

TRAIL+ Thesis

LL.M Programme in International Trade and Investment Law | 2021 - 2022

The Establishment of a Multilateral Investment Court: Lessons Learned from the WTO

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Abstract

The Multilateral Investment Court initiative emerged as a result of increased public criticism against investor-state dispute settlement. While such a court may provide a timely solution to the criticisms levelled against the dispute settlement system, its establishment would entail a complete overhaul of the system's current regime.

This thesis analyses the implications of establishing a Multilateral Investment Court for the settlement of investor-state disputes. It starts with an overview of the development of investor-state dispute settlement, an analysis of its features, and an investigation of the salient problems that led to various institutional mandates for its reform.

It subsequently analyses how the Multilateral Investment Court would address investor-state dispute settlement concerns and what problems may arise in case of its establishment, both in terms of operation and institutional framework, as well as political feasibility.

It concludes by submitting that the Multilateral Investment Court, as currently envisaged, would not be a better solution for the settlement of investor-state disputes than the current regime, as any potential benefits may be negated by the new problems it would generate.

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List of Abbreviations and Acronyms

Abbreviation/Acronym	Full Title
AA	Association Agreement
ABR	Appellate Body Report
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
Art./art	Article
BIT	Bilateral Investment Treaty
CETA	EU – Canada Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
DSB	Dispute Settlement Body
DSS	Dispute Settlement System
DSU	Dispute Settlement Understanding of the WTO
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FET	Fair and Equitable Treatment
GA	Global Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IPA	Investment Protection Agreement
ISDS	Investor-state Dispute Settlement

ITLOS	International Tribunal for the Law of the Sea
MIC	Multilateral Investment Court
MIT	Multilateral Investment Treaty
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
Para.	Paragraph
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of Justice
PR	Panel Report
SME	Small and Medium Enterprises
TBT	Technical Barriers to Trade Agreement
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USMCA	Agreement between the United States Of America, the United Mexican States, And Canada
WTO	World Trade Organization

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INTRODUCTION

Investor-state dispute settlement (ISDS) has been a subject of debate throughout the period of its existence. What remains central to the debate are the issues of the legitimacy of an international regulatory framework, as opposed to the sole national regulation of investments and investment disputes, and the limitations that it imposes on state public policy space. While these have had a limited impact on the growth of the dispute settlement system, especially as bilateral investment treaties (BITs) with ISDS clauses have multiplied over the past few decades¹ and ISDS institutions have recorded unprecedented number of cases in recent years,² the one-off character of decisions rendered by ISDS tribunals and the lack of a permanent body to exercise control over the system and ensure the quality of decisions suggest that ISDS cannot be isolated from the problems it inherently creates by its very nature.³

Following increased criticism that ISDS, be it ad hoc or institutional, has come under in recent years,⁴ various institutional mandates emerged to develop options for a possible reform.⁵ In

¹ Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *The International Lawyer* 655; Pohl Joachim, Mashigo Kekeletso and Nohen Alexis, 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey' (OECD 2012) OECD Working Papers on International Investment 2012/02 6–10 <https://www.oecd.org/investment/investment-policy/WP-2012_2.pdf>; See also 'Database of Bilateral Investment Treaties | ICSID' <<https://icsid.worldbank.org/resources/databases/bilateral-investment-treaties>> accessed 9 November 2022.

² See Stephan W. Schill, 'The Overlooked Role of Arbitration in International Adjudication Theory – European Society of International Law | Société Européenne de Droit International' (2015) 4 2–3 <https://esil-sedi.eu/post_name-131/>; 'ICSID Releases New Caseload Statistics for the 2021 Fiscal Year | ICSID' <<https://icsid.worldbank.org/news-and-events/news-releases/icsid-releases-new-caseload-statistics-2021-fiscal-year>> accessed 26 October 2022.

³ Faith Abel Abraham, 'The Creation of a WTO-Model Multilateral Investment Court: A Panacea for Investor-State Dispute Settlement?' (World Trade Institute, University of Bern 2022).

⁴ Marc Bungenberg and Reinisch August, *Draft Statute of the Multilateral Investment Court* (Nomos Verlagsgesellschaft mbH & Co KG 2021) 8; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2008); Mattias Kumm, 'An Empire of Capital?: Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege' [2015] *Verfassungsblog: On Matters Constitutional* <https://intr2dok.vifa-recht.de/receive/mir_mods_00001160> accessed 26 April 2022; Nicolas Hachez and Jan Wouters, 'International Investment Dispute Settlement in the 21st Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?' [2012] *SSRN Electronic Journal* <<http://www.ssrn.com/abstract=2009327>> accessed 26 April 2022.

⁵ See UNCITRAL (2017a), 'Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS) - Note by the Secretariat' (2017) A/72/17; See also European Commission, 'Multilateral Investment Court Project' <https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en> accessed 21 October 2022.

July 2017, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III, comprising of 60 voting members (and about 120 observers),⁶ was mandated to identify the problems with ISDS, determine the desirability of reform, and develop apposite solutions if any reforms were to be desired.⁷ The Working Group reached the conclusion that reform was desirable,⁸ and formally began to develop reform options, including the possible establishment of a permanent Multilateral Investment Court (MIC).⁹

As recognized by United Nations Conference on Trade and Development (UNCTAD), a standing investment court would, to a large extent, address the problems that beset ISDS; it would, inter alia, facilitate consistency and accuracy of decisions, and bring about legitimacy, transparency, and greater acceptance of the ISDS system.¹⁰ Against this backdrop, the Council of the European Union gave the Commission of the EU a mandate to negotiate an MIC,¹¹ following the successful incorporation of an Investment Court System (ICS), which is envisaged to transition into a full-fledged MIC, into the EU-Canada Comprehensive Economic and Trade Agreement (CETA).¹² The EU and Canada, thus, began to advocate for the establishment of an MIC as an apposite solution for ISDS at the UNCITRAL setting.¹³ This

⁶ UNCITRAL, ‘Report of the United Nations Commission on International Trade Law Fiftieth Session (3-21 July 2017), General Assembly, Official Records, Seventy-Second Session Supplement No. 17’ (2017) A/72/17 1,3, 42–47 <<https://undocs.org/en/A/72/17>>; CIARB, ‘CIARB at UNCITRAL Working Group III on ISDS Reform: Efficiency, Decisions, and Decision Makers’ <https://www.ciarb.org/media/6285/ciarb-uncitral_discussion-papers_digital-0819.pdf> accessed 30 October 2022; Anthea Roberts, ‘UNCITRAL and ISDS Reforms: The Divided West and the Battle by and for the Rest’ (*EJIL: Talk!*, 30 April 2019) <<https://www.ejiltalk.org/uncitral-and-isds-reforms-the-divided-west-and-the-battle-by-and-for-the-rest/>> accessed 26 October 2022.

⁷ UNCITRAL (2017a) (n 5).

⁸ UNCITRAL (2017b), ‘Report of the United Nations Commission on International Trade Law, Fiftieth Session (3-21 July 2017)’ (2017) A/72/17 paras 264, 447.

⁹ The exploration of reform options began on 10 July 2017. See European Commission, ‘Factsheet of 10.7.2017’ 2017b <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155744.pdf>.

¹⁰ Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (Springer Nature 2020) 2; Abraham (n 3).

¹¹ Council of the EU, ‘Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes’ (2018) 12981/17 ADD 1 DCL 1.

¹² Bungenberg and Reinisch (n 10) 9, 11.

¹³ See UNCITRAL Working Group III, ‘Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the European Union and Its Member States, Thirty-Seventh Session, New York, 1–5 April 2019’ (2019) A/CN.9/WG.III/WP.159/Add.1 <<http://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1>>; Roberts, ‘UNCITRAL and ISDS Reforms’ (n 6).

motion was amplified after a ruling of compatibility of the ICS with EU law was issued by the Court of Justice of the European Union (CJEU).¹⁴

Despite the potential benefits associated with the creation of an MIC, the two-instance permanent investment court, which in effect, is modelled after the WTO Multilateral Dispute Settlement System (WTO DSS), draws particular attention due to the current existential crisis and calls for a rethink of the WTO DSS itself.¹⁵ Further, while the WTO DSS has been largely successful due to its single, comprehensive and integrated structure,¹⁶ the reliance on existing BITs, which are each distinct from one another, as the material basis for the institutionalized and multilateralized MIC raises concerns of harmony and practical implementation.¹⁷ Moreover, an initiative to multilateralize investment dispute settlement of such a great magnitude that would require an overhaul of the entire existing ISDS system and its replacement with an MIC poses questions as to whether it would garner enough international support.¹⁸

While existing research suggests that the establishment of an MIC is possible in principle,¹⁹ there is a paucity of research on whether an MIC which incorporates key elements of the WTO DSS that negatively impact the objectives pursued, and certain features that have been heavily criticized, would be a better alternative to the current ISDS regime and be sustainable.

