Academic Forum on ISDS

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Anna De Luca

Crina Baltag

Daniel Behn

Holger Hestermeyer

Gregory Shaffer

Jonathan Bonnitcha

José Manuel Alvarez-Zarate

Loukas Mistelis

Malcolm Langford

Clara López Rodríguez

Simon Weber

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Duration of ISDS Proceedings

Anna De Luca
University of Bocconi
anna.deluca.pasquali@gmail.com

Crina Baltag
Stockholm University
crinabaltag@gmail.com

Daniel Behn
Queen Marys University
d.behn@qmul.ac.uk

Holger Hestermeyer
King's College London
holger.hestermeyer@kcl.ac.uk

Gregory Shaffer
University of California (Irvine)
gshaffer@law.uci.edu

Jonathan Bonnitcha
University of NSW
j.bonnitcha@unsw.edu.au

José Manuel Alvarez-Zarate
Externado de Colombia University
josealvarez.zarate@hotmail.com

Loukas Mistelis
Queen Marys University
l.mistelis@qmul.ac.uk

Malcolm Langford
University of Oslo
malcolm.langford@jus.uio.no

Clara López Rodríguez
King's College London
clara.lopez_rodriguez@kcl.ac.uk

Simon Weber
King's College London
simon.weber@kcl.ac.uk

Abstract

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

Key words

Appeal – Bifurcation - Due process - Duration of proceedings - Excessive length of proceedings – ISDS - Multilateral Investment Court – WTO

1. Introduction[1]

Speed is often touted as one of the advantages of arbitration over litigation. The quick and effective resolution of claims, especially in comparison with traditional inter-State proceedings including the exhaustion of internal remedies, has historically been one of the reasons for favouring investor-state arbitration as a means of settlement of investment disputes in public international law.[2] As pointed out by Mr. Broches during the elaboration of the ICSID Convention, "the object of the convention was to provide a speedy solution to a basic dispute [namely a dispute between a foreign investor and host state on 'investment'], and not to invite an international proceeding with lengthy introductory and preliminary

[1] This paper was prepared by the ISDS Academic Forum Working Group 2 – *Duration of proceedings*, which was chaired by Professor Holger Hestermeyer. We wish to thank the ISDS Academic Forum members and peer reviewers for their comments on earlier versions of the paper.

[2] For the history of investment disputes and their settlement see Anna De Luca and Giorgio Sacerdoti, Investment Dispute Settlement, in Markus Krajewski and Rhea T. Hoffmann (eds.), Research Handbook on Foreign Direct Investment, Elgar, 2019, 193-240, 193-202.

claims."[3] When the creation of an appeal mechanism within the framework of ICSID was discussed by the ICSID Secretariat in 2004 "to foster coherence and consistency in the case law emerging under investment treaties",[4] the likely increase in the length of investment arbitration proceedings was, alongside the connected increase in costs, one of the obstacles to the creation of such a mechanism.[5]

Whether arbitration still lives up to the expectation of a reasonably speedy resolution of disputes has been put in doubt over the last decade both with regard to commercial[6] and investment arbitration. As summarized by the UNCITRAL Secretariat, "the current ISDS practice has put into doubt the oft-quoted notion that arbitration represents a speedy and low-cost method for resolving investor-State disputes."[7]

In the current debate about ISDS reform, the length of ISDS proceedings, alongside their costs, has been repeatedly raised as a growing concern among the members of UNCITRAL Working Group III.[8]More specifically, '[…] lengthy and costly ISDS proceedings under some

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[3] History of the ICSID Convention, Documents concerning the Origin and the Formulation of the Convention, Volume II, Documents 1-43, para 34 on page 59.

[4] ICSID Secretariat, *Possible Improvements and the Framework for ICSID Arbitration* [2004], para 21. But see Barton Legum, 'Options to Establish an Appellate Mechanism for Investment Disputes' in Karl P. Sauvant (ed), *Appeals Mechanism in International Investment Disputes*, (Oxford University Press 2008), 231-239, who traces back the appellate mechanism to an initiative of the US, in 2002, when Congress enacted the Bipartisan Trade Promotion Authority Act, which set the negotiating objective of 'providing for an appellate body or similar mechanism to provide coherence to the interpretation of investment provisions in the trade agreements' in US free trade agreements. (p 232). See also the ICSID Secretariat, Suggested Changes to the ICSID Rules and Regulations [12 May 2005], para 4.

[5] Christian J. Tams, An Appealing Option? The Debate about an ICSID Appellate Structure, *Essays in Transnational Economic Law* No. 57 / June 2006, 1-50, 15 ('…the drafters [of the ICSID Convention] were certainly correct in stressing the need for a reasonably quick resolution of disputes. Whether investment arbitration presently meets that goal is of course a matter for debate. […] The present system, at least in practice, thus is not ideal. This however is certainly no argument for rendering it even less ideal, as the introduction of an appeals structure would inevitably do. Whatever its design, such a structure would not reduce, but increase the amount of time lapsing before a definite decision on the merits. Of course, much depends on time-frames governing appellate proceedings, and also on the scope of review. But it is clear that the possibility of having a second-level decision would prolong the period of uncertainty characterising legal proceedings. Ultimately, this might even discourage States or investors from seeking or providing foreign investment. Introducing an appeals facility thus runs counter to ICSID's object of resolving disputes quickly.') and 33-34.

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

[7] UNCITRAL Secretariat's Note, Possible reform of investor-State dispute settlement (ISDS)-cost and duration (A/CN.9WG.III/WP.153, 31 August 2018), para 2 ('…Accordingly, concerns were expressed regarding increasingly high costs and lengthy proceedings). Empirical studies also confirm that the duration of investment arbitration increased significantly in the period 2005 to 2014. See Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, Empirical Perspectives on Investment Arbitration: What do we know? Does it Matter?, (2020) 21 Journal of World Investment and Trade #.

[8] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017), A/CN.9/930/Rev.1, paras 36-51.

approaches raised concerns and practical challenges to respondent States as well as to claimant investors…'.[9] Additionally, 'there was a shared understanding that the duration and cost of the proceedings were interlinked, as lengthy proceedings were likely to result in higher costs.'[10]

This article attempts to evaluate the impact on the duration of ISDS proceedings of the following four alternative reform options: (i) mere procedural changes, including changes to the mechanism for the appointment of arbitrators, referred to as 'investment arbitration improved' (ii) adding an appellate mechanism to investment arbitration, referred to as 'investment arbitration + appellate mechanism', (iii) the creation of a multilateral investment court, and (iv) abolishing investor-state investment arbitration altogether, referred to as 'no ISDS' (with alternative domestic court and State-to-State sub-scenarios).[11] In carrying out this evaluation the present article takes a data-centric approach. Following the proposals of the UNCITRAL Working Group it will include comparators, namely the length of WTO proceedings, the length of domestic litigation, and that of interstate investment proceedings.[12]

Before proceeding to the substantive analysis, the present article will deal with the notion of "excessive" length of proceedings (2). It will then present data on duration of investment arbitration proceedings stemming from different data sets (3). As a comparator it then offers a summary of the Graduate Institute's data on the length of proceedings before the WTO Dispute Settlement Body, created by Joost Pauwelyn and Weiwei Zhang in Geneva (4).[13] Finally, the article turns to the various reform proposals and their possible impact on the length of ISDS proceedings, tackling in turn the improvement of the current system (5), the addition of an appellate mechanism (6), the multilateral investment court (7) and the abolition of ISDS (with alternative domestic court and State-to-State sub-scenarios) (8).

