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Resolution of Investment Disputes under the TTIP with Regard to the Principles of Independence, Impartiality, and Qualifications of the Court and its Judges

ABSTRACT

The article provides for the judicial analysis of how a typical ISDS mechanism, as well as the ICS under the draft texts of TTIP, complies with all the provisions of the principles of independence, impartiality and qualification of the court and its judges, established under ALI/UNIDROIT Principles of Transnational Civil Procedure, which were adopted by the American Law Institute (ALI) in May 2004 and by the International Institute for the Unification of Private Law (UNIDROIT) in April 2004. These are the following provisions: judicial independence, impartiality of the court and its judges, reasonable tenure in office, transparency, substantial legal knowledge and experience.

KEYWORDS

resolution of investment disputes, Investor-to-State Dispute Settlement, Investor Court System, TTIP

Introduction

Since July 2013[1] the European Union (hereinafter – the EU) has been negotiating a free trade and investment agreement with the United States – the

[1] *First Round of TTIP negotiations kicks off in Washington DC*, [online] http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151595.pdf [accessed: 13.07.2017].

Transatlantic Trade and Investment Partnership (hereinafter – the TTIP). One of the most controversial elements of the negotiations is the Investor-to-State Dispute Settlement (hereinafter – the ISDS). The issue of investment dispute resolution under the TTIP was opened for online public consultation carried out by the European Commission,[2] and faced strong criticism from different groups of society.[3] Afterwards, the European Commission proposed the Investor Court System (hereinafter – the ICS) in the TTIP.[4] The new draft was brought up for negotiations with the United States and made public on 12 November 2015.[5] As long as there is no final agreement, any of the options mentioned above might be reviewed. Thus, the article is aimed at the analysis of typical ISDS mechanisms with regards to the EU textual proposal of the investment resolution system in TTIP and studying its effects on investment activities.

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[2] *Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, [online] http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 [accessed: 13.07.2017].

[3] As examples see the following articles: "200 environmental, consumer and labor groups have urged EU and US officials not to include an investor-state dispute settlement (ISDS) mechanism… ISDS forces governments to use taxpayer funds to compensate corporations for public health, environmental, labor and other public interest policies and government actions: ISDS has been used to attack clean energy, mining, land use, health, labor, and other public interest policies" – *Civil society groups say no to investor-state dispute settlement in EU-US trade deal' (December 2013)*, [online] http://corporateeurope.org/trade/ 2013/ 12/ civil-society-groups-say-no-investor-state-dispute-settlement-eu-us-trade-deal [accessed: 13.07.2017]; "Concern, however, remains about potential 'policy freeze': might governments think twice about introducing certain kinds of legislation if they fear potential challenges under ISDS?" – *The Transatlantic Trade and Investment Partnership and the NHS: Separating myth from fact' (November 2014)*, [online] http://www.nhsconfed.org/ ~/media/ Confederation/ Files/ public%20access/TTIP%20briefing%20-%20final%20pdf %20for%20website.pdf [accessed: 13.07.2017]; "Investors have used this system not only to sue for compensation for alleged expropriation of land and factories, but also over a huge range of government measures, including environmental and social regulations, which they say infringe on their rights" – *The obscure legal system that lets corporations sue countries' (June 2015)*, [online] http://www.theguardian.com/business/2015/ jun/ 10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid [accessed: 13.07.2017].

[4] *Why the new EU proposal for an Investment Court System in TTIP is beneficial to both States and investors*, [online] http://europa.eu/rapid/press-release_MEMO-15-6060_en.htm [accessed: 13.07.2017].

[5] "This document is the European Union's proposal for Investment Protection and Resolution of Investment Disputes. It was tabled for discussion with the United States and made public on 12 November 2015. The actual text in the final agreement will be a result of negotiations between the EU and US" – *European Union's proposal for Investment Protection and Resolution of Investment Disputes*, [online] http://trade.ec.europa.eu/ doclib/ docs/2015/november/tradoc_153955.pdf [accessed: 13.07.2017].

1. Investor-to-state dispute settlement – what is it?

ISDS is a mechanism included in international investment treaties that allows a foreign investor access to international tribunals, if the host state has breached the investment provisions of the treaty. Typically, investment agreements include guarantees of minimum standards of treatment, non-discrimination provisions, compensations for expropriation, and free transfer of capital.[6] The European Union's proposal for Investment Protection and Resolution of Investment Disputes (hereinafter – the Draft) establishes no expropriation without compensation, the possibility to transfer funds relating to an investment, a general guarantee of both fair and equitable treatment and physical security, a commitment that governments will respect their own written contractual obligations towards an investor, and a commitment to compensate for losses in certain circumstances linked to war or armed conflict.[7] Another guarantee against nationality-based discrimination is already included in the EU proposal to the United States on Trade in Services, Investment and E-Commerce.[8]

Investment disputes arise because of an actual or potential breach of the above-mentioned provisions and, by its nature, it is no more than a breach of contract dispute. That is why no court decision may influence any legislation adopted by parliament. Invalidating regulation adopted by parliament is exclusively a competence of supreme courts or constitutional courts.[9] The state cannot use the ISDS mechanism to lodge a claim against investors, because investors are not parties to investment agreements and, thus, can-

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[6] See the following examples: *CETA – Article X.9: Treatment of Investors and of Covered Investments, Article X.11: Article X.10: Compensation for Losses, Expropriation, Article X.12: Transfers*, [online] http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [accessed: 13.07.2017]; *Germany-Poland BIT – Article 2, Article 4, Article 5*, [online] http://investmentpolicyhub.unctad.org/Download/TreatyFile/1393 [accessed: 13.07.2017]; *US Model BIT – Article 6: Expropriation and Compensation, Article 5: Minimum Standard of Treatment, 9 Article 7: Transfers*, [online] http://www.state.gov/documents/organization/188371.pdf [accessed: 13.07.2017]; *Ukraine-Germany BIT – Article 2, Article 4, Article 5*, [online] http://zakon3.rada.gov.ua/laws/show/276_415/print1448046711507083 [accessed: 13.07.2017].