Based on this consideration, the goal of the present research is to determine whether a WTO-model MIC would be a better option for the settlement of investor-state disputes than the current ISDS regime; whether it would solve the problems that have plagued ISDS; and/or whether it

¹⁴ Bungenberg and Reinisch (n 10) 9,11.

¹⁵See Peter Van den Bossche, 'The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?', *WTI Working Paper No. 02/2021* (2021); Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (5th edition, Cambridge University Press 2022) 173, 198.

¹⁶ Bossche and Zdouc (n 15) 196.

¹⁷ See Bungenberg and Reinisch (n 10) 2, 117–118, 126.

¹⁸ UNCTAD, 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap' (2013) Note № 2 9 <https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf>.

¹⁹ Bungenberg and Reinisch (n 10); Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap' (CIDS 2016) 75–97 <https://www.cids.ch/images/Documents/CIDS_First_Report_ISDS_2015.pdf>; UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the European Union and Its Member States, Thirty-Seventh Session, New York, 1–5 April 2019' (n 13).

would generate new ones. The research will address the problems besetting the current ISDS regime, which led to the call for reform, and examine the feasibility of establishing an MIC in light of the existing system of laws, recommendations and socio-political circumstances; it will further assess the sustainability of the proposed MIC, in the event of its establishment, through a comparative analysis with the WTO DSS and present the researcher's views and recommendations. The researcher will adopt a doctrinal and comparative law approach to answer the research questions and achieve the research objectives.

Following this introduction, this research consists of the following chapters: Chapter 1 gives an introductory background to the development of ISDS and its features; Chapter 2 addresses the salient problems with the current ISDS regime and determines why it has aroused public concern. It takes an objective view of these concerns in order to determine their validity; Chapter 3 discusses the establishment of an MIC, its objectives and feasibility of establishment; Chapter 4 begins with a structural overview of the MIC and subsequently analyzes how the MIC would address ISDS concerns in a comparative manner with the WTO DSS used for the settlement of international trade disputes. It will draw out the implications of implementing such a reform proposal; Chapter 5 describes the lessons learned from the WTO experience and provides recommendations for the MIC where appropriate; and Chapter 6 sets forth the conclusions.

CHAPTER 1: THE DEVELOPMENT OF INVESTOR-STATE DISPUTE SETTLEMENT

1.1. Investor-state Dispute Settlement and its Evolution

1.1.1. The Notion of Investor-state Dispute Settlement

ISDS is a mechanism of dispute resolution through which an investor may file claims against a state, in which it had made an investment, for breaches of rights and obligations covered by a binding agreement.²⁰ While the settlement of investment disputes may take various litigious and non-litigious forms, the notion of ISDS has been primarily limited to investor-state arbitration.²¹ This definition is, therefore, understood to exclude other forms of investment dispute settlement such as negotiation, mediation, litigation and diplomatic espousal, amongst others.²²

ISDS²³ is a distinct instrument of public international law which provides foreign investors (private parties) the possibility to file claims against a sovereign state in a forum other than the state's domestic courts.²⁴ It is a private form of international adjudication which allows the settlement of disputes between an investor and a host state by a third-party tribunal.²⁵ It is characterized by the binding nature of decisions rendered by arbitral tribunals and the obligation incumbent on disputing parties to enforce the arbitral awards.²⁶

Investors acquire the right to sue sovereign states through arbitration by virtue of the investment agreements concluded between their home states and a host state. These agreements may be

²⁰ See Scott Miller and Gregory N Hicks, *Investor-State Dispute Settlement: A Reality Check: A Report of the CSIS Scholl Chair in International Business* (Center for Strategic and International Studies 2015); see also Krista Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials* (3rd Edition, Edward Elgar Publishing Ltd 2020) ch 6.1.2.

²¹ CL Lim, Jean Ho and Mārtiņš Pāparinskis, *International Investment Law and Arbitration: Commentary, Awards and Other Materials* (Second edition, Cambridge University Press 2021) 1,2; Miller and Hicks (n 20) 1.

²² See Lim, Ho and Pāparinskis (n 21) ch 1.

²³ For the purpose of this research, ISDS shall retain the same meaning as “investor-state arbitration” as explained in the preceding paragraph.

²⁴ Christoph Schreuer, ‘Investment Arbitration’, *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 296–298.

²⁵ *ibid.*

²⁶ *ibid* 312.

embodied in legal instruments, such as bilateral investment treaties (BITs), separate chapters of international trade treaties,²⁷ as well as some specific treaties like the Energy Charter Treaty.²⁸

In order to initiate an ISDS proceeding before an arbitral tribunal, it is crucial for an investor to demonstrate that it had made an investment in a state (host) other than its home state; the home state and the host state must have in their regard committed to ISDS under a binding treaty. This treaty becomes the legal basis under which the rights and obligations of an investor and the host state, as well as claims of breach shall be determined.²⁹

Most frequently, ISDS claims are filed under the International Centre for Settlement of Investment Disputes (ICSID) Rules.³⁰ However, several alternatives which equally exercise the same function exist. These include the UNCITRAL Arbitration Rules, the International Chamber of Commerce (ICC) Rules, and the London Court of Arbitration (LCIA) Rules, amongst others. Depending on the forum chosen by parties to a dispute, they generally have the right to choose the applicable rules, otherwise, they may be subject to the mandatory rules of the institution deciding their dispute.³¹

1.1.2. The Historical Development of Investor-state Dispute Settlement

Historically, the natural forum for the settlement of investment disputes was the domestic courts of the host state.³² Foreign investors were subject to the laws of the host state and afforded the same treatment as the state affords its own nationals. Disputes arising out of investments between the investor and the host state were adjudicated by the domestic courts under the laws of the host state.

²⁷ See for example EU – Canada Comprehensive Economic And Trade Agreement 2017 ch Eight; North American Free Trade Agreement 1994 ch Eleven.

²⁸ See Valasek Martin and FitzGerald Alison, ‘International Arbitration Report’ (2017) 8 5 <<https://www.nortonrosefulbright.com/en/knowledge/publications/8014c6b7/frequently-asked-questions-about-investor-state-dispute-settlement>>.

²⁹ Miller and Hicks (n 20) 20–21.

³⁰ Schreuer (n 24) 298.

³¹ See ICSID Convention 2006 Art. 44.

³² Rodrigo Polanco Lazo, ‘The No of Tokyo Revisited: Or How Developed Countries Learned to Start Worrying and Love the Calvo Doctrine’ (2015) 30 ICSID Review - Foreign Investment Law Journal 172, 173.

Domestic courts, however, were challenged for lack of efficiency and criticized for local bias.³³ Regarding efficiency, foreign investors were apprehensive of domestic courts due to a perception that they lack “responsive, robust legal systems capable of effectively and quickly adjudicating complex claims”.³⁴ Moreover, States may even acknowledge the inefficiency of their courts in adjudicating certain disputes on their own. This was the case of India in the *In re Union Carbide*.³⁵ Additionally, domestic courts, particularly of developing countries, were challenged for not affording foreign investors substantive and procedural treatment conforming to an “international minimum standard”.³⁶ As regards bias, there is a general perception that bias exists in domestic courts against foreign investors even if such claims might not necessarily be substantiated.³⁷

As an alternative to domestic courts, the settlement of investment disputes could be carried out by diplomatic protection, governed by the regime of customary international law.³⁸ Under customary international law, a state may seek reparations for damages caused to its citizens,

³³ Rodrigo Polanco (ed), ‘The Rise of and Backlash against Investor–State Arbitration’, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* (Cambridge University Press 2019) 44.

³⁴ Christopher F Dugan and others, *Investor-State Arbitration* (Oxford University Press 2008) 15.

³⁵ *In Re Union Carbide Corp Gas Plant Disaster* [1986] SDNY 634F. Supp. 842.

³⁶ See Polanco Lazo (n 32) 174.

³⁷ See Polanco (n 33) 44; Dugan and others (n 34) 13.