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[9] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017), A/CN.9/930/Rev.1, para 36.

[10] Ibid, para 38.

[11] See Malcolm Langford, Daniel Behn, Gabrielle Kaufman-Kohler and Michele Potesta, 'UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions – An Introduction', (2020) 21 Journal of World Investment and Trade #.

[12] UNCITRAL Secretariat's Note, Possible reform of investor-State dispute settlement (ISDS)-cost and duration (A/CN.9WG.III/WP.153, 31 August 2018), para 11 ('cost and duration of ISDS proceedings should not be examined in isolation, but by reference to suitable comparators, which might include other international dispute settlement bodies such as the International Court of Justice (ICJ) and the Dispute Settlement Body (DSB) of the World Trade Organization (WTO), and domestic court procedures').

[13] The authors are grateful to Joost Pauwelyn and Weiwei Zhang for giving them access to their dataset developed with funding by the SNF in the context of the Project 'Convergence versus Divergence? Text-as-data and Network Analysis of International Economic Law Treaties and Tribunals.'

The evaluation of the impact of the various reform proposals on duration of ISDS proceedings faced a number of challenges. First of all, none of the afore-mentioned reform scenarios has been intended to specifically address the duration of ISDS proceedings except for 'IA improved'.[14] Even in this case the reform proposals more often than not address inefficiencies in arbitration, rather than the length of investment arbitration proceedings *per se*. As opposed to the 'IA improved' scenario, the other two main reform proposals currently under discussion at UNCITRAL, i.e., the addition of an appellate mechanism and the multilateral investment court, are clearly intended as policy responses to concerns different from those related to the duration of proceedings, namely "unjustified" inconsistencies, inaccuracies, and incorrectness in investment arbitral practice, and the impartiality, independence, and neutrality of adjudicators. We do not intend to take a position with regard to any of these alleged advantages and disadvantages – nor indeed do we intend to express an overall opinion on any of the proposals under discussion. We intend to focus on duration of proceedings alone. However, the impact of the reform proposals on the duration of ISDS proceedings seems to be more of a collateral damage or benefit of the reform proposals under discussion. It is, accordingly, no surprise that the impact on the duration of ISDS proceedings of the reform scenarios is not always easy to ascertain.

Secondly, while the use of comparators can give a rough indication of the duration of alternative procedural arrangements, neither the selection of the data used as comparators, nor the comparison itself is straightforward. The average length of proceedings differs considerably from one court or dispute settlement system to another, given that the jurisdictional scope of and the law applicable by each system significantly vary from one to another. Even within the same system different procedures might result in considerably different durations of proceedings, resulting in complex methodological questions with regard to how best to estimate the length of proceedings.[15] The case of the Court of Justice of the European Union is illustrative: on the one hand, in 2017, the average duration of proceedings before the Court of Justice and the General Court was 16.4 months, and 16.3 months, respectively; on the other, the average duration of urgent preliminary rulings was a mere 2.9

[14] Even in this case the reform proposals address inefficiencies in arbitration, rather than the length of investment arbitration proceedings *per se*.

[15] See for proceedings in the US David S. Clark and John Henry Merryman, *Measuring the Duration of Judicial and Administrative Proceedings,* (1976) 75 Mich. L. Rev. 89 using the number of cases pending at the beginning of a year and the number of cases filed during that year. D

months.[16] When a comparator is chosen and data for it has been collected, one has to bear in mind that the types of disputes at issue and the procedural setup differ significantly from ISDS.

Thirdly, the length of investment arbitration proceedings is so heavily fact-specific that it seems to defy all attempts at generalisation. Multiple factors may influence the duration of an ISDS case.[17] Among these are factors contingent on the features of the case itself (for instance, the complexity and intricacy of the factual and legal background, which can lead the tribunal to decide to bifurcate), and factors depending on the disputing parties' conduct in the procedure (for instance, the lack of mutual agreement on arbitrators, their request for additional time to submit their briefs, or their decision to put the dispute on ice while trying to settle). There can also be factors resting with arbitrators; for instance, an arbitrator can fall ill or even die, or she can be well-organised or poorly organised, she can focus more or less on a specific arbitration, tight work schedules can make the coordination of dates for hearings difficult and she can benefit from more or less administrative help. Furthermore, respondent States have strong incentives to delay the proceedings.

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

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[16] CJEU, *2017 Annual Report*, 37-39.

[17] This is, of course, a significant difficulty when analysing the length of legal proceedings in other fields, as well. See the example of cartel cases under the EU law, where EU Commission decisions can be appealled before the General Court of the EU by decisions' addressees and the judgment of the General Court can be, in turn, appealed before the European Court of Justice by the unsuccessful party (with the note that these appeals to the CJEU are limited to questions of law only). Smuda, Bougette and Hüschelrath refer to the following factors in discussing the duration of the appeals mechanisms in the EU cartel cases: (a) authority-related determinants, such as the characteristics of the case while handled by the EU Commission; (b) court-related determinants, for example the organizational structure or the educational standard and practical experience of the appeal courts; (c) appeals-related determinants, such as who the appellant is in the second appeal; etc. See Florian Smuda, Patrice Bougette and Kai Hüschelrath; *Determinants of the Duration of European Appellate Court Proceedings in Cartel Cases*, (2015) 53(6) JCMS 1352, 1358-1360.

2. The Notion of 'Excessive' Length of Proceedings

The article intentionally avoids making use of the notion of 'excessive' length of proceedings since the concept resists generalisations and is notoriously elusive, if one looks at the international judicial practice. Along these lines, UNCITRAL Working Group III has also acknowledged that '… notions of cost and duration were relative in nature, and whether the process was excessively costly or lengthy should be determined on a case-by-case basis and taking into account the need for effective administration of justice.' [18] Nevertheless, the Working Group has emphasised the need '…to draw a distinction between "excessive" or "unjustified" time and cost on the one hand, and "necessary" or "justified" time and cost on the other', as well as that to balance the quality of outcomes with the desire to reduce cost and duration.[19] Accordingly, some comments on the concept of 'excessive' duration are in order.

While a particular proceeding might, of course, be excessively long, it is impossible, in the light of the fact-specific nature of the length of individual investment arbitration proceedings, to state any rule of thumb as to a particular length that might allow us to qualify the duration of an arbitral procedure as 'excessive' and 'unjustified', or 'necessary' and 'justified' in the abstract.

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

As a matter of example, the European Convention on Human Rights guarantees the right to a fair trial in its Article 6 stating that '[i]n the determination of his civil rights and obligations or

[18] UNCITRAL Secretariat's Note, Possible reform of investor-State dispute settlement (ISDS)-cost and duration (A/CN.9WG.III/WP.153, 31 August 2018), para 12. [Emphasis in original].

[19] UNCITRAL Secretariat's Note, Possible reform of investor-State dispute settlement (ISDS)-cost and duration (A/CN.9WG.III/WP.153, 31 August 2018), para 12. [Emphasis in original].

of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law.'[20]

The 'reasonable' duration of proceedings occupies a good part of the workload of the European Court of Human Rights. That notwithstanding, the Court has not developed acceptable fixed maximum periods for the length of legal proceedings.[21] Instead, it has held that the reasonableness of the length of proceedings 'must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute.'[22] Even where proceedings as such are not excessively long, they can still be unreasonably long if the court becomes inactive.[23] On the other hand, the complexity of a case – and delay caused by the parties' own behaviour – can also justify comparatively long proceedings.[24] The approach of the ECtHR thus confirms that judging the length of proceedings is a heavily fact-specific exercise.