[7] *European Union's proposal...*, op. cit.

[8] *European Commission – Fact Sheet. Reading Guide. Draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP) (16 September 2015)*, [online] http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm [accessed: 13.07.2017].

[9] J. Risse, N. Gremminger, *The Truth About Investment Arbitration (not only) under TTIP – Four Case Studies*, "ASA Bulletin" 2015, Vol. 33, Issue 3, pp. 465–484.

not be liable for breaching provisions of the treaty. State may bring a claim against foreign investors in its own domestic court. An investment dispute is aimed at compensation arguably owed by the host state to the investor for breaching their contractual duties under the investment agreement.[10]

Today the ISDS mechanism is popular in the EU and among its member states as well as among non-European Union countries. The EU member states concluded almost half of the total number of bilateral investment agreements (hereinafter – BIT) that are currently in force worldwide (roughly to 1400 out of 3000). Almost all of them include the ISDS.[11] In 2014 the European Union signed the first two free trade agreements (hereinafter – FTA) that include the ISDS, with Canada and Singapore.[12] FTA would ultimately replace many of the BITs concluded by member states.[13] As for an example of non-European Union member states, apart from multilateral agreements, Ukraine is a party to 72 bilateral investment treaties for the reciprocal protection of the investments.[14]

ISDS may be governed under different rules and institutions such as the UNCITRAL Arbitration Rules or the rules of the International Centre for Settlement of Investment Disputes of the World Bank.

Under the Draft, a claim may be submitted to the Tribunal under one of the following sets of rules on dispute settlement:

a) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID);
b) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID) in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, where the conditions for proceedings pursuant to (a) do not apply;
c) the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL);

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[10] Ibidem.

[11] *The European Commission concept paper 'Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court'*, [online] http://trade.ec.europa.eu/doclib/docs/2015/ may/ tradoc_153408.PDF [accessed: 13.07.2017].

[12] Ibidem.

[13] M. Cremona, *Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)*, "Common Market Law Review" 2015, Vol. 52, Issue 2, p. 356.

[14] *Arbitration in CIS Countries. Current Issues,* Antwerpen–Apeldoorn–Portland 2012, p. 62.

d) any other rules agreed by the disputing parties at the request of the claimant;[15]
e) the above-mentioned rules on dispute settlement shall apply subject to the rules set out in the TTIP.[16]

2. Investment court system – what is the difference?

Whereas ISDS represents the tribunal made up of three arbiters, one chosen by the claimant, one by the defender, and one chosen mutually,[17] ICS is a two-instance court system composed of a Tribunal of First Instance and an Appeal Tribunal.

The Tribunal of First Instance consists of fifteen judges jointly appointed by the EU and the United States. Five of the judges shall be nationals of a member state of the European Union, five shall be nationals of the United States, and five shall be nationals of the third countries.[18] The Tribunal hears cases in divisions consisting of three judges, of whom one shall be a national of a member state of the European Union, one a national of the United States, and one a national of the third countries. Divisions shall be chaired by judges who are nationals of the third countries.[19] The disputing parties may agree that their case is heard by a sole judge who is a national of the third countries.[20] This would make the access to the system easier for small companies.[21]

The Appeal Tribunal is composed of six members, of whom two shall be nationals of a member state of the European Union, two shall be nationals of the United States and two shall be nationals of the third countries.[22] The judges are to be jointly appointed by the EU and the United States.[23] The

[15] Article 6 (2), Sub-Section 3, Section 3, Chapter II – *Investment of the Draft*, [online] http:// trade.ec.europa.eu/ doclib/docs/2015/november/tradoc_153955.pdf [accessed: 13.07.2017].

[16] Ibidem, Article 6 (3), Sub-Section 3, Section 3, Chapter II.

[17] U. Khan, R. Pallot, D. Taylor, P. Kanavos, *The Transatlantic Trade and Investment Partnership: international trade law, health systems and public health*, London 2015, p. 41.

[18] Article 9 (2), Sub-Section 4, Section 3, Chapter II – *Investment of the Draft*, op. cit.

[19] Ibidem, Article 9 (6), Sub-Section 4, Section 3, Chapter II.

[20] Ibidem, Article 9 (9), Sub-Section 4, Section 3, Chapter II.

[21] *The European Commission 'Factsheet on Investment protection in TTIP'*, [online] http:// trade.ec.europa.eu/ doclib/docs/2015/january/tradoc_153018.5%20Investment.pdf [accessed: 13.07.2017].

[22] Article 10 (2), Sub-Section 4, Section 3, Chapter II – *Investment of the Draft*, op cit.

[23] Ibidem, Article 10 (3), Sub-Section 4, Section 3, Chapter II.

Appeal Tribunal shall hear appeals in divisions consisting of three members, of whom one shall be a national of a member state of the European Union, one a national of the United States, and one a national of the third country who shall chair the division.[24]

Furthermore, the Draft establishes a mediation mechanism. The EU agreements are the first investment agreements ever to include a specific provision on voluntary mediation before the first formal steps of the dispute settlement.[25] The procedure is confidential. However, any disputing party may disclose to the public that mediation is taking place.[26] The EU and the United States shall jointly compile a list of six mediators.[27] Mediators are appointed by agreement of the disputing parties or by the President of the Tribunal under the parties' joint requests.[28] Mediation is not intended to serve as a basis for dispute settlement procedures, thus, a disputing party shall not rely on or introduce as evidence in such dispute settlement procedures, nor shall any adjudicative body take into consideration positions taken by a disputing party in the course of the mediation procedure; the fact that a disputing party has indicated its willingness to accept a solution to the measure subject to mediation; or advice given or proposals made by the mediator.[29]

3. Resolution of investment disputes under the TTIP with regard to the principles of independence, impartiality, and qualifications of the court and its judges

The opinions towards the due mechanism of investment dispute resolution are highly controversial. Although public attitudes might be influenced by different factors, international standards retain the objective criteria to analyze the phenomenon. International standards in civil justice are represented in ALI/UNIDROIT Principles of Transnational Civil Procedure (hereinafter – the Principles), which together with the accompanying commentary was adopted by the American Law Institute (ALI) in May 2004 and by

[24] Ibidem, Article 10 (8), Sub-Section 4, Section 3, Chapter II.