³⁸ Outside the realm of customary international law, states may engage in “often” disputed methods of dispute settlement such as retaliation, reprisal and intervention. Although retaliations (retaliatory measures such as the severance of diplomatic ties, withdrawal of economic concessions, and cutting off trade relations) are not illegitimate and are within the jurisdiction of the state employing them, their application should not jeopardize international peace and security; otherwise, they would be in violation of Art. 2.3 of the UN Charter, which obliges states to settle their disputes by peaceful means. Reprisals are punitive or retributive measures taken against a delinquent state to force a redress of its actions. They formerly included the seizure of property and persons, but now extend to every coercive measure against an offending state, including the embargo of its ships, seizure of its property on the high seas, economic sanctions, and naval demonstration or bombardment. Given the use of force involved in reprisals, they are circumscribed under international law as they contravene Art. 2.4 of the U.N Charter. The standard for reprisal was elucidated by the Special Arbitral Tribunal in the *Naulilaa* case (Portugal v Federal Republic of Germany)(1928). Similarly, military intervention involves the use of force by a state for the protection of its citizens’ investments in a foreign state. This was met with an increasing outrage from host states, which eventually led it to being outlawed by the Drago-Porter Treaty in 1907. The proscription, however, does not imply that states have stopped military interventions. The U.S, for instance, relied on the ground of protection of the rights and interests of its citizens abroad to militarily intervene in Grenada in 1983, and in Panama in December 1989. For relevant cases and literature, see: Verma S, *Introduction to Public International Law* (Satyam Law International 2012) 479–482; Schefer (n 14) 7, 470–472; DJ Harris, *Cases and Materials on International Law* (4. ed, 2. impr, Sweet & Maxwell 1991) 846–849.

including investors, by a foreign state through the exercise of diplomatic protection.³⁹ This principle was recognized by the Permanent Court of Justice (PCIJ), the predecessor to the current International Court of Justice (ICJ), in the *Mavromattis Palestine Concessions* Case. The Court noted:

*“it is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through ordinary channels.”*⁴⁰

The view adopted by the Court aligns with the legal fiction considered to emanate from Vattel’s dictum, that whoever injures a national of a state, injures the state itself.⁴¹ In this case, the claim becomes the state’s and not that of the national who was injured.⁴² Diplomatic protection in investment cases takes the form of an espousal, where a state espouses the claim of its investor and engages in state-state dispute settlement with an investor’s host state. Prior to an espousal, an investor must exhaust all local remedies available in the host state.⁴³ In turn, an investor’s home state decides whether to espouse the investor’s claim. A home state possesses absolute discretion over the espousal of a claim made by an investor of its nationality; it may pursue, modify or abandon the claim devoid of the investor’s consent, acquiescence, or even

³⁹ Draft Articles on Diplomatic Protection 2006 Art. 1; Chittharanjan F Amerasinghe, ‘Diplomatic Protection in Context’ in Chittharanjan F Amerasinghe (ed), *Diplomatic Protection* (Oxford University Press 2008) <<https://doi.org/10.1093/acprof:oso/9780199212385.003.0003>> accessed 26 August 2022; Lim, Ho and Paporinkis (n 21) 2–5; Sachet Singh and Sooraj Sharma, ‘Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap’ (31 January 2013) <<https://papers.ssrn.com/abstract=2219248>> accessed 26 August 2022.

⁴⁰ *Mavromattis Palestine Concessions (Greece v UK)* [1924] PCIJ V.I Series A No. 2 [21].

⁴¹ Emer de Vattel, *The Law of Nations or Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns*, vol III ([1758] English translation by Charles G Fenwick, Carnegie Institution 1916) 136.

⁴² See Annemarieke Vermeer-Künzli, ‘As If: The Legal Fiction in Diplomatic Protection’ (2007) 18 *European Journal of International Law* 37.

⁴³ Polanco (n 33) 38; Draft Articles on Diplomatic Protection arts 3, 14.

knowledge.⁴⁴ Should it decide in favour of an espousal, the investor loses control over the case;⁴⁵ and any ensuing compensation is due to the state – not the investor.⁴⁶

Based on the foregoing, diplomatic espousal is problematic. Not only did it not adequately provide an avenue for the sufficient representation of investors' rights and interests, it also created tension in international relations between states. This was often aggravated by claimants' requests for the right to wage private war through the grant of special reprisals. The *Don Pacifico* case, which ended up with gunboat diplomacy between the governments of Greece, the United Kingdom and Portugal as a result of the alleged failure of Greece to protect the property rights of a British subject, is notable in that regard.⁴⁷ In the same vein, developing countries were particularly indignant of the pressure from capital exporting countries, whether it was exercised bilaterally or in multilateral fora.⁴⁸ Apparently, it became evident that diplomatic protection in this manner, although legal, is unsustainable.

A peaceful type of diplomatic protection is provided through mixed commissions.⁴⁹ Mixed commissions were made up of commissioners of different nationalities chosen by states to settle claims between citizens of different states, citizens of one state against another state, as well as between states themselves.⁵⁰ This, however, does not imply that investors automatically had

⁴⁴ J Billiet, *International Investment Arbitration: A Practical Handbook* (Maklu 2016) 30–31; Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (23 August 2013) 31; For relevance of nationality and discretion of a state to espouse a claim, see *Case Concerning Barcelona Traction, Light and Power, Ltd (Belgium v Spain)* [1970] ICJ Rep. 3 [35,44, 77–80]; See also Draft Articles on Diplomatic Protection Arts. 3, 14.

⁴⁵ Schreuer (n 24) 296–297; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 232.

⁴⁶ Schefer (n 20) 468.

⁴⁷ Lord McNair, *International Law Opinions: Selected and Annotated*, vol 11 (Cambridge UP 1956) 197–198; See also the issues of gunboat diplomacy and armed intervention, which necessitated the depoliticization of investment dispute settlement to protect, particularly less powerful, host states from abuses of diplomatic protection by more powerful home states in Polanco Lazo (n 32) 176; Roberts, 'State-to-State Investment Treaty Arbitration' (n 44) 15–16.

⁴⁸ Schreuer (n 24) 296.

⁴⁹ For a detailed discussion on peaceful and non-peaceful means of diplomatic protection, see Polanco Lazo (n 32) 176–183.

⁵⁰ Lim, Ho and Paporinskis (n 21) 5–6.

direct access to dispute settlement with states.⁵¹ Mixed commissions were usually established by a treaty between different states;⁵² such treaties provided a forum for adjudication of state-state disputes and were limited to the consideration of claims pertaining to the treatment of investors on retrospective basis.⁵³ When disputes arose, the treaty parties played a key role in the selection of mixed commissioners, who would thereby mostly consist of their nationals.⁵⁴ Examples of such commissions include the Jay Treaty commissions, and the American-Mexican Claims Commission.

Mixed commissions had the tendency to help avoid coercion in dispute resolutions and repudiation of obligations. They promoted the rule of law through the substitution of a legal for a political determination.⁵⁵ Fundamentally, they did not normally require the exhaustion of local remedies, unlike espousal.⁵⁶ More significantly for states, mixed commissions alleviated them from being embroiled in the cumbersome process of espousing every single claim in situations where a large number of claims arose against a single state.⁵⁷

Notwithstanding their benefits, the success of mixed claims commissions was contingent on the abilities of the commissioners to a disproportionate degree.⁵⁸ Indeed, the very construction of the commissions was carried out in such a manner that would create commissioners of “non-judicious adversary temperament”.⁵⁹ Hence, their functioning was marred by the impartiality of adjudicators that permeated the proceedings.⁶⁰ This was exacerbated by the inordinate

⁵¹ This only became possible after the First World War. See Rudolf Dolzer, ‘Mixed Claims Commissions’, *Oxford Public International Law* (2011) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e64>> accessed 22 August 2022.

⁵² Lim, Ho and Papparinskis (n 21) 6.

⁵³ See Schefer (n 20) 474.

⁵⁴ Lim, Ho and Papparinskis (n 21) 5–6.

⁵⁵ Richard B Lillich, *International Claims: Their Adjudication by National Commissions* (1st edn, Syracuse University Press 1962) 6–11.

⁵⁶ Lim, Ho and Papparinskis (n 21) 6.

⁵⁷ Lillich (n 55) 6–11.

⁵⁸ See *ibid.*

⁵⁹ *ibid.*; Lim, Ho and Papparinskis (n 21) 7.

⁶⁰ Sandrine Giroud and Sam Moss, ‘Mass Claims Processes under Public International Law’ (British Institute of International and Comparative Law 2015) 482–485; Lim, Ho and Papparinskis (n 21) 7.

amount of time it took commissions to render their decisions.⁶¹ A combination of these elements often made the mixed commissions ineffective. For instance, one of the Jay Treaty Commissions deciding a dispute between the U.S and Great Britain had to be dissolved due to the conduct of the commissioners which greatly impeded the process.⁶² As a result, U.S resorted to making a lump sum settlement to Great Britain; Great Britain, in turn, established a “national” claims commission to distribute the money.⁶³ Eventually, dispute settlement by mixed commissions became nationalized;⁶⁴ the role of mixed commissions was gradually superseded by lump sum settlement, followed by the establishment of national commissions by recipient states to distribute the money.⁶⁵

While mixed commissions may have been an effective tool in the resolution of investment disputes and the consolidation of international law, they had deplorably failed to meet this objective in various instances. This made them eventually disappear in the aftermath of World War II.⁶⁶ And even if they functioned properly, much like diplomatic espousal, there was doubt as to their capability and suitability for the resolution of the plethora of claims of the post-war period.⁶⁷ A large number of claims would necessitate a degree of speed of adjudication which is not technically feasible if the claims are to be determined by commissioners of different

⁶¹ Giroud and Moss (n 60) 482–485.