Furthermore, even admitting that the key concept in the present context is that of '(un)reasonable' duration (rather than the notion of "excessive" or "unjustified" duration), as applied by the ECtHR, it is difficult to reconcile the afore-mentioned human right law standard with the more 'conservative' and cautious standard applied by some investment tribunals in deciding the issue of when the duration of domestic proceedings is so excessive as to amount to an investment treaty breach. As has been observed in legal literature, the concept of denial of justice adopted by the ECtHR is less restrictive than the concept adopted by some investment tribunals.[25]

Absent *lex specialis* provisions, such as the so-called effective means clauses, in the applicable investment treaty,[26] investment arbitral practice follows the position that only

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[20] Emphasis added.

[21] Jens Mayer-Ladewig et al. (eds.), *EMRK*, § 6, para 199 (4th ed. 2017).

[22] *Comingersoll S.A. v Portugal* [GC], App No 35382/97, para 19; *Frydlender v France*, App No 30979/96, para 43; *Glykantzi v Greece*, App No 40150/09, para 47.

[23] *Gjashta v Greece*, App No 4983/04, para 16; see also *Herbst v Germany*, App No 20027/02, para 78.

[24] *Yildiz v Germany*, App No 23279/06, paras 48 et seq.

[25] See Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 European Journal of International Law 729-749.

[26] Article 10(26) Energy Charter Treaty [Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect of Investments, investment agreements, and investment authorizations]; and Article II(7) Ecuador-US BIT [Each Contracting Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations]

extremely gross misconduct by a domestic judiciary can amount to a denial of justice, as an element of the fair and equitable treatment standard (FET). The case *Ian de Nul N.V. Dredging International N.V. v Egypt* well illustrates the point.[27] In dismissing claimants' claim that a first instance domestic proceedings, lasting nearly ten years, was so excessively long as to be considered in breach of the FET, the *de Nul* Tribunal clarifies that: '…there is no doubt that ten years to obtain a first instance judgment is a long period of time. However, the Tribunal is mindful that the issues were complex and highly technical, that two cases were involved, that the parties were especially productive in terms of submissions and filed extensive expert reports. For these reasons, it concludes that, while the duration of the proceedings leading to the Ismaïlia Judgment is certainly unsatisfactory in terms of efficient administration of justice, it does not rise to the level of a denial of justice.'[28] Such investment arbitral practice is consistent with international judicial practice on customary law on foreign investors' protection and the traditional law of diplomatic protection, but, to a certain extent, at odds with ECtHR practice.

But while the notion of 'excessive' duration of ISDS proceedings does not lend itself to being captured in a fixed and simple formula and hence may be rather unworkable in the present context, a longer duration of proceedings is not without relevant effects whether or not the duration amounts to being 'excessive'. Generally, the longer the investment arbitration proceedings will last, the higher will be the overall costs of the ISDS procedure.[29] In turn, high costs of investment arbitration (regardless of whether or not they are 'justified') may unduly limit the access of small and medium sized enterprises to international protection, as well as impose a heavy burden on developing states.[30] After all, not only justice delayed but also justice which is unaffordable to most, is justice denied. The link between ISDS duration and costs, on the one hand, and access to justice (including the role of third-party financing as well as support for developing states and small and medium enterprises), on the other, should

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[27] ICSID, Case No. ARB/04/13, Award 6 November 2008.

[28] Ibid, para 204.

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

[30] UNCITRAL Secretariat's Note, Possible reform of investor-State dispute settlement (ISDS)-cost and duration (A/CN.9WG.III/WP.153, 31 August 2018), para 94.

be considered when reform proposals of ISDS are designed.[31] It is, nonetheless, beyond the scope of this article.

3. Length of ISDS Proceedings: The Evidence

It has already been stated above that the length of ISDS proceedings is heavily fact-specific. Nevertheless, one can collect data from awards that are publicly accessible and through this exercise gain a more factual insight into how long ISDS proceedings really take. This article will, firstly, present a study by the International Centre for Settlement of Investment Disputes (ICSID) itself on the duration of ICSID arbitration proceedings (1), then offer some data from PluriCourt's Investment Treaty Arbitration Database, created by Daniel Behn and Malcolm Langford in Oslo (2); and finally supplement these datasets by data from a dataset developed for this paper by Holger Hestermeyer, Clara López Rodríguez and Simon Weber at King's College London (3).

3.1 ICSID's Review of Case Duration

ICSID reviewed the duration of cases as part of its rule amendment project.[32] For its study, it reviewed 63 cases that concluded with an award between 1 January 2015 and 30 June 2017.[33] The review yielded an average duration of proceedings of 1,336 days, i.e. three years and seven months – 1382 days for joint proceedings, 1301 days for bifurcated proceedings. ICSID also lists a third type of proceedings lasting 829 days, however this was a single proceeding that was on the merits only. The result for bifurcated proceedings is somewhat more nuanced however, if one looks at the details – it took 749 days on average for an award on jurisdiction, but 1,893 days if an award on the merits became necessary. As to the stages of the proceedings, after registration of the request it took 258 days on average to constitute the tribunal and another 71 days until the first session. The written process then took 581 days in joint proceedings, 369 days in the jurisdictional stage of bifurcated proceedings, another 516 days for the merits stage. The time between the final written or oral submission to the award

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

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

[33] The study on which this section is based can be found in ICSID Secretariat, *Proposals for Amendment of the ICSID Rules – Working Paper (Volume 3)*, 2 August 2018, p 899 et seq.

was 258 days on jurisdiction in bifurcated proceedings, another 364 days on the merits in bifurcated cases. For joint proceedings the average was 414 days.[34]

3.2 PluriCourt's Investment Treaty Arbitration Database

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

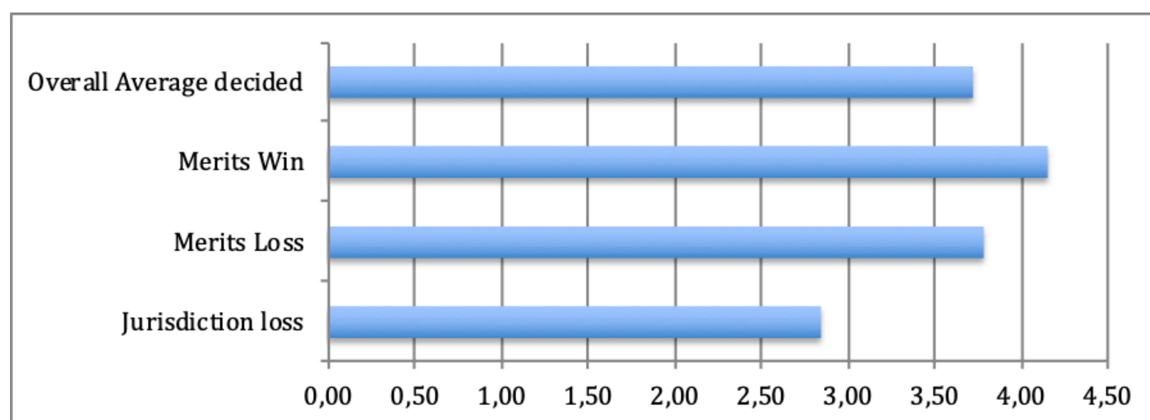
Table 1. Duration of proceedings – Summary statistics (PITAD)

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

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

[34] The quoted ICID paper describes in detail which adjustments were made to yield these outcomes.
[35] The database is available online <https://pitad.org/index#welcome> accessed 8 July 2019.