[25] *The European Commission Fact Sheet 'Why the new EU proposal for an Investment Court System in TTIP is beneficial to both States and investors' (12 November 2015)*, [online] http://europa.eu/rapid/press-release_MEMO-15-6060_en.htm [accessed: 13.07.2017].

[26] Article 6 (3) – *Annex I of the Draft*, [online] http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf [accessed: 13.07.2017].

[27] Article 3 (4), Sub-Section 2, Section 3, Chapter II – *Investment of the Draft*, op. cit.

[28] Ibidem, Article 3 (5), Sub-Section 2, Section 3, Chapter II.

[29] Ibidem, Article 6 (3), Annex I to Chapter II.

the International Institute for the Unification of Private Law (UNIDROIT) in April 2004. The Principles identify the scopes of their advisory application, namely they are considered the standards for adjudication of, inter alia, transnational commercial disputes; these Principles are applicable to international arbitration, to the extent that they are compatible with arbitration proceedings, e.g. the Principles related to jurisdiction, publicity of proceedings, and appeal.[30] Independence, impartiality, and qualifications of the court and its judges (hereinafter – the Principle 1) is one of the core principles. The Principle 1 contains a number of provisions, each of which will be analyzed with regards to the typical ISDS and the EU proposals on the ICS.

3.1. THE COURT AND THE JUDGES SHOULD HAVE JUDICIAL INDEPENDENCE TO DECIDE THE DISPUTE ACCORDING TO THE FACTS AND THE LAW, INCLUDING FREEDOM FROM IMPROPER INTERNAL AND EXTERNAL INFLUENCE

ISDS cases represent highly sensitive political issues. That is why securing judicial independence is a question of utmost importance. The accompanying commentary on the Principles clarifies possible sources of influences on the court and its judges: external influences may emanate from members of the executive or legislative branches of power, prosecutors, or persons with economic interests, etc.; internal influence could emanate from other officials of the judicial system.[31]

The opponents of ISDS mechanism state that ISDS is not necessarily needed in the countries which have a legal system based on the rule of law. However, the EU Commission pointed to the fact that even countries with strong legal systems do not always guarantee adequate protection of foreign investors. E.g. investors may face restrictions of their rights to bring their cases to domestic courts.[32] Moreover, even in countries where the rule of law applies, foreign investors do not always benefit from the same protection as domestic investors.[33]

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[30] PE Comment to *ALI / UNIDROIT Principles of Transnational Civil Procedure*, [online] http:// www.unidroit.org/english/principles/civilprocedure/ ali-unidroitprinciples-e.pdf [accessed: 13.07.2017].

[31] Ibidem.

[32] *The European Commission memo 'EU-Canada agree deal to boost trade and investment' (26 September 2014)*, [online] http://europa.eu/rapid/press-release_MEMO-14-542_en.htm [accessed: 13.07.2017].

[33] R. Quick, *Why TTIP Should Have an Investment Chapter Including ISDS*, "Journal of World Trade" 2015, No. 49, Issue 2, p. 204.

Both the ICSID Convention and the UNCITRAL Arbitration Rules establish that the arbitrator shall be independent.[34] If three arbitrators are to be appointed, each party shall appoint one arbitrator.[35] Under the UNICITRAL Arbitration Rules, the two arbitrators thus appointed shall choose the third arbitrator.[36] Under the ICSID Convention, the third arbitrator shall be appointed by agreement of the parties or by the president of the Tribunal.[37]

The UNCITRAL Arbitration Rules include a model statement of independence, which clarifies what is beyond the scope of independency and impartiality. In particular there might be no past or present professional, business, and other relationships with the parties and any other relevant circumstances which may affect independency and impartiality.

The Bluebank v. Venezuela case is instructive. The respondent filed a proposal for disqualification of the arbitrator on the ground that the arbitrator worked in a law firm that represented other claimants in unrelated ICSID cases against Venezuela. The proposal was upheld.[38]

In the **Vivendi v. Argentina** case an arbitrator lacked knowledge about a potential conflict. As far as arbitrators are to investigate whether conflicts of interests exist, the arbitrator was not excused from disclosure procedures.[39]

Thus, the practice proves the effectiveness of independency provisions. However, the fact that the arbitrators are chosen by the parties might affect the decisions.

The Draft includes the Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators,[40] which establishes provisions on inde-

[34] Articles 14 (1) of the *ICSID Convention* and Article 9 (1) of *the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013),* [online] https://www.uncitral.org/pdf/ english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf [accessed: 13.07.2017].

[35] Articles 37 (2) of the *ICSID Convention* and Article of the *UNCITRAL...*, op. cit.

[36] Ibidem.

[37] Article 37 (2b) of the *ICSID Convention*, op. cit.

[38] *Blue Bank International & Trust (Barbados) Ltd. v. the Bolivarian Republic of Venezuela case materials*, [online] http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf [accessed: 13.07.2017].

[39] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3) case materials. Available*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/97/3 [accessed: 13.07.2017].