⁶² Lillich (n 55) 6–11; Giroud and Moss (n 60) 483; Lillich (n 25) 6–11; See also the failure of American-Mexican Claims Commissions for similar reasons Howard F Cline, *The United States and Mexico* (Harvard University Press 1961) 209.

⁶³ Lillich (n 55) 6–11.

⁶⁴ Marc Henzelin, Veijo Heiskanen and Antoine Romanetti, ‘Reparations for Historical Wrongs: From Ad Hoc Mass Claims Programs to an International Framework Programs?’ [2006] *Uluslararası suçlar ve tarih* 91, 92–102.

⁶⁵ M Holtzmann Howard, ‘Mass Claims’, *Max Planck Encyclopedias of International Law [MPIL]* (2008) para 7 <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1891?prd=OPIL>> accessed 28 August 2022; Lillich (n 55) 6–11; Roland Bank and Friederike Foltz, ‘Lump Sum Agreements’, *Max Planck Encyclopedias of International Law [MPIL]* (2013) paras 1–8 <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e842>> accessed 28 August 2022.

⁶⁶ The disappearance of mixed commissions was largely due to their inefficiency; this was compounded by the unprecedented number of claims of breaches of international law that arose as a result of the nationalization of foreign investments in many countries, in addition to the fact that communists and many developing countries were disinclined to submit such claims to third-party adjudication. See Burns H Weston, Richard B Lillich and David J Bederman, *International Claims: Their Settlement by Lump Sum Agreements, 1975-1995*, vol 1 (Transnational Publishers 1999) xi; See also Ilaria Bottiglierio, *Redress for Victims of Crimes Under International Law* (Springer 2004) 80; and Schefer (n 20) 474–475.

⁶⁷ See Lillich (n 55) 6–11.

nationalities and language, and who are educated in different legal systems.⁶⁸ The reputation of mixed commissions for extraordinary delays, in this regard, only intensified the lack of confidence in them.⁶⁹ Moreover, they generally dealt with claims concerning property and other economic rights exclusively, and not personal injury sustained by individuals.⁷⁰ Consequently, they did not provide a sufficient remedy to individual investors. All these factors, thus, detracted from the significance of mixed commissions and precipitated their disuse.

Further, the era of customary international law regime of investment dispute settlement also suffered a setback due to the lack of agreement over the appropriate standard of compensation. Opinions significantly diverged between developed and developing countries from the second half of the 20th century. As former colonies became sovereign countries, the legitimacy of the “Hull Rule’s”⁷¹ status as a customary rule of international law regulating expropriation by a host state was challenged.⁷² While the Hull Rule, which prevailed in the first half of the century, advances that a state should grant “prompt,” “adequate” and “effective” compensation, otherwise known as “full compensation”, developing countries claimed that the rule lacked the broad international support that customary international law demands.⁷³ Instead, they supported a more lenient view which emphasizes state sovereignty over foreign investments and the right to expropriate property under justifiable grounds, and offer the compensation that is deemed

⁶⁸ See *ibid.*

⁶⁹ See *ibid.*

⁷⁰ Henzelin, Heiskanen and Romanetti (n 64) 92–93.

⁷¹ See United States, ‘The Secretary of State of the United States (Cordell Hull) to Mexican Ambassador at Washington D.C.’ (1938) 32 AJIL Supp 181.

⁷² For a norm to attain a customary international law status, it must be based on general practice accepted as law, see Statute of the International Court of Justice 1946 art 38(1)(b); the standard for a customary rule was elaborated by the ICJ in various cases, see *Colombian-Peruvian Asylum (Colombia v Peru)* (1949) 225 ICJ Rep (International Court of Justice) 277. In this judgment, the ICJ held that a norm must be based on state practice and *opinio juris* (a belief by states that they are acting under an obligation). State practice must be ‘uniform and constant’. In the *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (1969) 3 ICJ Rep (International Court of Justice) the Court held that state practice must be ‘extensive’; whereas in the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* (1986) 14 ICJ Rep (International Court of Justice) it held that state practice must be ‘consistent’.

⁷³ See for instance *Ebrahimi v Iran, Final Award* [1994] Iran-US Claims Tribunal Award No. 560-44/46/47-3) [88–89]; M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 1994) 365.

“appropriate.”⁷⁴ This view is largely reflective of a later/contemporary version of the Calvo Doctrine.⁷⁵ The position taken by the developing countries was supported by a majority of states during the adoption of a series of United Nations General Assembly Resolutions (UN Res), which eventually led to the demise of the Hull Rule.⁷⁶ The consequence, however, is that neither the traditional view of “prompt, adequate, and effective” compensation advanced by the Hull Rule, nor the “appropriate” compensation espoused by developing countries gained sufficient international support to be regarded as a customary rule.⁷⁷ This left the customary international law regarding expropriation entirely uncertain and obscure in its basic aspects.⁷⁸

1.1.3. The Modern Practice of Investor-state Dispute Settlement

While it might seem that developing countries are against the idea of investment protection at the international level, owing to the demise of the Hull Rule, such a view is contrasted by their

⁷⁴ Andrew T Guzman, ‘Explaining the Popularity of Bilateral Investment Treaties’ in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009) 76–78.

⁷⁵ Originally, the development of the Calvo Doctrine in the 19th century Latin America aimed at incentivizing investment through the granting of “equal” civil legal rights to foreign investors. This was quite revolutionary at that time, and would be tantamount to modern day trade or investment “liberalization”. The focus of international disputes at that time was between “national standards” – supported by developing countries—and “international minimum standards”—supported by developed countries. This is quite different from the later/contemporary ‘distorted’ version developed in the second half of the 20th century, which centres around “expropriation without compensation”—supported by developing countries—and the Hull Rule (prompt, adequate, and effective compensation) espoused by developed countries. The original version of the Calvo Doctrine also advances that that foreign investors should be subject to the same treatment as the host offers its citizens’ property regardless of the level of protection. The later version might be a result of the Marxist and revisionist developments in international law after the Second World War, particularly during the Cold War, when a lot of developing countries “adopted nationalization and import substitution industrialization policies”. See Montt Santiago, ‘Chapter 1 The Latin American Position on State Responsibility: Looking into the Past for Lessons on the Future’, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the Bit Generation* (Hart Publishing Ltd) 4–5
<https://www.bloomsburyprofessionalonline.com/view/state_liability_investment_treaty/SLITA-ch1.xml>
accessed 12 October 2022; Schefer (n 15) 6–7.

⁷⁶ Since a customary rule requires a belief by states that they are acting under an obligation, whereas the series of resolutions adopted by the General Assembly portray the opposite, the demise of the Hull Rule became apparent, particularly, after the adoption of UN Res 3171 . See Guzman (n 74) 76–78.

⁷⁷ See *ibid* 77 ‘The UN Resolutions provide evidence of the demise of the Hull Rule, not of the rise of an alternative rule of customary international law’.

⁷⁸ See Rudolf Dolzer, ‘New Foundations of the Law of Expropriation of Alien Property’ (1981) 75 *The American Journal of International Law* 553, 567.

inclination to sign binding investment agreements with developed countries and between themselves.⁷⁹

A new investment climate characterised by the conclusion of International Investment Agreements (IIAs) in the form of Bilateral Investment Treaties (BITs), Multilateral Investment Treaties (MITs), and Free Trade Agreements (FTAs) with separate chapters on investment protection soon emerged.

As a perceived balance between the need for developed countries to protect their investors abroad, and the desire of developing countries to attract Foreign Direct Investments (FDI), states concluded various investment treaties that offer individual investors a certain degree of protection.⁸⁰ The first BIT, concluded in 1959, ushered in a new regime of investment protection with significant state interest, such that by 1991 more than 90 developing countries and most developed countries were parties to at least one BIT.⁸¹ BITs had an explosive period in the 1990s, with more than a thousand of them concluded and almost every state being a signatory to at least one of them.⁸²

By March 2022, about 2,805 IIAs were concluded globally, 2,242 of which were in force.⁸³ These treaties form a complex, overlapping network of investment rules. Ironically, not only do they reproduce the Hull Rule, they also offer investors more protection than the Hull Rule

⁷⁹ See Polanco Lazo (n 32) 183; UNCTAD, ‘South-South Cooperation in International Investment Arrangements’ (United Nations 2005).

⁸⁰ See Roberts, ‘State-to-State Investment Treaty Arbitration’ (n 44) 24–25; Deborah L Swenson, ‘Why Do Developing Countries Sign BITs?’ in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009). This perceived balance, however, was later disputed. See chapter 3.1.

