yes	Yes	No	No	Yes	No
Kyrgyzstan - Tajikistan BIT (2000)	Yes	None	No	Yes	Yes	No	No	Yes	No
Kyrgyzstan - Mongolia BIT (1999)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Belarus - Kyrgyzstan BIT (1999)	-	-	-	-	-	-	-	-	-
Kyrgyzstan - Switzerland BIT (1999)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Germany - Kyrgyzstan BIT (1997)	Yes	None	No	Yes	No	Yes	No	Yes	No
Azerbaijan - Kyrgyzstan BIT (1997)	Yes	None	No	Yes	No	Yes	No	Yes	No
Georgia - Kyrgyzstan BIT (1997)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Kazakhstan - Kyrgyzstan BIT (1997)	Yes	None	No	Yes	Yes	Yes	No	Yes	No
Kyrgyzstan - Uzbekistan BIT (1996)	Yes	None	No	Yes	No	No	No	Yes	No
Iran, Islamic Republic of - Kyrgyzstan BIT (1996)	Yes	None	No	No	Yes	No	No	Yes	No
Kyrgyzstan - Pakistan BIT (1995)	Yes	None	Yes	No	Yes	Yes	No	Yes	No
Kyrgyzstan - Malaysia BIT (1995)	Yes	None	Yes	Yes	No	No	No	No	No
Kyrgyzstan - United Kingdom BIT (1994)	Yes	None	No	Yes	Yes	Yes	No	Yes	No
Armenia - Kyrgyzstan BIT (1994)	-	-	-	-	-	-	-	-	-
France - Kyrgyzstan BIT (1994)	Yes	None	No	Yes	No	No	No	Yes	No
Kyrgyzstan - Ukraine BIT (1993)	-	-	-	-	-	-	-	-	-
Kyrgyzstan - United States of America BIT (1993)	Yes	None	Yes	Yes	Yes	Yes	No	Yes	No
China - Kyrgyzstan BIT (1992)	-	-	-	-	-	-	-	-	-
Kyrgyzstan - Turkey BIT (1992)	Yes	None	No	Yes	Yes	Yes	No	Yes	No
Kyrgyzstan - Spain BIT (1990)	-	-	-	-	-	-	-	-	-
Belgium/Luxembourg - Kyrgyzstan BIT (1989)	-	-	-	-	-	-	-	-	-

Short title	ISDS included	Alternatives to arbitration	ISDS forum options				Exhaustion of local remedies	Indirect Expropriation	
			Domestic courts of the host state	ICSID	UNCITRAL	Other forums		Mentioned	Defined
Kazakhstan									
Kazakhstan - Singapore BIT (2018)	Yes	None	Yes	Yes	Yes	Yes	No	Yes	No
Kazakhstan - United Arab Emirates BIT (2018)	Yes	None	Yes	Yes	No	No	No	Yes	No
Japan - Kazakhstan BIT (2014)	Yes	Voluntary ADR (conciliation / mediation)	Yes	Yes	Yes	Yes	No	Yes	No
Kazakhstan - Macedonia, The former Yugoslav Republic of BIT (2012)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Estonia - Kazakhstan BIT (2011)	Yes	Consultation and negotiation	Yes	Yes	Yes	No	No	Yes	No
Kazakhstan - Serbia BIT (2010)	Yes	None	Yes	Yes	Yes	Yes	No	Yes	No
Kazakhstan - Romania BIT (2010)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Austria - Kazakhstan BIT (2010)	Yes	None	Yes	Yes	Yes	Yes	No	Yes	No
Kazakhstan - Viet Nam BIT (2009)	-	-	-	-	-	-	-	-	-
Kazakhstan - Qatar BIT (2008)	-	-	-	-	-	-	-	-	-
Kazakhstan - Slovakia BIT (2007)	-	-	-	-	-	-	-	-	-
Finland - Kazakhstan BIT (2007)	Yes	None	Yes	Yes	Yes	Yes	No	Yes	No
Jordan - Kazakhstan BIT (2006)	-	-	-	-	-	-	-	-	-
Armenia - Kazakhstan BIT (2006)	-	-	-	-	-	-	-	-	-
Kazakhstan - Sweden BIT (2004)	Yes	Voluntary ADR (conciliation / mediation)	Yes	Yes	Yes	Yes	"Fork in the road"	Yes	No