[40] See the following provisions of the Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators of the Draft: Article 1: "member" means a Judge of the Tribunal or a Member of the Appeal Tribunal established pursuant to Section X (Resolution of Investment Disputes and Investment Court System); Article 5: Independence and Impartiality of Members: 1. Members must be independent and impartial and avoid creat-

pendence and impartiality of the judges. Moreover, there are other provisions that ensure the independence of the judges. The judges of the Tribunal and the members of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt. They shall not be affiliated with any government. They shall not take instructions from any government or organization with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed experts or witnesses in any pending or new investment protection dispute under this or any other agreement or domestic law.[41] Unlike ISDS mechanism, the judges would be allocated randomly, so disputing parties would have no influence on the process.[42]

3.2. Judges should have reasonable tenure in office. Nonprofessional members of the court should be designated by a procedure assuring their independence from the parties, the dispute, and other persons interested in the resolution

According to the accompanying commentary, this Principle recognizes that typically judges serve for an extensive period of time, usually their entire careers. However, in some systems most judges assume the bench only after careers as lawyers and some judicial officials are designated for short periods. An objective of this Principle is to avoid the creation of ad hoc courts. The term "judge" includes any judicial or quasi-judicial official under the law of the forum.[43]

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ing an appearance of bias or impropriety and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party or fear of criticism; 2. Members shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere or appear to interfere, with the proper performance of their duties; 3. Members may not use their position to advance any personal or private interests and shall avoid actions that may create the impression that they are in a position to be influenced by others; 4. Members may not allow financial, business, professional, family or social relationships or responsibilities to influence their conduct or judgment; 5. Members must avoid entering into any relationship or acquiring any financial interest that is likely to affect their impartiality or that might reasonably create an appearance of impropriety or bias.

[41] Article 11 (1), Sub-Section 4, Section 3, Chapter II – *Investment of the Draft*, op. cit.

[42] Ibidem, Article 9, Sub-Section 4, Section 3, Chapter II.

[43] P-1C Comment to *ALI / UNIDROIT Principles*..., op. cit.

The ICSID Convention provides that the arbitrators shall serve for renewable periods of six years.[44] The UNCITRAL Arbitration Rules do not contain provisions regulating judges' tenure in office.

Under the TTIP the judges and Appeal Tribunal Members are appointed for a six-year term, renewable once.[45]

3.3. THE COURT SHOULD BE IMPARTIAL. A JUDGE OR OTHER PERSON HAVING DECISIONAL AUTHORITY MUST NOT PARTICIPATE IF THERE IS REASONABLE GROUND TO DOUBT SUCH PERSON'S IMPARTIALITY. THERE SHOULD BE A FAIR AND EFFECTIVE PROCEDURE FOR ADDRESSING CONTENTIONS OF JUDICIAL BIAS

The accompanying commentary clarifies that independence can be considered a more objective characteristic and impartiality a more subjective one, but those attributes are closely connected.[46] There has been a debate on impartiality of investment treaty arbitration. Some argue that investment arbitration favors the position of foreign investors over respondent host states.[47] However, the history of investment arbitration in Ukraine[48] proves the opposite. Since Ukraine joined the ICSID Convention, there have been 14 claims against Ukraine. Five disputes were decided in favor of Ukraine (Global Trading Resource Corp. and Globex International, Inc. v. Ukraine,[49] GEA Group Aktiengesellschaft v. Ukraine,[50] Tokios Tokelės v. Ukra-

[44] Article 15 (1) of the *ICSID Convention*, op. cit.

[45] See: Article 9 (5), Article 10 (5), Sub-Section 4, Section 3, Chapter II – *Investment of the Draft*, op. cit.

[46] P-1A Comment to *ALI / UNIDROIT Principles*..., op. cit.

[47] The position is based on, inter alia, the following materials: G. van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, [online] http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1036&context=ohlj [accessed: 13.07.2017]; J. Paulsson, *Denial of Justice in International Law*, Cambridge 2005, p. 306; *S&D Position Paper on Investor-state dispute settlement mechanisms in ongoing trade negotiations*, [online] http://www.socialistsanddemocrats.eu/ sites/ default/files/position_paper_investor_state_dispute_settlement_ISDS_en_150304_3.pdf [accessed: 13.07.2017].

[48] To compare the amount of cases lodged against the EU member states: Austria – 1, Belgium – 1, Bulgaria – 6, Croatia – 4, Cyprus – 2, Czech Republic – 2, Denmark – 0, Estonia – 4, Finland – 0, France – 1, Germany – 2, Greece – 2, Hungary – 12, Ireland – 0, Italy – 4, Latvia – 1, Lithuania – 1, Luxembourg – 0, Malta – 0, Netherlands – 0, Poland – 3, Portugal – 0, Romania – 12, Slovak Republic – 4, Slovenia – 3, Spain – 25, Sweden – 0, United Kingdom – 0. Cases details see at: [online] https://icsid.worldbank.org/ [accessed: 13.07.2017].

[49] *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, [online] https:// icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/09/11 [accessed: 13.07.2017].

ine,[51] Generation Ukraine Inc. v. Ukraine,[52] Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine[53]), two cases were amicably settled (Western NIS Enterprise Fund v. Ukraine,[54] Joseph C. Lemire v. Ukraine[55]), three cases were settled in favor of investors (Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine,[56] Alpha Projekt holding GmbH v. Ukraine,[57] Joseph C. Lemire v. Ukraine[58]), three cases are still pending (Gilward Investments B.V. v. Ukraine,[59] Krederi Ltd. v. Ukraine,[60] City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine[61]), and the Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine case[62] was discontinued pursuant to ICSID Arbitration Rule 43(1).

The following paragraphs discuss some cases demonstrating the issue, namely, Tokios Tokelės v. Ukraine, Joseph C. Lemire v. Ukraine, Generation Ukraine Inc. v. Ukraine, Western NIS Enterprise Fund v. Ukraine.