⁸¹ See Guzman (n 74) 76–78; Swenson (n 80).

⁸² Guzman (n 74) 76–78.

⁸³ Congressional Research Service, ‘U.S. International Investment Agreements (IIAs)’ (2022) IF10052.

ever did.⁸⁴ And unlike the old generation of investment protection, they establish the basis under which investors can make claims against states in general and on a prospective basis.⁸⁵

Most IIAs grant foreign investors substantive standards of protection such as the right to "fair and equitable treatment," "full protection and security," "free transfer of means," and the right not to be directly or indirectly expropriated without full compensation.⁸⁶ As a paradigm shift, they also grant investors access to ISDS for redress against host state actions in breach of such standards.⁸⁷ Some of these standards, however, are framed in ambiguous terms, leaving adjudicators with a wide margin of discretion in their interpretation and application.⁸⁸

1.2. The Features of Investor-state Dispute Settlement

1.2.1. Consent to Arbitrate

The modern practice of investor-state dispute settlement is characterized by various features. The most fundamental of them is the consent to arbitrate.⁸⁹ Arbitration is only possible when the parties to a dispute consent to its resolution via arbitration. Generally, consent is granted in three ways: provision of a consent clause in a direct agreement (contract) between the parties; an offer of arbitration in the national legislation of a host state to foreign investors (such as investment promotion law); and bilateral treaties or other agreements with reference to

⁸⁴ They capture both the Hull Rule for expropriation as well as expropriation that 'falls short of a direct taking'. See Guzman (n 69) 74–78; Aside from the perception of developing countries that changing their investment legal framework as well as subscribing to ICSID would increase mutual confidence in them and attract foreign direct investment, the emergence of BITs with a higher level of protection could be attributed to the fact that the U.S began signing Investment Protection Agreements (IPAs) in accordance with its newly developed Model BITS instead of Investment Guarantee Agreements (IGAs); this gave no option to states which wanted to sign BITs with the U.S but to accept those higher standards. See Singh and Sharma (n 34) 92; Huiping Chen, 'The Investor-State Dispute Settlement Mechanism: Where to Go in the 21st Century?' (2008) 9 *The journal of world investment & trade: law, economics, politics* 2; Christoph Schreuer, 'Course on Dispute Settlement ICSID 2.1 Overview' (United Nations Conference on Trade and Development 2003) UNCTAD/EDM/Misc.232 6 <http://www.unctad.org/en/docs/edmmisc232overview_en.pdf>.

⁸⁵ See Guzman (n 74) 78.

⁸⁶ See Lim, Ho and Paporinskis (n 21) 66–73; Guzman (n 74) 78.

⁸⁷ See Lim, Ho and Paporinskis (n 21) 66–73.

⁸⁸ A notable example is the Fair and Equitable Treatment (FET). See Schefer (n 20) ch 5.5.

⁸⁹ See International Bank for Reconstruction and Development, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Pursuant to Resolution No. 214 of 1964)' (1965) paras 23–25.

arbitration as a means for ISDS.⁹⁰ Consent to arbitration must be sufficiently clear to avoid potential disputes. Once given, it cannot be withdrawn unilaterally.⁹¹

An offer of arbitration through national legislation or treaties is only perfected after acceptance; hence, it is only valid before a repeal or annulment.⁹² Usually, however, there is a disassociation in the timing when consent to arbitration is expressed by the state party and the investor since the treaties providing for investor-state arbitration are concluded between state parties and not between an investor and a state.⁹³ For this reason, an investor's consent to treaty-based ISDS is only perfected the moment it files a written notice of arbitration.⁹⁴

1.2.2. Asymmetry of Rights and Obligations

Another notable feature of ISDS is the asymmetry of rights and obligations. Generally, only foreign investors can initiate arbitral proceedings whereas states cannot.⁹⁵ This is because only states are parties to a treaty under which arbitral proceedings arise. Only states, therefore, can breach the treaty and be held liable to for any damages. The corresponding right of a state to initiate arbitral proceedings against an investor is negated by the fact that the investor cannot breach the treaty since it is not a party to it. A decision rendered by an arbitral tribunal in favour of a state, thus, denotes that the state has not been requisitioned to pay compensation, and not that it is to receive one from the investor. Nevertheless, costs may be awarded against an investor when it loses a case or at a tribunal's discretion.⁹⁶

⁹⁰ See Schreuer (n 24) s 5.1; International Bank for Reconstruction and Development (n 89) paras 23–24; Faith Abel Abraham, 'The Growth of Arbitration in Comparison to the Judicial Settlement of International Economic Disputes: Are Parties Seeking an Actual Benefit or an Escape Route?' (World Trade Institute, University of Bern 2021).

⁹¹ See for instance ICSID Convention art 25(1).

⁹² Schreuer (n 24) s 5.1.

⁹³ See Andrea M Steingruber, *Consent in International Arbitration* (1st edition, Oxford University Press 2012) 11–12, 25 et seq.

⁹⁴ See *ibid*; Lim, Ho and Paporinskis (n 21) 88; See also International Bank for Reconstruction and Development (n 89) para 24.

⁹⁵ Steingruber (n 93) 26–27.

⁹⁶ See ICSID Arbitration Rules 2006 r 28.

In the same vein, a state cannot "win" in ISDS in the same way as a foreign investor. It does not need a treaty to initiate a claim against a foreign investor since it can do that through its domestic courts.⁹⁷ Moreover, it can require the investor to exhaust local administrative or judicial remedies as a prerequisite for consent to arbitrate at the international level.⁹⁸ These indicate the significant power disadvantage that an investor is in when juxtaposed with a state. Thus, a victory for an investor in arbitration is a manifestation of its determination for recognition and remedy for breach of its rights, whereas that for a state only consolidates its power.

1.2.3. Jurisdiction of the Arbitral Tribunal

Before the determination of the merits of a case, an arbitral tribunal must satisfy itself of its own jurisdiction. Jurisdiction refers to the power or authority of the tribunal to resolve a dispute.⁹⁹ Such power is derived from the consent of the parties to arbitrate.¹⁰⁰ An arbitral tribunal is the ultimate judge of its own jurisdiction;¹⁰¹ it may also rule on any objections with respect to the existence or validity of the arbitration agreement.¹⁰² An arbitration clause that forms part of a contract, treaty, or other agreement is to be treated as a separate agreement independent of the other terms of the contract, treaty, or other agreement. Thus, the determination of invalidity of the contract, treaty, or other agreement by the tribunal does not categorically entail the invalidity of the arbitration clause.¹⁰³

The jurisdiction of an arbitral tribunal also depends on the nature of a dispute. Only disputes within the limits of a binding agreement are considered within a tribunal's jurisdiction.¹⁰⁴ In ISDS, arbitral tribunals are limited to the determination of "legal disputes directly arising out

⁹⁷ See Martin Jarrett, 'New Options for Investor Accountability in ISDS' (*EJIL: Talk!*, 22 December 2021) <<https://www.ejiltalk.org/new-options-for-investor-accountability-in-isds/>> accessed 2 September 2022.

⁹⁸ See ICSID Arbitration Rules r 26.

⁹⁹ See Alex Mills, 'Arbitral Jurisdiction', *The Oxford Handbook of International Arbitration* (2020).

¹⁰⁰ International Bank for Reconstruction and Development (n 89) para 22.

¹⁰¹ ICSID Convention art 41.

¹⁰² *ibid* 41.

¹⁰³ See for instance Permanent Court of Arbitration Rules 2012 r 23.

¹⁰⁴ See International Bank for Reconstruction and Development (n 89) para 22.

of an investment.”¹⁰⁵The expression “legal dispute” is conceptualized as a “conflict of rights” to the exclusion of a *mere* “conflict of interest.”¹⁰⁶ The latter is, thus, excluded from the tribunal’s jurisdiction. The dispute must pertain to the “existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.”¹⁰⁷

The nationality of the parties to a dispute is another major determinant of jurisdiction. ISDS involves the settlement of disputes between a host state and a national of another state.¹⁰⁸ The term “national” encompasses both natural and juridical persons.¹⁰⁹ Typically, both categories must demonstrate that they are “foreign” investors (i.e. not nationals of the host state – negative nationality requirement), and possess the nationality of the home state (positive nationality requirement), whose IIA protection is sought, on the dates relevant to the dispute settlement procedures.¹¹⁰ However, depending on the dispute settlement forum, there may be some degree of divergence.

For instance, while both natural and juridical persons are generally required to also demonstrate that they do “not” have the nationality of the host state in ICSID dispute settlement, such a requirement is more stringent on natural persons.¹¹¹ A natural person who is a national of the state party to the dispute is ineligible to participate in ICSID ISDS proceedings.¹¹² This requirement is absolute and is not affected even if the investor at the same time possesses the

¹⁰⁵ See ICSID Convention art 25(1); International Bank for Reconstruction and Development (n 89) para 26.