Figure 1 – Length of cases by type of decision (PITAD)



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

The duration of annulment proceedings is summarised in Table 2. Annulment proceedings take, on average, 1.91 years (1.75 taking into account discontinued cases). Here, again, successful cases take a bit longer (2.11 years for a full, 2.01 years for a partial annulment) than rejected annulments (1.87 years).

Table 1. Duration of annulment proceedings – Summary statistics (PITAD)

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

Annulment Rejected	47	681	1.87	0.66

As indicated by the standard deviation, case length varies significantly from case to case. Identifying causes for a longer duration of arbitration proceedings requires testing various hypotheses with the available data and finding statistically significant differences. In assessing the available empirical evidence, Langford et al. come to the conclusion that procedural events, such as bifurcation, arbitrator challenges and arbitrator replacements as well as the existence of a dissenting opinion are the most significant factors that prolong arbitration.[36]

3.3 King's College London Dataset

The King's College London dataset contains 110 cases, namely those in the ICSID or ITA database with awards rendered in selected years (1997, 2002, 2007, 2015 and 2017), which brought the arbitration to an end. Different years were selected to include developments over time. 59 of the 110 awards were rendered in ordinary proceedings without annulment, 32 proceedings were bifurcated, 10 ordinary proceedings went through annulment, 9 bifurcated cases went through annulment. While the data was extracted specifically to determine the length of duration of the various stages of the proceedings and thus supplement the other available data, it is important to note that not all of the cases allow such a determination, as for some of them some relevant dates are not known.

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

As to the specific stages, the constitution of the tribunal took an average of 181 days ranging from 17 to 712 days. Annulment committees were constituted rather more quickly, namely on average within 103 days (in between 28 and 229). The written phase of ordinary proceedings without annulment took an average of 407 days (ranging from 30 to 1,511), bifurcated cases took on average 224 days for the first, 379 days for the second and 403 days for the third stage (where a case is trifurcated).

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[36] See Daniel Behn, Tarald Berge, Malcolm Langford and Maksim Usynin, 'Why the Delay? Explaining Length of Proceedings in International Investment Arbitration' (2019) PluriCourts Working Paper, January 2019.

4. Length of Proceedings in International Law: The WTO DSB

ISDS proceedings are unique in international law. They allow access to non-states and issue enforceable awards for full compensation of damages. Comparing ISDS proceedings to any other type of proceeding under international law is, accordingly, an exercise of limited value. That there is some limited value, however, is equally hard to deny: it is worthwhile to have at least some idea of how long international legal proceedings take elsewhere – even if it is only to then conclude that the difference in nature of the proceedings justifies a difference in their length. Since the WTO and its dispute settlement mechanism have inspired some of the thinking behind proposals of a court system, this article chooses the WTO as a comparator, even though WTO proceedings are state to state and remedies are only prospective. The dataset used has been compiled by Joost Pauwelyn and Weiwei Zhang with support by the SNF.

4.1 Indicative Timeframe

The Dispute Settlement Understanding of the WTO contains indicative time frames for many of the procedural steps. The WTO has, on its website, translated these into target figures for each stage of the proceedings.[37] See Figure 2.

Figure 2 – WTO Target Figures for Length of Proceedings

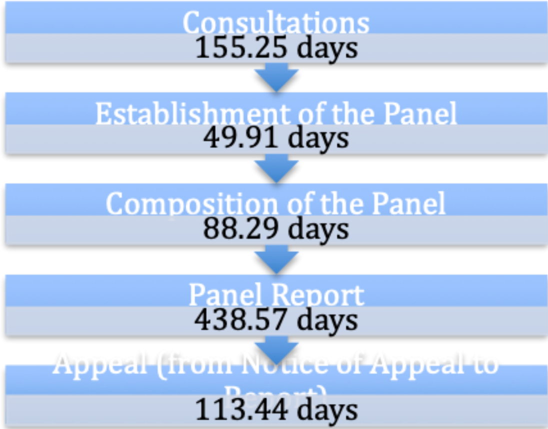
[37] <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed 8 July 2019.

The time frame is reproduced on the left. Under this indicative timeframe, dispute settlement is supposed to take 308.5 days until the circulation of the Panel report and a maximum of 458.5 days until the Appellate Body Report.

4.2 Reality

The indicative time frame has always appeared ambitious – and was meant to be flexible, given that WTO cases vary in complexity, from straightforward legislative discrimination to complex fact-based violation claims. In reality, cases vary enormously in length: The shortest case for the panel stage was *US – Wool Shirts and Blouses*,[38] which took just 298 days from the request of consultation to the circulation of the Panel Report. The *Australia – Tobacco Plain Packaging*[39] disputes (combining several disputes into one and counting from the earliest request for consultations) needed 2276 days for the same stage. Appeals from notice of appeal to the report by the Appellate Body took in between 57 days (*Japan – Alcoholic Beverages II*[40]) and 395 days (*Russia – Commercial Vehicles*[41]). Average times for various stages of the procedure are given in the preceding graph.

Figure 3 – WTO Actual Figures for Length of Proceedings



[38] *US – Wool Shirts and Blouses*, WT/DS33.
[39] *Australia – Tobacco Plain Packaging*, WT/DS434, 435, 441, 458, 467.
[40] *Japan – Alcoholic Beverages II*, WT/DS8, 10, 11.
[41] *Russia – Commercial Vehicles*, WT/DS479.

5. Investment Arbitration Improved

ICSID, the leading forum in the field of investment arbitration, explicitly tackled the topic of duration and efficiency of investment arbitration in its Working Papers #1 and #2 on Proposals for Amendment of the ICSID Rules.[42] The exercise yielded some proposals for rule amendments to speed up proceedings, which shall be listed below.[43]

5.1 Relevant Improvements

As suggested by the current ICSID amendment process, ISDS could be improved as to the length of proceedings in the following ways:[44] first, speeding up the constitution of the arbitral tribunals, with the default method triggered after a certain period after the registration of the claim; secondly, including a general obligation for parties and arbitrators to conduct the proceedings in an expeditious manner;[45] thirdly, addressing the organization of hearings and witness examination, by providing more flexibility;[46] fourthly, speeding up the deliberation process and specifying/shortening the time limits for the delivery of the arbitral award;[47] fifthly, introducing expedited arbitration proceedings; sixthly, explicitly providing for consolidation and coordination of claims; and finally, other procedural improvements. We discuss each in turn.

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

[43] But see the comments received from the ICSID Contracting States to Working Papers #1 and #2. In particular, Canada's comment regarding the consequences of default in payment of estimated costs of proceedings indicates that States' participation in the proceedings are likely to be one of the sources of longer duration of arbitration proceedings: 'The reality is that the amount of the deposit required or the particular timing of a request often requires States to seek lengthy internal approvals.' (Canada, 10 June 2019, in ICSID, *Rule Amendment Project – Member State & Public Comments on Working Paper # 2 of 15 March 2019*, p. 13)

[44] See also ICSID, *Proposals for Amendment of the ICSID Rules — Consolidated Paper*, Working Paper #2, vol. II [2019], the proposed Rules 9-11 of the new ICSID Arbitration Rules on the time limits.