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[50] *GEA Group Aktiengesellschaft v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/08/16 [accessed: 13.07.2017].

[51] *Tokios Tokelės v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/02/18 [accessed: 13.07.2017].

[52] *Generation Ukraine Inc. v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/00/9 [accessed: 13.07.2017].

[53] *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx? Case No=ARB/08/11 [accessed: 13.07.2017].

[54] *Western NIS Enterprise Fund v. Ukraine*, [online] https://icsid.worldbank.org/ apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/04/2 [accessed: 13.07.2017].

[55] *Joseph C. Lemire v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB(AF)/98/1 [accessed: 13.07.2017].

[56] *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, [online] https:// icsid.worldbank.org/apps/ICSIDWEB/ cases/Pages/casedetail.aspx?CaseNo=ARB/08/8 [accessed: 13.07.2017].

[57] *Alpha Projektholding GmbH v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/07/16 [accessed: 13.07.2017].

[58] *Joseph C. Lemire v. Ukraine*, op. cit.

[59] *Gilward Investments B.V. v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/15/33 [accessed: 13.07.2017].

[60] *Krederi Ltd. v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/14/17 [accessed: 13.07.2017].

[61] *City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/14/9 [accessed: 13.07.2017].

[62] *Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine*, [online] https://icsid.worldbank.org/ apps/ICSIDWEB/cases/Pages/ casedetail.aspx?CaseNo=ARB/15/9 [accessed: 13.07.2017].

Tokios Tokelės v. Ukraine. Tokios Tokeles, a Lithuanian entity, founded Taki Spravy, a subsidiary established under the laws of Ukraine. Taki Spravy is in the business of advertising, publishing, printing, and related activities in Ukraine and outside its borders. The Claimant, Tokios Tokeles claimed that governmental authorities in Ukraine were engaged in the series of actions related to Taki Spravy that breach the obligations of the bilateral investment treaty between Ukraine and Lithuania (hereinafter – 'Ukraine-Lithuania BIT'). Ukraine challenged the jurisdiction of the Tribunal to hear claims brought by Tokios Tokeles.

As far as Tokios Tokeles had no substantial business activities in Lithuania, the nationals of Ukraine owned ninety-nine percent of the outstanding shares of Tokios Tokeles and comprised two-thirds of its management, and the capital for the investment had also originated in Ukraine. Ukraine argued that Tokios Tokeles was economic substance-wise a Ukrainian investor in Lithuania rather than a Lithuanian investor in Ukraine. The Tribunal ruled that under the Article 1(2)(b) of Ukraine-Lithuania BIT, an investor is any entity established in the territory of the Republic of Lithuania according to its laws and regulations. And it was found that Tokios Tokeles was established under the laws of Lithuania. The Ukraine-Lithuania BIT stipulates no other criteria of foreign investor. Thus, the Tribunal decided that the dispute is within the competence of the Tribunal.[63] Afterwards the Tribunal found no Ukraine-Lithuania BIT breach committed by the state. Thus, the dispute was settled in favor of Ukraine.[64]

Joseph C. Lemire v. Ukraine. Mr. Joseph Charles Lemire, the national of the United States of America, brought a claim against Ukraine, concerning the issuance and operation of radio broadcasting licenses in Ukraine. The parties reached an amicable resolution of the dispute according to which Ukraine agreed to use its best possible efforts to consider in a positive way Gala Radio's application for the radio frequencies licenses. Additionally, Ukraine took the obligations to offer three leasing properties for a beauty salon for the Claimant's consideration. In accordance with Article 50 of the Arbitration (Additional Facility) Rules, the Parties agreed to request the Tribunal to record the settlement in the form of an award of the Tribunal.[65]

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[63] *Tokios Tokelės v. Ukraine Case No.ARB/02/18 Decision on Jurisdiction*, [online] https:// icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC639_En&caseId=C220 [accessed: 13.07.2017].

[64] *Tokios Tokelės v. Ukraine Case No.ARB/02/18 AWARD*, [online] https://icsid.worldbank.org/ ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2232_En&caseId=C220 [accessed: 13.07.2017].

[65] *Joseph Charles Lemire v. Ukraine (ICSID Case No. ARB(AF)/98/1) AWARD*, [online] https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC569_En&caseId=C165 [accessed: 13.07.2017].

Generation Ukraine Inc. v. Ukraine. The Claimant, a U.S. corporate vehicle owned outright by Eugene J. Laka, a U.S. national, sought damages for the spoliation of its alleged investment. It established a local investment vehicle and achieved approval of its specific project by the Kyiv City Administration. After that the local authorities were impeding and interfering with the implementation of that project for six years in a manner which, according to the Claimant opinion, was tantamount to expropriation and therefore proscribed under the Ukraine-U.S. Bilateral Investment Treaty. The Tribunal concluded that the failure of the Kyiv City State Administration to secure the Claimant's use of the adjoining property could not amount to an expropriation. The claim was dismissed.[66]

Western NIS Enterprise Fund v. Ukraine. The Claimant, Western NIS Enterprise Fund is the US regional private equity fund, which invests in small and medium-sized companies in Ukraine. The claimant lodged the claim against Ukraine because Ukrainian courts refused to enforce the American Arbitration Association commercial award in favor of the claimant. The claim fell within the scope of the United States-Ukraine Bilateral Investment Treaty (hereinafter – the US-Ukraine BIT). Under the Article VI (2) and (3) of the US-Ukraine BIT, the parties to the dispute shall initially seek a resolution through consultation and negotiation and than, if the dispute could not be settled amicably and if six months had elapsed from the date on which the dispute arose, the investor may submit the dispute to ICSID. The tribunal ruled that proper notice of the claim under the US-Ukraine BIT was not given, thus, the proceedings was suspended during six months. If a proper notice were not given within this period, the claim would have been dismissed.[67] Afterwards an amicable settlement was reached by the parties and proceeding was discontinued at their request.[68]

The cases mentioned above demonstrate how ISDS might be not a mere mechanism protecting investor's rights only, but rather a system securing the right balance. Moreover, the European Commission in its concept paper on investment in TTIP noticed that they have already accomplished some reforms of the traditional approach to investment protection and the associated ISDS system. As an example they mentioned CETA, a free trade agree-

[66] *Generation Ukraine Inc. v. Ukraine (ICSID CASE No. ARB/00/9) AWARD*, [online] http://www.italaw.com/sites/default/files/case-documents/ita0358.pdf [accessed: 13.07.2017].