¹⁰⁶ International Bank for Reconstruction and Development (n 89) para 26.

¹⁰⁷ *ibid.*

¹⁰⁸ See ICSID Convention art 25; Schefer (n 20) ch 6; Lim, Ho and Paporinskis (n 21) ch 5.

¹⁰⁹ International Bank for Reconstruction and Development (n 89) para 28.

¹¹⁰ For instance, a reading of the U.S. Model Bilateral Investment Treaty 2012 art 1 in conjunction with Section B would establish that an investor must possess U.S nationality when the investment is made, and at the time the claim for investment protection under the BIT is submitted to arbitration; The same nationality requirement applies under the ASEAN Comprehensive Investment Agreement (ACIA) 2012; As for nationality requirement under a dispute settlement forum, ICSID Convention art 25(2) stipulates that an investor must have the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to arbitration (as well as on the date on on which the request was registered [for natural persons]).

¹¹¹ The requirement to demonstrate the possession of nationality of the home state (positive) and not being in possession of the nationality of the host state (negative) is cumulative and can have an effect on the success of the claim. See Schefer (n 20) 147; *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt (Decision on Jurisdiction, and Partial Dissenting Opinion of Professor Francisco Orrego Vicuña)* [2007] ICSID Case No. ARB/05/15 [176–201]; International Bank for Reconstruction and Development (n 89) para 29.

¹¹² International Bank for Reconstruction and Development (n 89) para 29.

nationality of another state, and the state party to the dispute consents to the participation of the investor in the proceedings.¹¹³

Conversely, the requirement for juridical persons is flexible. A juridical person, such as a commercial company, which possesses the nationality of the state party to the dispute would be allowed to be a party to the proceedings if that state had agreed to treat it as a national of another state by virtue of foreign control.¹¹⁴ On a more objective note, parastatals¹¹⁵ and other state entities,¹¹⁶ which can be classified as state nationals within Art. 25 of the ICSID convention, can have a legal standing before ICSID tribunals as claimants against states in which they had made an investment. The appropriate test to determine their eligibility, however, depends on the treaty text and tribunal deciding the dispute.¹¹⁷ While it is common for tribunals to apply the “Broches test”, which stipulates that an entity must (i) *not be acting as an agent for the government or (ii) discharging an essentially governmental function*,¹¹⁸ in some cases, tribunals tend to apply the rules of attribution provided in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). For instance, they may require the entity to pass the test of Arts. 5 and 8 of ARSIWA, which specify that an entity must (i) *not be discharging a governmental function, or (ii) under the effective control of a state*.¹¹⁹ In any event, both tests aim at investigating state-investor link in the context of determining an entity’s legal standing as a Claimant investor.¹²⁰ Should the entity fail any of the required tests, it would lose the

¹¹³ *ibid.*

¹¹⁴ *ibid* 30.

¹¹⁵ This refers to state-owned entities (SOEs)

¹¹⁶ This includes, for example, sovereign wealth funds (SWFs)

¹¹⁷ See Bianca Nalbandian, ‘State Capitalists as Claimants in International Investor-State Arbitration’ (2021) 81 *Questions of International Law* 5.

¹¹⁸ See Farouk El-Hosseny, ‘State-Owned Enterprises as Claimants before ICSID: Is the Broches Test on the Ebb?’ (2016) 3 *BCDR International Arbitration Review* <<https://kluwerlawonline.com/journalarticle/BCDR+International+Arbitration+Review/3.2/BCDR2016034>> accessed 12 October 2022; For relevant cases, see *Ceskoslovenska Obchodni Banka AS v The Slovak Republic (Decision on Jurisdiction)* [1999] ICSID Case No ARB/97/4 [15–31]; *Beijing Urban Construction v Republic of Yemen (Decision on Jurisdiction)* [2017] ICSID Case No ARB/14/30 [29–47].

¹¹⁹ See for instance *Masdar Solar & Wind Co-operatief UA v Kingdom of Spain (Award)* [2018] ICSID Case No ARB/14/1 [145–146, 170].

¹²⁰ See Nalbandian (n 117) 20.

‘national’ status and assume the character of a state,¹²¹ which bars it from having legal standing as a Claimant before ICSID tribunals.¹²²

Outside the sphere of ICSID ISDS, the negative nationality requirement does not always apply, whereas the positive one under IIAs remains in effect.¹²³ Whereas a similar approach to ICSID could be adopted by non-ICSID tribunals in the determination of the legal standing of parastatals and other state-entities as Claimants in ISDS proceedings,¹²⁴ there is an obscurity as to the appropriate test for the determination of their standing.¹²⁵

1.2.4. Independent, Impartial, and Neutral Third-party Arbitrator

One essential feature of international adjudication that finds embodiment in ISDS is dispute settlement by an independent, impartial, and neutral third-party adjudicator.¹²⁶ This requirement for an adjudicator is set out in the rules of all dispute settlement institutions,¹²⁷ and in some

¹²¹ This is subject to the rules of attribution under customary international law.

¹²² Nalbandian (n 117) 16; For relevant case law, see *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea (Award)* [2015] ICSID Case No ARB/13/33 79.

¹²³ See Schefer (n 20) 147.

¹²⁴ See for example *Beijing Shougang and others v Mongolia (Award)* [2017] PCA Case No 2010-20; *OAO Tatneft v Ukraine (Partial Award on Jurisdiction)* [2010] PCA Case No 2008-8.

¹²⁵ See, for example, *Tatarstan v Ukraine Ministry of Land and Property of the Republic of Tatarstan v Ukraine* [2016] PCA Case No. 2016-15. While the ‘Republic of Tartasan’ could not qualify as an investor, its fully-fledged organ ‘Ministry of Land and Property of the Republic of Tatarstan’ was allowed standing as investor by an UNCITRAL tribunal; See also Vladislav Djanic, ‘BIT Claim against Ukraine Is Allowed to Proceed, but One of the Claimants - the Republic of Tatarstan - Fails to Clear Jurisdictional Hurdle’ (*Investment Arbitration Reporter*, 18 February 2020) <<https://www.iareporter.com/articles/claim-against-ukraine-is-allowed-to-proceed-but-one-of-the-claimants-fails-to-clear-jurisdictional-hurdle/>> accessed 2 November 2022; While enquiry into Russian law would indicate that the Ministry might engage in civil law relations as a government institution, it is rather obscure why the real asset owner- the Republic of Tartasan could not have standing, whereas the Ministry, which only held a limited operational management title on the asset, could. Question then arises as to whether there could be any such distinction if their roles were reversed and a dispute was instituted against them as Respondents. See Szilárd Gáspár-Szilágyi and Maxim Usynin, ‘Procedural Developments in Investment Arbitration’ (2020) 19 *The Law & Practice of International Courts and Tribunals* 269; Nalbandian (n 116) 24.

¹²⁶ See Diego M Papayannis, ‘Independence, Impartiality and Neutrality in Legal Adjudication’ [2016] *Revis. Journal for Constitutional Theory and Philosophy of Law / Revija za ustavno teorijo in filozofijo prava* 33; Stephen Gent, ‘The Politics of International Arbitration and Adjudication’ (2013) 2 *Penn State Journal of Law & International Affairs* 66, 67; Franz Cede, ‘The Settlement of International Disputes by Legal Means – Arbitration and Judicial Settlement’, *The SAGE Handbook of Conflict Resolution* (SAGE Publications Ltd 2009) 358–359.

¹²⁷ See for example Statute of the International Court of Justice art 2; Internationaler Gerichtshof (ed), *The International Court of Justice Handbook* (6th edition, International Court of Justice 2016) 23; ICSID Convention art 14; Permanent Court of Arbitration Rules art 6; José Zeitune, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors Practitioners Guide No. 1* (2nd edn, International Commission of Jurists 2007) 4–5, 17 and 27 <<https://www.refworld.org/pdfid/4a7837af2.pdf>>; Edward Gordon and others, ‘The Independence and Impartiality of International Judges’ (1989) 83 *Proceedings of the Annual Meeting*

instances, in the general rules applicable to a dispute settlement forum.¹²⁸ The requirement of independence is directed towards an adjudicator's "attitude towards external pressure and influence."¹²⁹ It necessitates the resistance of all external pressures and influences by an adjudicator. Impartiality is the required attitude of an adjudicator "towards the parties and subject matter of the dispute."¹³⁰ It is essential for an adjudicator to be free from bias and deliver his verdict without any prejudicial views against any of the parties and interest in the outcome of dispute. Neutrality is the required "attitude towards law."¹³¹ A neutral adjudicator makes an objective assessment of a dispute and delivers his judgment from a legal standpoint. Where it is impossible for an adjudicator to meet such requirements or the adjudicator may be affected by any conflict of interest in a particular dispute, he is expected to recuse himself from deciding the dispute.¹³²

1.2.5. Party Autonomy and Influence on Proceedings

International arbitration is premised on the principle of party autonomy.¹³³ In ISDS, party autonomy finds manifestation in the appointment of arbitrators and the choice of law.¹³⁴

(American Society of International Law) 508; Theodor Meron, 'Judicial Independence and Impartiality in International Criminal Tribunals' (2005) 99 *The American Journal of International Law* 359.