[45] ICSID Secretariat, *Proposals for Amendment of the ICSID Rules — Consolidated Paper*, Working Paper #2, vol. II [2019], proposed Rule 2 of the new ICSID Arbitration Rules.

[46] ICSID Secretariat, *Proposals for Amendment of the ICSID Rules — Consolidated Paper*, Working Paper #2, vol. II [2019], proposed Rules 37 and 41 of the new ICSID Arbitration Rules, pp. 28 and 42. The new rules allow the president of the tribunal to discuss the method of holding the hearings.

[47] ICSID Secretariat, *Proposals for Amendment of the ICSID Rules — Consolidated Paper*, Working Paper #2, vol. II [2019], proposed Rules 33(4) and 68. For the arbitral award, the new Rule 68(1) provides the following:

> 'The Tribunal shall render the Award as soon as possible and in any event no later than:
>
> (a) 60 days after the last written or oral submission, or the Tribunal constitution, whichever is later, if the Award is rendered pursuant to Rule 50(4);
>
> (b) 180 days after the last written or oral submission if the Award is rendered pursuant to Rule 52BIS(3)(c); or
>
> (c) 240 days after the last written or oral submission on all other matters.'

a) Speeding up the constitution of the arbitral tribunals, with the default method triggered after a certain period after the registration of the claim

The survey of the arbitral proceedings conducted by ICSID on the occasion of the amendment process showed that the average duration of the surveyed tribunal constitutions was of 258 days.[48] This long process is explained by (i) no initial participation by the respondent due to delay in organizing its defence; (ii) methods that provide for a long appointment process; (iii) no immediate request by a party for the Chairman of the Administrative Council to appoint a missing arbitrator after the expiry of the 90-day period provided in Art. 38 of the Convention; and (iv) agreed methods that eventually lead to default.[49]

b) Disputing parties and arbitrators' general obligation to conduct the proceedings in an expeditious manner

Such an obligation already exists in national arbitration laws[50] and the rules of major arbitral institutions such as the ICC,[51] and is also included in the UNCITRAL Arbitration Rules.[52] Failure to observe this obligation could be reflected in the allocation of the costs of arbitration or in the fees of arbitrators, respectively.[53] The ICSID Convention, in Article 61(2), provides for sufficient flexibility for the arbitral tribunal to sanction a failure of one party in complying with such obligation: 'the Tribunal shall decide how and by whom those expenses, the fees

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[48] ICSID Secretariat, *Proposals for Amendment of the ICSID Rules – Working Paper (Volume 3)*, 2 August 2018, p 902.

[49] Ibid.

[50] See, e.g. English Arbitration Act 1996, section 33.

[51] ICC Arbitration Rules 2017, Article 22.

[52] UNCITRAL Arbitration Rules 2010, Article 17. Related to this, several measures are contemplated in the proposed ICSID Arbitration Rules, such as the electronical submission of written submissions. ICSID Secretariat, *Proposals for Amendment of the ICSID Rules — Consolidated Paper*, Working Paper #2, vol. II [2019], proposed Rule 4: 'A document shall only be filed electronically, unless the Tribunal orders otherwise in special circumstances.'

[53] But see ICSID's position on reducing arbitrators' fees in ICSID Secretariat, *Proposals for Amendment of the ICSID Rules — Consolidated Paper*, Working Paper #2, vol. II [2019], para 22:

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

and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid.'[54] The ICC rules expressly include the 'rapidity' with which the arbitral proceedings have been conducted in fixing the fess of arbitrators.[55]

c) Addressing the organization of hearings and witness examination, by providing more flexibility

ICSID has been operating on the basis of procedural flow-charts organising proceedings on the basis of whether there are preliminary objections and whether the parties wish to bifurcate or tri-furcate the arbitration. This entailed the risk of repeating evidentiary exercises for different aspects of the cases and having some overlaps in submissions.

d) Speeding up the deliberation process and specifying/shortening the time limits for the delivery of the arbitral award

As with the conduct of proceedings in an expeditious manner, the failure to render the award within the specified period of time, unless justified, could be reflected in the fees of arbitrators, as the ICC rules currently provide.[56] The data indicates that the rendering of the award often takes more than six months after the final procedural action in the proceedings and awards rendered a year later are not uncommon.

e) Expedited arbitration proceedings

Probably the most significant development recorded by the proposed ICSID Arbitration Rules, and which is contemplated by the new generation of international investment agreements (see CETA, Art. 8.23(5)) and by other institutional arbitration rules (e.g. ICC,

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[54] This is also considered in the ICSID Secretariat, *Proposals for Amendment of the ICSID Rules — Consolidated Paper*, Working Paper #2, vol. II [2019], proposed Rule 50(1) of the new ICSID Arbitration Rules:

> 'In allocating the costs of the proceeding, the Tribunal shall consider:
>
> (a) the outcome of the proceeding or any part of it;
>
> (b) the parties' conduct during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner;
>
> (c) the complexity of the issues;
>
> (d) the reasonableness of the costs claimed; and
>
> (e) all other relevant circumstance'

[55] Appendix III, Article 2(2) of the ICC rules currently in force provides that:

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

[56] See Appendix III, Article 2(2) of the ICC rules currently in force.

SCC) is the proposal for expedited arbitration proceedings, when the parties consented to it.[57] The proposed expedited arbitration proceedings are conducted by a sole arbitrator and propose lower fees and shorter time limits, increasing thus the efficiency of the proceedings. However, it is to be seen whether the nature of ISDS proceedings, as well as the complexity of the disputes thereof are suitable to expedited arbitration proceedings. In any case, a similar provision could make ISDS more attractive for small value claims (and thus improve access of small and medium size investors) before ICSID.

f) Consolidation and coordination of claims

The proposed ICSID Arbitration Rules, similar to other rules, contain provisions concerning consolidation of claims with the consent of the parties. The proposed Rule 43 also refers to the 'coordination' of claims, where consolidation is not available.[58] Under the proposed ICSID Arbitration Rules, consolidation means that all aspects of the arbitrations sought to be consolidated are joined resulting in a single award, while coordination aligns only specific procedural aspects of each pending arbitration, and, consequently, the arbitrations remain separate proceedings and result in individual awards.[59]

g) Other procedural improvements

Other areas of concern, as identified in the review of arbitral awards, as well as by ICSID during the current amendment process, are the length of the proceedings when bifurcation is granted (including under Rule 41(5) of the current ICSID Arbitration Rules concerning an objection that a claim is manifestly without legal merit); the lengthy periods for the submission of written proceedings[60] (and with this, the documentary evidence submitted to the tribunal), procedures for provisional measures,[61] etc. These are all issues that could be addressed, either in the applicable arbitration rules or by the arbitral tribunal in its wide

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[57] See ICSID Secretariat, *Proposals for Amendment of the ICSID Rules — Consolidated Paper*, Working Paper #2, vol. II [2019], proposed Rules 73-84.

[58] Ibid, proposed Rule 43.

[59] Ibid, proposed Rule 43(2) and (3).

[60] ICSID Secretariat, *Proposals for Amendment of the ICSID Rules – Working Paper (Volume 3)*, 2 August 2018, pp 901-904.