[67] *Western NIS Enterprise Fund v. Ukraine (ICSID Case No. ARB/04/2) ORDER*, [online] https:// icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC649_En&caseId=C236 [accessed: 13.07.2017].

[68] *Western NIS Enterprise Fund v. Ukraine*, op. cit.

ment with Canada, setting out clearly defined procedures to follow to ensure full impartiality of arbitrators by requiring full disclosure of any situation which could give rise to real or perceived conflicts of interest. CETA provides concrete, clear procedure to determine whether a conflict could arise or has arisen. In case arbitrators are found not to comply with the code, they will be replaced.[69]

As for ICS, the EU proposed wording of investment chapter includes several provisions on impartiality. Article 3 (3) requires the impartiality of mediators. Both Article (2) and Article (5) command the impartiality of candidates and members of the Tribunal or the Appeal Tribunal. Article 3 (1) set forth the obligation for candidates to the Tribunal or the Appeal Tribunal to disclose any past and present interest, relationship, or matter that is likely to affect their independence or impartiality, or that might reasonably create an appearance of impropriety or bias in the proceeding. The candidates shall make all reasonable efforts to become aware of any such interests, relationships, or matters.[70]

3.4. NEITHER THE COURT NOR THE JUDGE SHOULD ACCEPT COMMUNICATIONS ABOUT THE CASE FROM A PARTY IN THE ABSENCE OF OTHER PARTIES, EXCEPT FOR COMMUNICATIONS CONCERNING PROCEEDINGS WITHOUT NOTICE AND FOR ROUTINE PROCEDURAL ADMINISTRATION. WHEN COMMUNICATION BETWEEN THE COURT AND A PARTY OCCURS IN THE ABSENCE OF ANOTHER PARTY, THAT PARTY SHOULD BE PROMPTLY ADVISED OF THE CONTENT OF THE COMMUNICATION

According to the accompanying commentary, proceedings without notice (ex parte proceedings) may be proper in certain cases, e.g. in initial application for a provisional remedy.[71]

The arbitration rules stipulate the relevant provisions. Under the UNCITRAL Arbitration rules in the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.[72] Under the ICSID Convention, if a party fails to appear or to pre-

[69] *Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court', published on the 5 May, 2015*, [online] http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF [accessed: 13.07.2017].

[70] *The EU textual proposal of investment chapter*, [online] http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf [accessed: 13.07.2017].

[71] P-1E Comment to *ALI / UNIDROIT Principles...*, op. cit.

[72] Article 28 (1) of the *UNCITRAL Arbitration Rules...*, op. cit.

sent their case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.[73] Moreover, Article 44 of the ICSID Convention provides that arbitrations will be conducted in accordance with the Arbitration Rules. Under the ICSID Arbitration Rules, as soon as the Tribunal is constituted, the Secretary-General shall transmit to each member a copy of the request by which the proceeding was initiated, of the supporting documentation, of the notice of registration, and of any communication received from either party in response thereto.[74]

In TTIP, however, the issue of transparency is regarded broader than in usual civil procedures. Given that investment cases under the TTIP is a matter of money of tax payers, the resolution of investment disputes are of public interest. The Draft incorporates the UNCITRAL rules on transparency, under which all documents will be made publicly available[75] and all hearings will be open to the public.[76]

3.5. THE COURT SHOULD HAVE SUBSTANTIAL LEGAL KNOWLEDGE AND EXPERIENCE

According to the accompanying commentary, judges for transnational litigation shall be familiar with the law. It does not require the judge to have special knowledge of commercial or financial law, but familiarity with such matters would be desirable.[77]

The ICSID Convention states that the competence in the field of law is of particular importance. Arbitrator shall be a person of high morale and recognized competence in the fields of law, commerce, industry, or finance.[78] The parties may challenge arbitrators on ground of a real or apparent lack of, inter alia, competence in the fields of law.[79] The UNCITRAL Arbitration Rules, however, do not provide provisions towards legal knowledge and experience of arbitrators.

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[73] Article 45 (2) of the *ICSID Convention*, op. cit.

[74] Rule 30 of the *ICSID Arbitration Rules*, [online] http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partf-chap04.htm [accessed: 13.07.2017].

[75] Article 2, Article 3 of the *UNCITRAL rules on transparency*, [online] http://www.uncitral.org/ pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf [accessed: 13.07.2017].

[76] Ibidem, Article 6.

[77] P-1F Comment to *ALI / UNIDROIT Principles...*, op. cit.

[78] Article 14 (1) of the *ICSID Convention*, op. cit.

[79] Ibidem, Article 57.