Kazakhstan - Latvia BIT (2004)	-	-	-	-	-	-	-	-	-
Kazakhstan - Pakistan BIT (2003)	Yes	None	Yes	No	Yes	No	"Fork in the road"	Yes	No
Kazakhstan - Netherlands BIT (2002)	Yes	None	No	Yes	No	No	No	Yes	No
Greece - Kazakhstan BIT (2002)	Yes	None	Yes	Yes	Yes	Yes	No	Yes	No
Kazakhstan - Tajikistan BIT (1999)	Yes	None	No	Yes	No	Yes	No	Yes	No
Bulgaria - Kazakhstan BIT (1999)	Yes	None	Yes	Yes	Yes	No	No	No	No
Kazakhstan - Russian Federation BIT (1998)	Yes	None	Yes	No	Yes	Yes	No	Yes	No
BLEU (Belgium-Luxembourg Economic Union) - Kazakhstan BIT (1998)	Yes	Voluntary ADR (conciliation / mediation)	Yes	Yes	Yes	Yes	No	Yes	No
France - Kazakhstan BIT (1998)	Yes	None	No	Yes	Yes	Yes	No	Yes	No
Kazakhstan - Kuwait BIT (1997)	Yes	Inconclusive	No	Yes	Yes	Yes	No	Yes	No
Kazakhstan - Uzbekistan BIT (1997)	Yes	None	No	Yes	Yes	Yes	No	Yes	No
Kazakhstan - Kyrgyzstan BIT (1997)	Yes	None	No	Yes	Yes	Yes	No	Yes	No
Czech Republic - Kazakhstan BIT (1996)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Georgia - Kazakhstan BIT (1996)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Azerbaijan - Kazakhstan BIT (1996)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Kazakhstan - Malaysia BIT (1996)	Yes	Voluntary ADR (conciliation / mediation)	Yes	Yes	No	No	No	No	No
Kazakhstan - Korea, Republic of BIT (1996)	Yes	None	Yes	Yes	Yes	Yes	No	Yes	No
Iran, Islamic Republic of - Kazakhstan BIT (1996)	Yes	None	No	No	Yes	No	No	Yes	No
Israel - Kazakhstan BIT (1995)	Yes	Voluntary ADR (conciliation / mediation)	No	Yes	No	Yes	No	Yes	No
Kazakhstan - United Kingdom BIT (1995)	Yes	None	No	Yes	Yes	Yes	No	Yes	No
Hungary - Kazakhstan BIT (1994)	Yes	None	No	Yes	Yes	No	No	Yes	No
Kazakhstan - Mongolia BIT (1994)	-	-	-	-	-	-	-	-	-
Kazakhstan - Poland BIT (1994)	-	-	-	-	-	-	-	-	-
Kazakhstan - Ukraine BIT (1994)	-	-	-	-	-	-	-	-	-
Kazakhstan - Lithuania BIT (1994)	Yes	None	No	Yes	Yes	No	No	Yes	No
Kazakhstan - Switzerland BIT (1994)	Yes	None	No	Yes	No	No	No	Yes	No
Kazakhstan - Spain BIT (1994)	Yes	None	Yes	Yes	Yes	Yes	No	Yes	No
Egypt - Kazakhstan BIT (1993)	Yes	None	No	No	No	Yes	No	Inconclusive	No
Germany - Kazakhstan BIT (1992)	Yes	None	No	Yes	No	No	No	Yes	No
China - Kazakhstan BIT (1992)	-	-	-	-	-	-	-	-	-
Kazakhstan - United States of America BIT (1992)	Yes	None	Yes	Yes	Yes	Yes	No	Yes	No
Kazakhstan - Turkey BIT (1992)	Yes	None	Yes	Yes	Yes	yes	Yes (Art. 12.2.)	Yes	No

Short title	ISDS included	Alternatives to arbitration	ISDS forum options				Exhaustion of local remedies	Indirect Expropriation	
			Domestic courts of the host state	ICSID	UNCITRAL	Other forums		Mentioned	Defined
Tajikistan									
Hungary - Tajikistan BIT (2017)	-	-	-	-	-	-	-	-	-
Austria - Tajikistan BIT (2010)	Yes	None	Yes	Yes	Yes	Yes	No	Yes	No