[61] Although the request for provisional measures may be submitted with the Secretary General before the constitution of the arbitral tribunal (Rule 39(5) of the current ICSID Arbitration Rules), it is for the tribunal to decide on the suitability of the measures. Thus, the process is closely linked to the appointment of the tribunal. In *Levi v Peru,* the claimant filed the request for provisional measures with the ICSID Secretariat on 9 September 2010 and the decision of the tribunal was issued on 17 June 2011. See, *Renée Rose Levy de Levi v Republic of Peru* (ICSID Case No. ARB/10/17).

discretion in conducting the proceedings. In the light of the statistics above, one could also suggest that excluding bifurcation altogether or restricting the grounds for granting bifurcation could shorten the duration of the proceedings.[62]

The article will now present the main advantages and disadvantages the proposed reforms may have in relation to the duration of proceedings.

5.2 Advantages and Disadvantages

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

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

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

Given the limited nature of the changes to the system, the door would be left open to introduce additional changes such as fixed time limits or limited hearings as is the cases in some national supreme courts (e.g. US)[63] or international or regional courts (CJEU).[64]

6. Adding an appellate mechanism

The discussion on the introduction of an appellate mechanism in investor-state arbitration is not new and it dates back at least to the 2004 proposal for the amendment of the ICSID

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[62] Lucy Greenwood, 'Does Bifurcation Really Promote Efficiency?' (2011) 28 Journal of International Arbitration 105–111.

[63] Typically oral hearings are limited to 60 minutes.

[64] Speaking time at oral hearings before the CJEU, which are not held in every case, is severely restricted and as a rule is 15 minutes per party. See the Practice directions to parties concerning cases before the Court, [2014] OJ L331/1, para 52.

Arbitration Rules, as already pointed out above in the introduction.[65] While the discussions at ICSID did not progress much in that direction, the new generation of international investment agreements (IIAs) starting with CAFTA-DR in 2006 started to refer to an 'appellate body or similar mechanism', envisaging the implementation of an appellate mechanism for arbitral awards issued under the ISDS provisions. Inconsistent decisions against Argentina dealing with the state of necessity defence (*LG&E, Enron, Sempra* etc) certainly had an impact on the debate. At government level, in the period 2008-2010, there were also discussions initiated by Latin American states about the introduction of an optional protocol attached to the ICSID Convention and dealing with an appellate body. Similarly, an appeals mechanism was discussed in the UNASUR negotiations during the same period.

As the purpose of this paper is to review the duration of ISDS proceedings under the existing framework, as well as in different reform scenarios, we will only examine this aspect of the possible introduction of an appellate mechanism. It goes without saying that, as with other suggested reform options, the examination of the overall suitability and viability of the proposal requires an analysis of a multitude of other factors, including the impact of such a mechanism on the finality of arbitral awards and on consistency and transparency in the fundamentally heterogeneous ISDS system,[66] including whether the mechanism would be fit to address all types of investment arbitral awards.[67] With regard to the duration of proceedings it should be pointed out that the advantages and disadvantages of an appellate mechanism depend heavily on the way in which such a mechanism is constructed.[68]

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[65] See above note no. 4.

[66] Katia Yannaca-Small summarises the advantages and disadvantages of an appellate mechanism in Katia Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement: The OECD Governments' Perspective' in Karl P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008), 223, 224-225. On the fragmented nature of investment law and the impact of this on the future of ISDS, see Joost Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed?' (2014) 29 ICSID Review 372-418.

[67] It is outside the ambit of this paper to assess whether there is room for such an appellate mechanism under the ICSID Convention, given the provisions of Art. 53(1) of the ICSID Convention, which reads: 'The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.' In the ICSID context an appellate mechanism could be introduced by way of a separate treaty or protocol or through a potential lengthy and onerous revision of the ICSID Convention. See Jan Paulsson, 'Avoiding Unintended Consequences' Disputes' in Sauvant, *Appeals Mechanism in International Investment Disputes*, ibid, 241, 259: 'The ICSID Convention does not contemplate an appellate mechanism. To the contrary, being internationally enforceable ICSID awards are inherently unable to accommodate the intrusion of an appellate mechanism.'

[68] On the duration of the appellate mechanisms for cartel cases under the EU Law and the various factors influencing such duration Florian Smuda, Patrice Bougette and Kai Hüschelrath; Determinants of the Duration of European Appellate Court Proceedings in Cartel Cases, (2015) 53(6) JCMS 1352.

6.1 Advantages

If constituted as the only available (or as a consolidated) mechanism excluding other mechanisms, such as the annulment procedure under the ICSID Convention or the setting aside procedure for non-ICSID arbitral awards, an appellate mechanism does not excessively prolong the procedure. As such, the system could consider the challenge of an arbitral award based on the existence of a procedural irregularity, as set out in Article 52 of the ICSID Convention, as well as for well-defined errors of law. Including errors of fact in the review (within a narrow definition, arguably) would likely lengthen the proceedings. Depending on the structure of the appellate facility/body, the constitution of the panel that would hear the appeal as well as the time in which it would reach a solution would arguably take longer than annulment proceedings because of the enlarged scope of review, but could, depending on the national system at issue, arguably be shorter than setting aside proceedings before competent domestic courts, at least in certain cases.[69]

The appellate mechanism could, however, save significant time in terms of a final resolution to the case, if, where it admits the appeal in part or in full, the appellate body would be entrusted with the power to retain the case and render a new arbitral award. No remedy against the decision of the appellate body or against the new award rendered following the appeal could be contemplated. In this way, the appellate mechanism would be the second and final instance of ISDS proceedings with a well-defined jurisdictional threshold. This might be a major advantage of such an appellate mechanism over the current ICSID system.[70] In that system the authority of the ICSID Annulment Committee is limited under Art. 52(6) of the

[69] For instance, in the *Yukos Cases* (*Yukos Universal Ltd v Russian Federation,* PCA AA 227; *Hulley Enterprises Ltd v Russian Federation,* PCA AA 226; and *Veteran Petroleum Trust v Russian Federation*, PCA AA 228) the arbitral tribunal rendered the award on 18 July 2014 and the Respondent commenced the setting aside proceedings in the Hague, with the Hague District Court rendering the decision on 20 April 2018. The judgment of the Hague District Court is under appeal by the investors and the proceedings are pending in the Hague Court of Appeal. The judgment of the Court of Appeal is subject to appeal, on limited grounds, before the Supreme Court. See also *Renta v Russia* (*Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No. 24/2007), where the arbitral tribunal rendered the award on 20 July 2012, the Stockholm District Court dealt with the setting aside procedure by judgment of 14 September 2014 and the Svea Court of Appeal granted the appeal against the judgment of the District Court on 18 January 2016.

[70] Supporting this position, see Barton Legum, 'Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-US FTA?' in Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill Nijhoff, 2015), 437, 441-442; Gabriel Bottini, 'Reform of the Investor-State Arbitration Regime: The Appeal Proposal', ' in Kalicki and Joubin-Bret, *Reshaping the Investor-State Dispute Settlement System*, ibid, 455, 471-472.

ICSID Convention.[71] As such, the Annulment Committee may decide to annul the award in full or in part or to reject the annulment only. The Committee does not have the competence to keep the dispute and issue a new arbitral award. If an award is annulled, whether in full or in part, the dispute has to be resubmitted to generate a new arbitral award, which in turn, can be annulled in full or in part and the dispute resubmitted and a new arbitral award issued, and so on. The decision of the Committee will be final only if the Committee decides that the dispute falls outside the jurisdiction of the ICSID.