TTIP establishes requirements for high qualification towards the judges. The judges shall have technical and legal qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body.[80] Under the Draft, the judges of the Tribunal of First Instance shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence; and the members of the Appeal Tribunal shall have the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognized competence. They shall have demonstrated expertise in public international law. In particular, it is desirable that they have expertise in international investment law, international trade law, and the resolution of disputes arising under international investment or international trade agreements.[81] The text also provides for giving the judges a monthly retainer fee in order to secure highly qualified individuals and ensure their availability at short notice.[82]

As for the mediators, TTIP provides for the mediators the same requirements as the ICSID Convention establishes for the arbitrators – mediator should be a person of high morale and recognized competence in the fields of law, commerce, industry, or finance.[83]

Conclusion

Notwithstanding strong public opposition, typical ISDS mechanism as well the ICS under the draft texts of TTIP complies with the principles of independence, impartiality and qualification of the court and its judges, established under UNIDROIT:

1. Under UNIDROIT, the court and the judges should have judicial independence. Both the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules establish that an arbitrator shall be independent. The cases prove the effectiveness of those provisions. The TTIP draft goes even further – the judges shall be allocated randomly so that disputing parties would have no influence on it.

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[80] See: *European Commission – Fact Sheet. Reading Guide...*, op. cit.

[81] Article 9 (4), Sub-Section 4, Article 10 (7), Sub-Section 4 – *Investment of the Draft*, op. cit.

[82] *European Commission – Fact Sheet. Reading Guide...*, op. cit.

[83] Article 3 (4), Sub-Section 2, Section 3, Chapter II – *Investment of the Draft*, op. cit.

2. UNIDROIT requires that judges should have reasonable tenure in office. According to the ICSID Convention the arbitrators shall serve for renewable periods of six years. Under the TTIP draft, the judges and Appeal Tribunal Members are appointed for a six-year term, renewable once.

3. UNDROIT provides the principle of impartiality of judges. There has been debate on impartiality of investment treaty arbitration on the ground of the argument that investment arbitration favors the position of foreign investors over respondent host states. However, the case analysis proves the opposite. Ukraine appears to be a leader among post-soviet countries in acting as a respondent in ICSID cases. Five of fourteen cases lodged against Ukraine were decided in favor of Ukraine. Two cases of fourteen were amicably settled. All the cases were controversial; however, all the decisions are unbiased.

4. UNIDROIT requires transparency in communication between the party and the judge, inter alia, the due notice of hearings. The UNCITRAL Arbitration as well as the ICSID Convention includes the relevant provisions. In the draft of the TTIP the issue of transparency is regarded even broader. The draft incorporates the UNCITRAL rules on transparency, under which all documents will be made publicly available and all hearings will be open to the public.

5. Under UNIDROIT judges for transnational litigation shall be familiar with the law. The ICSID Convention establishes higher standards – the arbitrators should have recognized competence in the fields of law, commerce, industry, or finance. Under the draft of the TTIP, the judges shall have technical and legal qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body.

Thus, both ISDS and ISC provide the right balance of maintaining public interest and securing the rights of investors.

Bibliography

1. *Alpha Projektholding GmbH v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/07/16 [accessed: 13.07.2017].
2. *Annex I of the Draft*, [online] http://trade.ec.europa.eu/doclib/docs/2015/november/ tradoc_153955.pdf [accessed: 13.07.2017].
3. *Arbitration in CIS Countries. Current Issues*, Antwerpen–Apeldoorn–Portland 2012.
4. *Blue Bank International & Trust (Barbados) Ltd. v. the Bolivarian Republic of Venezuela case materials*, [online] http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf [accessed: 13.07.2017].
5. *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/08/11 [accessed: 13.07.2017].

6. *CETA – Article X.9: Treatment of Investors and of Covered Investments, Article X.11: Article X.10: Compensation for Losses, Expropriation, Article X.12: Transfers*, [online] http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [accessed: 13.07.2017].
7. *City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/ cases/ Pages/casedetail.aspx?CaseNo=ARB/14/9 [accessed: 13.07.2017].
8. *Civil society groups say no to investor-state dispute settlement in EU-US trade deal' (December 2013)*, [online] http://corporateeurope.org/trade/2013/12/civil-society-groups-say-no-investor-state-dispute-settlement-eu-us-trade-deal [accessed: 13.07. 2017].
9. *Comments to ALI / UNIDROIT Principles of Transnational Civil Procedure*, [online] http:// www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciplese.pdf [accessed: 13.07.2017].
10. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3)*, [online] https://icsid.worldbank.org/apps/ ICSIDWEB/ cases/Pages/casedetail.aspx?CaseNo=ARB/97/3 [accessed: 13.07.2017].
11. *Comprehensive Economic and Trade Agreement (CETA)*, [online] http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [accessed: 13.07.2017].
12. Cremona M., *Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)*, "Common Market Law Review" 2015, Vol. 52, Issue 2.
13. *European Commission – Fact Sheet. Reading Guide. Draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP) (16 September 2015)*, [online] http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm [accessed: 13.07.2017].
14. *European Commission concept paper 'Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court', published on the 5 May, 2015*, [online] http://trade. ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF [accessed: 13.07.2017].
15. *European Union's proposal for Investment Protection and Resolution of Investment Disputes*, [online] http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_ 15 39 55.pdf [accessed: 13.07.2017].
16. *First Round of TTIP negotiations kicks off in Washington DC*, [online] http://trade.ec. europa.eu/doclib/docs/2013/july/tradoc_151595.pdf [accessed: 13.07.2017].
17. *GEA Group Aktiengesellschaft v. Ukraine*, [online] https://icsid.worldbank.org/apps/ ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/08/16 [accessed: 13.07.2017].
18. *Generation Ukraine Inc. v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSID-WEB/cases/Pages/casedetail.aspx?CaseNo=ARB/00/9 [accessed: 13.07.2017].
19. *Generation Ukraine Inc. v. Ukraine (ICSID CASE No. ARB/00/9) AWARD*, [online] http:// www.italaw.com/ sites/ default/ files/case-documents/ita0358.pdf [accessed: 13.07. 2017].
20. *Germany-Poland BIT*, [online] http://investmentpolicyhub.unctad.org/Download/TreatyFile/1393 [accessed: 13.07.2017].
21. *Gilward Investments B.V.v.Ukraine*, [online] https://icsid.worldbank.org/ apps/ ICSID WEB/cases/Pages/casedetail.aspx?CaseNo=ARB/15/33 [accessed: 13.07.2017].