Switzerland - Tajikistan BIT (2009)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Mongolia - Tajikistan BIT (2009)	Yes	None	Yes	No	Yes	Yes	No	Yes	No
BLEU (Belgium-Luxembourg Economic Union) - Tajikistan BIT (2009)	Yes	Voluntary ADR (conciliation / mediation)	Yes	Yes	Yes	No	No	Yes	No
Lithuania - Tajikistan BIT (2009)	-	-	-	-	-	-	-	-	-
Algeria - Tajikistan BIT (2008)	-	-	-	-	-	-	-	-	-
Tajikistan - Turkmenistan BIT (2007)	-	-	-	-	-	-	-	-	-
Qatar - Tajikistan BIT (2007)	-	-	-	-	-	-	-	-	-
Azerbaijan - Tajikistan (2007)	Yes	None	No	No	Yes	No	No	Yes	No
Syrian Arab Republic - Tajikistan BIT (2007)	-	-	-	-	-	-	-	-	-
Tajikistan - Thailand BIT (2005)	-	-	-	-	-	-	-	-	-
Pakistan - Tajikistan BIT (2004)	Yes	None	Yes	No	Yes	No	No	Yes	No
Indonesia - Tajikistan BIT (2003)	-	-	-	-	-	-	-	-	-
Germany - Tajikistan BIT (2003)	Yes	None	No	Yes	No	Yes	No	Yes	No
France - Tajikistan BIT (2002)	Yes	None	No	Yes	No	No	No	Yes	No
Moldova, Republic of - Tajikistan BIT (2002)	-	-	-	-	-	-	-	-	-
Netherlands - Tajikistan BIT (2002)	Yes	Voluntary ADR (conciliation / mediation)	No	Yes	No	No	No	Yes	No
Armenia - Tajikistan BIT (2002)	-	-	-	-	-	-	-	-	-
Tajikistan - Ukraine BIT (2001)	-	-	-	-	-	-	-	-	-
Kyrgyzstan - Tajikistan BIT (2000)	Yes	None	No	Yes	Yes	No	No	Yes	No
Kazakhstan - Tajikistan BIT (1999)	Yes	None	No	Yes	No	Yes	No	Yes	No
Russian Federation - Tajikistan BIT (1999)	Yes	None	Yes	No	Yes	Yes	No	Yes	No
Tajikistan - Viet Nam BIT (1999)	Yes	None	Inconclusive	Inconclusive	Inconclusive	Inconclusive	Inconclusive	Yes	No
Belarus - Tajikistan BIT (1998)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Tajikistan - Turkey BIT (1996)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Tajikistan - United Arab Emirates BIT (1995)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Iran, Islamic Republic of - Tajikistan BIT (1995)	-	-	-	-	-	-	-	-	-
Korea, Republic of - Tajikistan BIT (1995)	Yes	None	Yes	Inconclusive	No	Yes	No	Yes	No
Kuwait - Tajikistan BIT (1995)	-	-	-	-	-	-	-	-	-
Slovakia - Tajikistan BIT (1994)	-	-	-	-	-	-	-	-	-
Czech Republic - Tajikistan BIT (1994)	-	-	-	-	-	-	-	-	-
China - Tajikistan BIT (1993)	-	-	-	-	-	-	-	-	-
Spain - Tajikistan BIT (1990)	-	-	-	-	-	-	-	-	-
Belgium/Luxembourg - Tajikistan BIT (1989)	-	-	-	-	-	-	-	-	-

Short title	ISDS included	Alternatives to arbitration	ISDS forum options				Exhaustion of local remedies	Indirect Expropriation	
			Domestic courts of the host state	ICSID	UNCITRAL	Other forums		Mentioned	Defined
Turkmenistan									
Azerbaijan - Turkmenistan BIT (2018)	-	-	-	-	-	-	-	-	-
Bahrain - Turkmenistan BIT (2011)	Yes	None	Yes	Yes	Yes	No	“Fork in the road"	Yes	No
Italy - Turkmenistan BIT (2009)	-	-	-	-	-	-	-	-	-