As shown in Table 3 below, the resubmission of the case after the annulment proceedings has the potential to add between 5 and 10 years, where the proceedings are still pending. This duration could be reduced if an appellate mechanism is added and is constructed as described above.

Table 3 – Resubmission of Cases

Case	**Award**	**Decision of Ad Hoc Committee**	**Second Award**	**Second Decision of Ad Hoc Committee**
Amco Asia Corporation and others v Republic of Indonesia (ICSID Case No ARB/81/1)	20 November 1984	16 May1986	5 June 1990	17 December 1992
Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais (ICSID Case No ARB/81/2)	21 October 1983	3 May 1985	26 January 1988	17 May 1990
Maritime International Nominees Establishment v Republic of Guinea (ICSID Case No ARB/84/4)	6 January 1988	22 December 1989	- *Discontinued, 20 November 1990*	
Compañía de Aguas del Aconquija S.A. and Vivendi	21 November 2000	3 July 2002	20 August 2007	10 August 2010

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

Universal S.A. v Argentine Republic (ICSID Case No ARB/97/3)				
Víctor Pey Casado and President Allende Foundation v Republic of Chile (ICSID Case No ARB/98/2)	8 May 2008	18 December 2012	13 September 2016	- *pending*
Enron Creditors Recovery Corporation v Argentine Republic (ICSID Case No ARB/01/3)	22 May 2007	30 July 2010	- *Discontinued, 19 July 2018*	
Sempra Energy International v Argentine Republic (ICSID Case No ARB/02/16)	28 September 2007	29 June 2010	- *Discontinued, 3 April 2015*	
TECO Guatemala Holdings, LLC v Republic of Guatemala (ICSID Case No ARB/10/23)	19 December 2013	5 April 2016	- *pending*	

An appellate mechanism could also ensure the expeditious enforcement of arbitral awards. The design of the appellate mechanism could deal with issues of enforcement of an arbitral award pending the appeal and ensure, for the sake of a timely resolution of the dispute, that the relevant party provides the financial security in the amount of the award, while the appeal is pending.[72] Furthermore, if the appellate mechanism is designed as a limited and final second instance within the ISDS system, enforcement ought to be automatic.

6.2 Disadvantages

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

[72] See the current proposal for the amendment of the ICSID Arbitration Rules, and, in particular the new Arbitration Rule 71, which lays down a detailed procedure for the stay of enforcement of arbitral award during the annulment proceedings.

obtaining a final resolution of the dispute. It would become a *de facto* third instance of ISDS proceedings.

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

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

7. The Multilateral Investment Court (MIC)

The next proposal to scrutinise with respect to duration of proceedings is the proposal to establish a Multilateral Investment Court (MIC). The analysis of the proposal's effect on the duration of proceedings is not entirely straightforward, as it is difficult to predict precisely how a MIC would work in practice. It is not unreasonable to assume that the Investment Court System (ICS) currently included in some EU free trade agreements would at least have some impact on the MIC. Thus, a glance at relevant provisions of CETA and the EU-Vietnam Investment Protection Agreement,[73] which can be found in Chapter 8 of CETA and Chapter 3 Section B of the EU-Vietnam Investment Protection Agreement are helpful.

The duration of proceedings of a MIC can be addressed in the treaty that creates the MIC. This could, for example, be done through setting strict time limits for each stage of the proceeding, as the WTO Members did in the DSU. However, states may be less interested in strict timelines for ISDS proceedings, in which they are respondents, than in the trade law

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

context, where they are both complainants and respondents.[74] Moreover, investment law provides for compensation as a remedy whereas the remedies in WTO law are only prospective. Thus, the duration of proceedings has less of an impact in terms of a party's ultimate remedy in investment law.

7.1 Advantages

The MIC model would likely speed up at least some of the stages of arbitration proceedings. In particular, the constitution of the tribunals would likely be more expeditious as a result of the fact that the adjudicators are pre-elected. In arbitral proceedings, the constitution of the tribunal takes an average of roughly 6 months, as described above. Provisions in both CETA and the EU-Vietnam Agreement, in contrast, establish that the president of the tribunal must appoint 3 members to constitute the tribunal within 45 days.

Furthermore, international investment agreements (IIAs) typically do not regulate party challenges to appointed arbitrators. In practice, such challenges can last 4 months on average for ISDS. The ICS in both CETA and the EU-Vietnam FTA reduces the time for such challenges to 45 days. Similarly, the members of the MIC would already be pre-approved and as members of a standing judicial body subject to fewer grounds for challenges.

Moreover, most IIAs only regulate the first phase of ISDS arbitral proceedings, including the request of consultations and the notice of intent before submitting a claim. They leave it to the applicable arbitration rules such as the ICSID or UNCITRAL Rules to determine specific time limits for the proceedings. However, since these procedural rules do not provide for specific time limits, this practice can result in delays. The MIC could address duration of proceedings across the board and set time limits for the various stages of the proceedings. This could speed up the proceedings. As noted in Section 1, ISDS proceedings take 3.73 years on average (although arbitral proceedings infrequently can last less than 2 years). In comparison, CETA provides that the ICS must issue its final award within 24 months, in EU-Vietnam the ICS has to present a partial award within 18 months from the date the claim is submitted. Similarly, the time limits for appeals – compared to annulment proceedings – are shorter. Today, (decided) annulment proceedings take 1.91 years or 697 days on average. In contrast, the EU-Vietnam Agreement sets the time limit for the appeal to be between 180-270

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

days from the date of notification of appeal, which in turn must be within 90 days of the issuance of the award. Therefore, in theory, these provisions should result in more expeditious proceedings. However, as the example of the WTO illustrates, the time limits set in the agreement might well turn out to be unrealistic. Simply setting strict time limits does not automatically reduce the duration of proceedings. This is true even where the time limits as such are not unrealistic. Where cases are complex and the caseload of a tribunal is significant, delays will occur and the imposed time limits might be neither practical nor desirable due to the implications for the award's quality and the ability of under-resourced countries to participate effectively.

Finally, the structure of payment of members of the tribunal could affect the duration of proceedings in practice. Paying members of a tribunal a set salary rather than an hourly fee incentivises faster resolution of cases.

7.2 Disadvantages

On the other hand, there are also factors that could lead a MIC to lengthen proceedings. In theory, a MIC has a pre-set number of members. As a result, it is less flexible to adapt to an increasing caseload involving complex cases unlike *ad hoc* arbitrations. However, in practice, many ISDS arbitrators are assigned to multiple cases under the current system, which also reduces the flexibility of the system and leads to delays. Moreover, the duration of proceedings in the MIC will depend to a large extent on the quality of the administration of the court. Finally, the appointment process of the judges of a MIC is likely to be politicised, potentially leading to political conflict or even vetoes with a negative impact on the settlement of disputes.[75]

8. Abolition of ISDS

This section looks at the effects of the proposal to abolish ISDS entirely and, accordingly, examines the likely duration of alternative binding, adjudicative proceedings to resolve foreign investment disputes in the absence of ISDS. In particular, the section will examine (1) State-state arbitration under investment treaties, (2) investor-state arbitration under investment contracts and (3) litigation against the host state in domestic courts. It should be pointed out that the availability of these three alternatives depends on the case at hand. They are not

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[75] José M Alvarez Zárate, 'Legitimacy Concerns of the Proposed Multilateral Investment Court' (2018) 59 BCL Rev. 2765.

mutually exclusive. In some situations, all three options might be available in relation to the same underlying dispute, even though some of them can require exhaustion of internal remedies. In other cases, none of them might be available. The evaluation of reform proposals will need to examine in detail whether the possibility of not providing an investor with any recourse at all is desirable. The abolition of ISDS and a return to a world of diplomatic protection and litigation in domestic courts hardly constitutes a panacea for the problems haunting ISDS. However, this article solely tackles the aspect of duration and accordingly will not venture into these issues.