¹²⁸ See for example International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (2014); Abraham (n 90).

¹²⁹ Papayannis (n 126) para 44.

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² See International Bar Association (n 128) pt I (2), Explanation to General Standard 2(a); See also criteria for the dismissal of an ICJ judge *Internationaler Gerichtshof* (n 127) 22–23; Abraham (n 90).

¹³³ See Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration' in Catherine Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 191–192.

¹³⁴ *ibid* 192; See also Sundaresh Menon, 'Adjudicator, Advocate, or Something in Between? Coming to Terms with the Role of the Party-Appointed Arbitrator' (2017) 34 *Journal of International Arbitration* 360; VV Veeder, 'The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator—From Miami to Geneva' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 127–149.

Parties to an arbitral proceeding have the right to choose their own arbitrators and decide on the composition of the tribunal. For instance, UNCITRAL Rules allow parties to issue a “notice of arbitration” with a proposal for the number of arbitrators.¹³⁵ Based on the parties’ agreement, the arbitral proceeding could consist of a sole or three-member tribunal.¹³⁶ In case the parties disagree over the number of arbitrators, the default number of arbitrators that could be appointed by the appointing authority is three.¹³⁷ ICSID also has similar provisions concerning the composition of the tribunal. The tribunal may consist of a sole or “any” uneven number of arbitrators depending on the agreement between the parties.¹³⁸ Where the parties do not have an agreement on the composition, the number of arbitrators shall be three: one member selected by each party, and the third will be selected on the basis of an agreement between the parties.¹³⁹ The function of the appointed arbitrators is limited to the duration of the case.

Given the complex and multi-faceted nature of arbitral disputes, which frequently require technical expertise in the subject-matter,¹⁴⁰ the composition of the tribunal may not only be limited to arbitrators with legal knowledge.¹⁴¹ Such allows the disputing parties to appoint arbitrators that fit a certain profile, such as of language and competence in the subject-matter of dispute. However, it does not mean that the significance of arbitrators with legal knowledge shall be disregarded in the appointment process.¹⁴² Where appropriate, the tribunals may,

¹³⁵ United Nations Commission on International Trade Law, ‘UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013)’ art 3.3(g).

¹³⁶ See *ibid* 3, 4, 7.

¹³⁷ *ibid* 7.

¹³⁸ ICSID Convention art 37.

¹³⁹ *ibid*.

¹⁴⁰ Arbitration is used in the resolution of disputes in diverse areas which include natural sciences, economics, engineering, surveying, construction, and technology amongst others. See Michael E Schneider, ‘Technical Experts in International Arbitration, Introductory Comments to the Materials from Arbitration Practice’ <https://www.lalive.law/wp-content/uploads/2019/10/mes_technical_experts.pdf> accessed 4 September 2022; Bernard Hanotiau, ‘International Arbitration in a Global Economy: The Challenges of the Future’ (2011) 28 *Journal of International Arbitration* 90; Schreuer (n 24) s 9; Gary L Benton and Steven K Andersen, ‘Technology Arbitration Revisited’ 74 *Dispute Resolution Journal* 25.

¹⁴¹ See for instance ICSID Convention art 14, A panel shall be composed of ‘persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment’; Abraham (n 90).

¹⁴² See ICSID Arbitration Rules art 14.

instead, be assisted by experts appointed by the parties, or experts appointed by the tribunals themselves.¹⁴³

Further, the determination of the rules of procedure is within the power of the parties.¹⁴⁴ Disputing parties determine the procedure to be adopted and rules to be applied in their proceedings.¹⁴⁵ Arbitral institutions may propose rules to the parties. The PCA, for instance, has a variety of rules for dispute settlement involving different categories of parties,¹⁴⁶ all of which are consolidated in the 2012 Arbitration Rules, largely based on the UNCITRAL Arbitration Rules of procedure.¹⁴⁷ Parties may mutually agree to change or deviate from the procedural rules.¹⁴⁸ The Rules as well allow a tribunal to consider proceedings as it sees fit provided the parties are treated equally and each one of them is given full opportunity to present its case.¹⁴⁹ Similarly, ICSID has its set of procedural rules that apply to disputes involving an investor and a state party to the convention.¹⁵⁰ Generally, where a gap exists in the relevant rules in arbitration, the tribunal may apply the rules of the seat of arbitration, otherwise known as the “*lex loci arbitri*.”, in purely commercial arbitration and certain other cases. In state-state arbitration, the tribunal is empowered by the arbitration agreement or the ad hoc rules adopted by the parties to fill such gaps without making reference to national laws.¹⁵¹ In ISDS, there could be reliance on both national, and international law - typically BITs or MITs, depending on the dispute at hand.¹⁵² The laws that apply to a dispute may be substantive, procedural or

¹⁴³ See Permanent Court of Arbitration Rules arts 27–29; ICSID Arbitration Rules arts 32, 34–36; ICSID Additional Facility Arbitration Rules 2022 arts 41–43; UNCITRAL Arbitration Rules 1976 arts 27–29; See also Nigel Blackaby and Alex Wilbraham, ‘Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration’ (2016) 31 ICSID Review - Foreign Investment Law Journal 655.

¹⁴⁴ See Internationaler Gerichtshof (n 127) 49; Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (7 Rev., Routledge 1997) 293–298.

¹⁴⁵ Malanczuk (n 144) 293; Abraham (n 90).

¹⁴⁶ ‘PCA Arbitration Rules | PCA-CPA’ <<https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/>> accessed 4 September 2022.

¹⁴⁷ Permanent Court of Arbitration Rules.

¹⁴⁸ United Nations Conference on Trade And Development, ‘Dispute Settlement General Topics 1.3 Permanent Court of Arbitration’ s 4.1.

¹⁴⁹ Permanent Court of Arbitration Rules art 17.

¹⁵⁰ See ICSID Convention.

¹⁵¹ United Nations Conference on Trade And Development (n 148) s 4.1; Abraham (n 90).

¹⁵² See Lim, Ho and Paporinskis (n 21) 153–154; Schreuer (n 24) s 9.

both. The arbitral process is governed by the procedural rules “*lex arbitri*”; the merits are governed by substantive laws “*lex causae*,” which may be national and international law;¹⁵³ and the law of the seat of arbitration “*lex loci arbitri*,” specifically the non-derogable mandatory rules of an arbitral forum may govern both the substantive and procedural aspects of a dispute.¹⁵⁴

As a corollary of party autonomy, disputing parties have significant influence over arbitral proceedings. Not only do they have the power to appoint arbitrators, determine the composition of a tribunal and decide on the applicable rules, they also define the limits to the power of the tribunal through drawing up its terms of reference (*compromis*) amongst others.¹⁵⁵ The parties are only, notably, excluded from the decision-making, which is exclusively within the competence of the tribunal, unless the parties agree to some other form of dispute settlement out of arbitration.

1.2.6. Confidentiality

Arbitral proceedings and decisions are usually confidential in nature.¹⁵⁶ The ICSID, for instance, may only make a hearing public under limited circumstances, such as those established by certain treaties or a tribunal initiative to which the disputing parties have consented;¹⁵⁷ however, the publication of an ICSID award is fully dependent on the consent of disputing parties to such publication.¹⁵⁸ The PCA extends the possibility of disclosing an award to when it is necessary for a party, as a legal duty, to protect or pursue a legal right or engage in legal proceedings before a court or other competent authority.¹⁵⁹

As a key feature of international adjudication, deliberations by arbitral tribunals are held in private.¹⁶⁰ Some legal instruments, such as the North American Free Trade Agreement

¹⁵³ See Jean Ho, ‘Unraveling the Lex Causae in Investment Claims’ (2014) 15 *The Journal of World Investment & Trade* 757.

¹⁵⁴ Lim, Ho and Papparinskis (n 21) 153–172; Abraham (n 90).

¹⁵⁵ Malanczuk (n 144) 293.

¹⁵⁶ *Internationaler Gerichtshof* (n 127) 54, 71 and 73.

¹⁵⁷ Schreuer (n 24) s 14.2; ICSID Arbitration Rules r 32(2).

¹⁵⁸ Schreuer (n 24) s 14.2; ICSID Convention art 48.5.

¹⁵⁹ Permanent Court of Arbitration Rules art 34.