22. *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/09/11 [accessed: 13.07.2017].
23. van Harten G., *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, [online] http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1036&context=ohlj [accessed: 13.07.2017].
24. *ICSID Arbitration Rules*, [online] http://icsidfiles.worldbank.org/icsid/icsid/ staticfiles/basicdoc/partf-chap04.htm [accessed: 13.07.2017].
25. *ICSID Convention*, [online] http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partA.htm [accessed: 13.07.2017].
26. *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, [online] https:// icsid.worldbank.org/ apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/08/8 [accessed: 13.07.2017].
27. *Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court', published on the 5 May, 2015*, [online] http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF [accessed: 13.07.2017].
28. *Investment of the Draft*, [online] http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf [accessed: 13.07.2017].
29. *Joseph C. Lemire v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB(AF)/98/1 [accessed: 13.07.2017].
30. *Joseph Charles Lemire v. Ukraine (ICSID Case No. ARB(AF)/98/1) AWARD*, [online] https:// icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC569_En&caseId=C165 [accessed: 13.07.2017].
31. Khan U., Pallot R., Taylor D., Kanavos P., *The Transatlantic Trade and Investment Partnership: international trade law, health systems and public health*, London 2015.
32. *Krederi Ltd. v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/14/17 [accessed: 13.07.2017].
33. *Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, [online] http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 [accessed: 13.07.2017].
34. Paulsson J., *Denial of Justice in International Law*, Cambridge 2005.
35. *Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/15/9 [accessed: 13.07.2017].
36. Quick R., *Why TTIP Should Have an Investment Chapter Including ISDS*, "Journal of World Trade", 2015, Vol. 49, Issue 2.
37. Risse J., Gremminger N., *The Truth About Investment Arbitration (not only) under TTIP – Four Case Studies*, "ASA Bulletin" 2015, Vol. 33, Issue 3.
38. *S&D Position Paper on Investor-state dispute settlement mechanisms in ongoing trade negotiations*, [online] http://www.socialistsanddemocrats.eu/sites/default/files/ position_paper_investor_state_dispute_settlement_ISDS_en_150304_3.pdf [accessed: 13.07.2017].
39. *The EU textual proposal of investment chapter*, [online] http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf [accessed: 13.07.2017].

40. *The European Commission Fact Sheet 'Why the new EU proposal for an Investment Court System in TTIP is beneficial to both States and investors' (12 November 2015)*, [online] http://europa.eu/rapid/press-release_MEMO-15-6060_en.htm [accessed: 13.07. 2017].
41. *The European Commission 'Factsheet on Investment protection in TTIP'*, [online] http:// trade.ec.europa.eu/ doclib/ docs/ 2015/ january/ tradoc_153018.5%20Investment.pdf [accessed: 13.07.2017].
42. *The European Commission concept paper 'Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court'*, [online] http://trade.ec.europa.eu/doclib/docs/ 2015/may/tradoc_153408.PDF [accessed: 13.07.2017].
43. *The European Commission memo 'EU-Canada agree deal to boost trade and investment' (26 September 2014)*, [online] http://europa.eu/rapid/press-release_MEMO-14-542_en.htm [accessed: 13.07.2017].
44. *The obscure legal system that lets corporations sue countries' (June 2015)*, [online] http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid [accessed: 13.07.2017].
45. *The Transatlantic Trade and Investment Partnership and the NHS: Separating myth from fact' (November 2014)*, [online] http://www.nhsconfed.org/~/media/ Confederation/Files/public%20access/TTIP%20briefing%20-%-%20final% 20pdf% 20for%20 website.pdf [accessed: 13.07.2017]
46. *Tokios Tokelės v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/02/18 [accessed: 13.07.2017].
47. *Tokios Tokelės v. Ukraine Case No.ARB/02/18 AWARD*, [online] https://icsid.worldbank.org/ICSID/ FrontServlet?requestType=CasesRH&actionVal=showDoc&docId= DC 2232_En&caseId=C220 [accessed: 13.07.2017].
48. *Tokios Tokelės v. Ukraine Case No.ARB/02/18 Decision on Jurisdiction*, [online] https:// icsid.worldbank.org/ICSID/ FrontServlet?requestType=CasesRH&actionVal=showDoc & docId=DC639_En&caseId=C220 [accessed: 13.07.2017].
49. *Ukraine-Germany BIT*, [online] http://zakon3.rada.gov.ua/laws/show/276_415/ print 1448046711507083 [accessed:13.07.2017].
50. *UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013)*, [online] https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/ UNCITRAL-Arbitration-Rules-2013-e.pdf [accessed: 13.07.2017].
51. *UNCITRAL rules on transparency*, [online] http://www.uncitral.org/pdf/english/texts/ arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf [accessed: 13.07.2017].
52. *US Model BIT*, [online] http://www.state.gov/documents/organization/188371.pdf [accessed: 13.07.2017].
53. *Western NIS Enterprise Fund v. Ukraine*, [online] https://icsid.worldbank.org/apps/ ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/04/2 [accessed: 13.07.2017].
54. *Western NIS Enterprise Fund v. Ukraine (ICSID Case No. ARB/04/2) ORDER*, [online] https:// icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal= showDoc&docId=DC649_En&caseId=C236 [accessed: 13.07.2017].
55. *Why the new EU proposal for an Investment Court System in TTIP is beneficial to both States and investors*, [online] http://europa.eu/rapid/press-release_MEMO-15-6060_ en.htm [accessed: 13.07.2017].