Russian Federation - Turkmenistan BIT (2009)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Switzerland - Turkmenistan BIT (2008)	Yes	None	No	Yes	Yes	No	No	Yes	No
Tajikistan - Turkmenistan BIT (2007)	-	-	-	-	-	-	-	-	-
Turkmenistan - United Arab Emirates BIT (1998)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Turkmenistan - Ukraine BIT (1998)	-	-	-	-	-	-	-	-	-
Germany - Turkmenistan BIT (1997)	Yes	None	No	Yes	No	No	No	Yes	No
Georgia - Turkmenistan BIT (1996)	-	-	-	-	-	-	-	-	-
Armenia - Turkmenistan BIT (1996)	-	-	-	-	-	-	-	-	-
Iran, Islamic Republic of - Turkmenistan BIT (1996)	-	-	-	-	-	-	-	-	-
Turkmenistan - Uzbekistan BIT (1996)	Yes	None	No	Yes	Yes	No	No	Yes	No
Israel - Turkmenistan BIT (1995)	Yes	Voluntary ADR (conciliation)	No	Yes	No	No	No	Yes	No
Egypt - Turkmenistan BIT (1995)	Yes	None	No	No	Yes	No	No	Yes	No
Turkmenistan - United Kingdom BIT (1995)	Yes	None	No	Yes	Yes	Yes	No	Yes	No
Slovakia - Turkmenistan BIT (1995)	-	-	-	-	-	-	-	-	-
Romania - Turkmenistan BIT (1994)	-	-	-	-	-	-	-	-	-
Pakistan - Turkmenistan BIT (1994)	Yes	None	No	Yes	Yes	No	No	Yes	No
Indonesia - Turkmenistan BIT (1994)	-	-	-	-	-	-	-	-	-
Malaysia - Turkmenistan BIT (1994)	-	-	-	-	-	-	-	-	-
France - Turkmenistan BIT (1994)	Yes	None	No	Yes	No	No	No	Yes	No
China - Turkmenistan BIT (1992)	-	-	-	-	-	-	-	-	-
Turkey - Turkmenistan BIT (1992)	Yes	None	Yes	Yes	Yes	Yes	Inconclusive	Yes	No
Spain - Turkmenistan BIT (1990)	-	-	-	-	-	-	-	-	-
Belgium/Luxembourg - Turkmenistan BIT (1989)	-	-	-	-	-	-	-	-	-

Short title	ISDS included	Alternatives to arbitration	ISDS forum options				Exhaustion of local remedies	Indirect Expropriation	
			Domestic courts of the host state	ICSID	UNCITRAL	Other forums		Mentioned	Defined
Uzbekistan									
Belarus - Uzbekistan BIT (2019)	-	-	-	-	-	-	-	-	-
Korea, Republic of - Uzbekistan BIT (2019)	-	-	-	-	-	-	-	-	-
Turkey - Uzbekistan BIT (2017)	Yes	None	Yes	Yes	Yes	Yes	Yes (Art. 10.5.)	Yes	No
Russian Federation - Uzbekistan BIT (2013)	Yes	None	Yes	Yes	Yes	Yes	No	Yes	No
Saudi Arabia - Uzbekistan BIT (2011)	-	-	-	-	-	-	-	-	-
China - Uzbekistan BIT (2011)	Yes	None	Yes	Yes	Yes	Yes	Yes (Art. 12.2.)	Yes	No
Bahrain - Uzbekistan BIT (2009)	-	-	-	-	-	-	-	-	-
Oman - Uzbekistan BIT (2009)	Yes	None	Yes	Yes	Yes	Yes	"Fork in the road"	Yes	No
Japan - Uzbekistan BIT (2008)	Yes	Voluntary ADR (conciliation / mediation)	No	Yes	Yes	Yes	No	Yes	No
United Arab Emirates - Uzbekistan BIT (2007)	Yes	None	Yes	Yes	No	No	Yes (Art. 9.2.)	Yes	No
Kuwait - Uzbekistan BIT (2004)	-	-	-	-	-	-	-	-	-
Slovenia - Uzbekistan BIT (2003)	-	-	-	-	-	-	-	-	-
Singapore - Uzbekistan BIT (2003)	Yes	Voluntary ADR (conciliation / mediation)	No	Yes	No	No	No	Yes	No