8.1 State-to-state Arbitration under Investment Treaties

There are only three known state-state arbitrations under investment treaties. These arbitrations provide some rough guidance on the duration of such proceedings, but care should be taken in drawing conclusions from such a small number of cases. It should also be pointed out that state-to-state investment arbitrations often involves diplomatic protection: the state makes a claim because of injury suffered by an investor. The consequence is that generally (unless provided otherwise) internal remedies need to be exhausted, adding significantly to the duration the case takes to be resolved even where the state-to-state arbitration itself is conducted with adequate speed. Finally, changes to the procedural rules governing future state-state arbitrations could also increase or decrease the duration of such proceedings.

The first of the three known cases, a dispute between Chile and Peru, was discontinued, so provides little insight into the duration of such proceedings. The second was an arbitration between Ecuador and the US concerning the interpretation of the BIT between the two states. In that case, the tribunal handed down its award rejecting jurisdiction one year and three months after Ecuador lodged its request for arbitration.[76] The third was an arbitration between Italy and Cuba concerning Italy's claim under the BIT between the two states. In that case, the final award was issued four and a half years after Italy lodged its request for arbitration.[77]

While technically not claims under an investment treaty, the set of arbitrations between the US and Canada under the United States-Canada Softwood Lumber Agreements raised investment-related issues that had previously been the subject of investor-state arbitration

[76] *Republic of Ecuador v United States of America*, PCA Case No. 2012-5, 29 September 2012.
[77] *Italian Republic v Republic of Cuba*, ad hoc state-state arbitration, 1 January 2008.

under NAFTA's Chapter 11. These disputes provide further guidance on the duration of analogous state-state arbitrations. The US request for arbitration in relation to the Quebec and Ontario softwood lumber programs was issued on 18 January 2008.[78] The tribunal's final award was issued on 20 January 2011, almost exactly three years later.[79] In 2013, the parties jointly lodged a request for clarification of the award. This additional stage of proceedings took a further 6 months.[80]

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

8.2 Investor-state arbitration under investment contracts

Investors and host states can give advance consent to investor-state arbitration of disputes arising under an investment contract between them. Recent ICSID case-load statistics show that 16% of ICSID arbitrations have been based on contractual consent to arbitration.[81] Of course, investor-state arbitration under investment contracts is also possible outside the ICSID system under other procedural rules. Such arbitrations do not necessarily become public knowledge.

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

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[78] *United States of America v Canada*, LCIA Case No. 81010.

[79] Ibid.

[80] *United States of America v Canada*, LCIA Case No. 81010B

[81] <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf> accessed 8 July 2019.

the fact that contract-based proceedings dominated during the first period of investment arbitrations. However, the difference is not very large.[82]

8.3 Litigation against the host state in domestic courts

Comparing the duration of investor-state arbitration to litigation in domestic courts (assuming litigation options exist) raises considerable conceptual and empirical challenges.

A major conceptual challenge is identifying the type of domestic litigation that investor-state arbitration should be compared to.[83] In domestic legal systems, different causes of actions may engage different domestic courts/tribunals, which operate under different procedures. This has implications for the duration of proceedings. Whichever court might ultimately have jurisdiction, the applicable law will differ substantially from that applicable in investment arbitration. A different conceptual challenge concerns accounting for the possibility of appeal in domestic proceedings. The decisions of arbitral tribunals are not subject to appeal, but they can be, and often are, challenged through annulment or set-aside proceedings.

Empirical challenges include the fact that the duration of domestic court proceedings appears to vary enormously depending on the state in question, the domestic court/tribunal involved, the cause of action and the complexity of the case. A comparison of the duration of proceedings is therefore only of limited use. It is, however, included for the sake of completeness.

The challenges are illustrated by examples in which domestic court proceedings and investor-state arbitration have examined the same underlying factual situation. For example, foreign tobacco companies challenged Australia's Tobacco Plain Packaging Act through both Australian court proceedings and investor-state arbitration. Domestic court proceedings were initiated the day the legislation entered into force. A final judgment was rendered by Australia's highest court less than a year later.[84] Faced with essentially the same measure, the arbitral tribunal in *Philip Morris Asia v Australia* took over four years from the notice of arbitration to render an award on jurisdiction, and a further eighteen months to render a final

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[82] See Behn, Berge, Langford and Usynin, 'Why the Delay?' (n 35).

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

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

award on costs.[85] In contrast, the investor-state arbitration in *Chevron v Ecuador* arose out of the extreme delays in Chevron's attempts to resolve commercial disputes in Ecuadorian courts.[86] With these court cases unresolved after more than a decade, Chevron commenced investor-state arbitration. Within four and a half years of the notice of arbitration, the tribunal had rendered its final award.[87]

Bonnitcha, Poulsen and Waibel have attempted a more systematic comparison of the duration of investor-state arbitration to commercial litigation in domestic courts. Table4 summarising their findings is reproduced here:[88]

Table 4. Average Length of Litigation

Table 3.4 Average length of civil litigation

Country (overall 'Doing Business' ranking in brackets)	Average length (in years) to obtain and enforce final judgment (Doing Business 2016)	Average length (in years) to obtain first-instance decision (ICLG 2016)	Average length (in years) to obtain decision (2013 data)		
			First	Second	Final
England & Wales (33)	1.2*	1.5	0.9		
France (14)	1.1	–	0.8	0.9	0.9
Germany (12)	1.2	0.8	0.5	0.6	
Italy (111)	3.1	3.5	1.5	3.0	3.3
India (178)	3.9	7.5	–	–	–
United States (21)	1.0	1.5**	–	–	–
Switzerland (46)	1.1	1.5	0.4	0.4	0.3

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

Source: Author compilation, based on Doing Business (2016); International Comparative Legal Guides (ICLG) (2016); and OECD (2013).

It is important to note the limits of this exercise and the reliance on different sets of data. The three data-sets collated by Bonnitcha, Poulsen and Waibel measure the duration of disputes in which, on average, less money is at stake than the average investor-state arbitration. Nevertheless, this exercise suggests that investor-state arbitration is, on average, significantly

[85] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.

[86] *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23.

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

[88] Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017).

slower than domestic court proceedings in some countries (e.g. Switzerland or Japan), while being significantly quicker than domestic court proceedings in others (e.g. India or Italy).

9. Conclusion

Our analysis yields a nuanced outcome. An empirical study of investment awards shows that the length of investment arbitration varies significantly depending on the specifics of each case, but that the presence of some procedural characteristics (such as bifurcation) predicts longer proceedings. Despite the perceived overly long duration of investment arbitration proceedings, none of the reform proposals are designed specifically to tackle this concern. It can, accordingly, hardly be a surprise that none of them is certain to achieve this goal. All depends on the construction of each mechanism. While this article gives pointers in that regard, it should be emphasised that devices that speed up proceedings often come at a cost. Adequate speed is an important aspect of effective dispute resolution, but any reform process must also safeguard other aspects of due process.