Spain - Uzbekistan BIT (2003)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Hungary - Uzbekistan BIT (2002)	Yes	Voluntary ADR (conciliation / mediation)	Yes	Yes	Yes	No	No	Yes	No
Lithuania - Uzbekistan BIT (2002)	-	-	-	-	-	-	-	-	-
Portugal - Uzbekistan BIT (2001)	Yes	None	Yes	Yes	No	Yes	No	Yes	No
Sweden - Uzbekistan BIT (2001)	Yes	Voluntary ADR (conciliation / mediation)	No	Yes	Yes	No	No	Yes	No
Bangladesh - Uzbekistan BIT (2000)	Yes	None	No	Yes	No	No	No	Yes	No
Iran, Islamic Republic of - Uzbekistan BIT (2000)	-	-	-	-	-	-	-	-	-
Austria - Uzbekistan BIT (2000)	Yes	None	Yes	Yes	Yes	Yes	No	Yes	No
Bulgaria - Uzbekistan BIT (1998)	-	-	-	-	-	-	-	-	-
BLEU (Belgium-Luxembourg Economic Union) - Uzbekistan BIT (1998)	Yes	Voluntary ADR (conciliation / mediation)	Yes	Yes	Yes	Yes	No	Yes	No
Malaysia - Uzbekistan BIT (1997)	Yes	None	No	Yes	Yes	Yes	No	No	No
Kazakhstan - Uzbekistan BIT (1997)	Yes	None	No	Yes	Yes	Yes	No	Yes	No
Greece - Uzbekistan BIT (1997)	Yes	None	Yes	No	Yes	Yes	No	Yes	No
Czech Republic - Uzbekistan BIT (1997)	Yes	None	Yes	Yes	Yes	No	No	Yes	No
Kyrgyzstan - Uzbekistan BIT (1996)	Yes	None	No	Yes	No	No	No	Yes	No
Indonesia - Uzbekistan BIT (1996)	Yes	Voluntary ADR (conciliation / mediation)	Yes	Yes	No	No	No	Yes	No
Romania - Uzbekistan BIT (1996)	-	-	-	-	-	-	-	-	-
Azerbaijan - Uzbekistan BIT (1996)	-	-	-	-	-	-	-	-	-
Latvia - Uzbekistan BIT (1996)	-	-	-	-	-	-	-	-	-
Uzbekistan - Viet Nam BIT (1996)	-	-	-	-	-	-	-	-	-
Netherlands - Uzbekistan BIT (1996)	Yes	Voluntary ADR (conciliation / mediation)	No	Yes	No	No	No	Yes	No
Turkmenistan - Uzbekistan BIT (1996)	Yes	None	No	Yes	Yes	No	No	Yes	No
Moldova, Republic of - Uzbekistan BIT (1995)	-	-	-	-	-	-	-	-	-
Georgia - Uzbekistan BIT (1995)	-	-	-	-	-	-	-	-	-
Slovakia - Uzbekistan BIT (1995)	-	-	-	-	-	-	-	-	-
Poland - Uzbekistan BIT (1995)	-	-	-	-	-	-	-	-	-
United States of America - Uzbekistan BIT (1994)	Yes	None	Yes	Yes	Yes	Yes	“Fork in the road"	Yes	No
Israel - Uzbekistan BIT (1994)	Yes	Voluntary ADR (conciliation / mediation)	No	Yes	No	No	No	Yes	No
United Kingdom - Uzbekistan BIT (1993)	Yes	None	No	Yes	Yes	Yes	No	Yes	No
France - Uzbekistan BIT (1993)	Yes	None	No	Yes	No	No	No	Yes	No
Germany - Uzbekistan BIT (1993)	Yes	None	No	No	No	Yes	No	Yes	No
Switzerland - Uzbekistan BIT (1993)	Yes	None	No	Yes	Yes	No	No	Yes	No
Ukraine - Uzbekistan BIT (1993)	-	-	-	-	-	-	-	-	-
Egypt - Uzbekistan BIT (1992)	No	-	-	-	-	-	-	-	-
Finland - Uzbekistan BIT (1992)	Yes	Voluntary ADR (conciliation / mediation)	No	Yes	Yes	No	No	Yes	No
Pakistan - Uzbekistan BIT (1992)	Yes	None	Yes	No	Yes	Yes	No	Yes	No
Korea, Republic of - Uzbekistan BIT (1992)	Yes	None	No	No	Yes	No	No	Yes	No
Turkey - Uzbekistan BIT (1992)	Yes	Voluntary ADR (conciliation / mediation)	No	Yes	Yes	Yes	Inconclusive	Yes	No

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