¹⁶⁰ *Internationaler Gerichtshof* (n 127) 71.

(NAFTA), go further to make the tribunal meetings a secret, their members generally unknown, and the full disclosure of their decisions unnecessary.¹⁶¹ Similar situation could be seen under the ICC, and even more compelling - the ICC initially did not publish its awards at all.¹⁶²

1.2.7. Binding Nature of Arbitral Decisions, Enforcement and Challenge of Awards

ISDS as a form of adjudication is characterized by the binding nature of the decisions adopted by adjudicators.¹⁶³ In adjudication, disputing parties make an undertaking to be bound by the decisions of an adjudicator, which may or may not be subject to appeal or corrections depending on the institution deciding the dispute.¹⁶⁴

The current regime of ISDS does not provide the possibility for an appeal; hence, the decisions of arbitral tribunals are final and must be complied with.¹⁶⁵ ICSID, for instance, obliges each contracting party to recognize the decisions rendered by arbitral tribunals as binding and enforce the pecuniary obligations imposed by the award within its territories as if it were a final judgement of its domestic courts.¹⁶⁶ Non-compliance with the decisions would, thus, constitute a breach of the convention.¹⁶⁷ In the case of non-ICSID awards, including the ICSID Additional

¹⁶¹ This relates to ISDS under the NAFTA ch Eleven; See ‘Confidentiality of NAFTA Chapter 11 Proceedings’ (2001) 95 *The American Journal of International Law* 885; Anthony Depalma, ‘Nafta’s Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say’ *The New York Times* (11 March 2001) <<https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html>> accessed 17 September 2022; The NAFTA chapter Eleven, however, had been criticized, and the Agreement itself was modified into the USMCA, getting rid of the controversial chapter, see Kaiser E Gordon, ‘NAFTA and USMCA Energy Arbitrations’ (*Global Arbitration Review*, 5 August 2022) <<https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/fifth-edition/article/nafta-and-usmca-energy-arbitrations>> accessed 17 September 2022.

¹⁶² This started from January 2019 under certain conditions. See ‘ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration’ s IV <<https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf>>.

¹⁶³ For the binding nature of adjudicatory decisions, see Statute of the International Court of Justice art 59; Permanent Court of Arbitration Rules art 34(2); ICSID Convention art 53; Convention on the Law of the Sea 1982 art 33; DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) arts 16.4 and 17.14; Malanczuk (n 144) 281.

¹⁶⁴ The ICJ, ICSID, and ITLOS are three examples of institutions that render final and binding decisions, whereas the PCA and WTO Dispute Settlement Body allow for corrections and appeal respectively, see *ibid*.

¹⁶⁵ See ICSID Convention art 53(1).

¹⁶⁶ *ibid* 54(1).

¹⁶⁷ This is however subject to the doctrine of sovereign immunity recognized under *ibid* 55.

Facility, enforcement is governed by the national laws of the place of enforcement and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁶⁸

Nevertheless, arbitral decisions may be reviewed, the nature of which depends on the institution deciding the dispute. ICSID awards may only be reviewed under limited circumstances. The review is conducted by an ad hoc committee, which may only annul an award but not correct or replace it. The annulment process, which only involves the assessment of the legitimacy of the process of the decision but not its substantive correctness, may be conducted upon the request of a party on the basis of 5 narrowly defined grounds defined in Art. 52 of the ICSID Convention: improper constitution of the arbitral tribunal; manifest excess of power by the tribunal; corruption of a member of the tribunal; serious departure from the fundamental rules of procedure by the tribunal; and the tribunal's failure to provide the reasoning for its award.¹⁶⁹ Should the plea for annulment be successful, the only available remedy is for the dispute to be resubmitted to a new tribunal for consideration if the parties want to continue the dispute settlement by arbitration.¹⁷⁰ In the case of non-ICSID arbitration, as well as under the Additional Facility, the challenge of an award is conducted through the national courts of the seat of arbitration or by the courts responsible for enforcement. This process is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 in a vast number of countries.¹⁷¹

1.2.8. Cost Allocation

¹⁶⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York) 1958; See also Schreuer (n 24) s 13.

¹⁶⁹ See ICSID Convention art 52; Schreuer (n 24) s 12; Abraham (n 90).

¹⁷⁰ See Schreuer (n 24) s 12.

¹⁷¹ *ibid*; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York); Abraham (n 90).

In the determination of cost in arbitration, various practices are in place: the loser pays the cost of the proceedings; each party pays its own cost; or parties share the cost.¹⁷² The PCA 2012 Rules, based on the UNCITRAL Rules, stipulates that the losing party will pay the cost. However, where the court deems it fit, it may split the costs between the parties or determine a portion that one party has to pay the other.¹⁷³ ICSID gives the tribunals the discretion to determine which party bears the costs unless the parties have a prior agreement.¹⁷⁴

1.2.9. Reparations for Injury

The purpose of adjudication is to make a peaceful resolution of disputes and provide reparation for the injury suffered by a party. Under customary international law, ARSIWA requires a state party responsible for a wrongful act to make “full” reparation for injury caused to the opposing party in the absence of treaty provisions establishing the specific consequences that may arise in the event of a breach of obligation.¹⁷⁵ Three forms of reparation are identified by ARSIWA:¹⁷⁶ restitution (re-establishment of the situation which existed before the wrongful act was committed if possible);¹⁷⁷ compensation (monetary equivalent of injury caused);¹⁷⁸ satisfaction (acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality).¹⁷⁹ All three forms are prevalent in judicial dispute settlement by permanent international courts.¹⁸⁰

¹⁷² See ‘Decisions on Costs in International Arbitration - ICC Arbitration and ADR Commission Report’ (*ICC - International Chamber of Commerce*) <<https://iccwbo.org/publication/decisions-on-costs-in-international-arbitration-icc-arbitration-and-adr-commission-report/>> accessed 5 September 2022; Schreuer (n 24) s 11.

¹⁷³ See Permanent Court of Arbitration Rules art 42; See also United Nations Commission on International Trade Law (n 135) art 42.

¹⁷⁴ ICSID Convention art 59.

¹⁷⁵ See Articles on Responsibility of States for Internationally Wrongful Acts 2001 art 31; See also Dinah Shelton, ‘Remedies and Reparation’ in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press 2012).

¹⁷⁶ ARSIWA art 34; See also United Nations General Assembly, ‘United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation’.

¹⁷⁷ ARSIWA art 35.

¹⁷⁸ *ibid* 36.

¹⁷⁹ *ibid* 37; Abraham (n 90).

¹⁸⁰ See cases under art 31, and 34-37 of the ARSIWA; See also Shelton (n 175); Carla Ferstman, ‘Reparations’ <<https://oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0003.xml>> accessed 16 September 2022.

As noted earlier, the customary nature of the “full” reparation standard had been strongly disputed in the settlement of investment disputes in the second half of the 20th century;¹⁸¹ however, most BITs ended up providing a similar or even higher standard under the current ISDS regime.¹⁸² In this regard, all three forms of reparation are equally replicated in ISDS; however, their application varies in degree. As a reflection of the nature of its claims, virtually all reparations in ISDS are in monetary form (compensation).¹⁸³ Arbitral tribunals rarely order restitution in kind or specific performance;¹⁸⁴ similarly, satisfaction is only ordered to a lesser degree.¹⁸⁵

Since reparation aims at remedying the damage “actually” suffered by a party, punitive or moral damages are generally excluded from the arbitral award.¹⁸⁶ Similarly, lost profits will typically not be awarded unless they are based on concrete evidence, such as the record of profitability, and not mere speculations.¹⁸⁷

¹⁸¹ See 1.1.2 (Historical Development of ISDS)

¹⁸² See 1.1.3 (Modern Practice of ISDS)

¹⁸³ See Schreuer (n 24) s 10.

¹⁸⁴ See *Texaco v Libya (Award on the Merits)* (1977) 53 ILR 389, 497–511; *Goetz v Burundi (Award)* (1998, 1999) [132–133]; *Semos v Mali (Award)* (2003); *Enron v Argentina (Decision on Jurisdiction)* ((2004) [76–79]; *ADC v Hungary (Award)* (2006) [523]; *Micula v Romania (Decision on Jurisdiction and Admissibility)* (2008) [158–168]; *ATA v Jordan (Award)* (2010) [129–132].

¹⁸⁵ See Schreuer (n 23) s 10; *Biwater Gauff v Tanzania (Award)* (2008) [465–467, 807]; *Europe Cement v Turkey (Award)* (2009) [146–148, 176, 181]; *Quiborax v Bolivia (Decision on Jurisdiction)* (2012) [37, 299–308].

¹⁸⁶ See *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt (Award)* (2009) [544–548]; *Europe Cement v. Turkey (Award)* (n 183) paras 177–181; *Lemire v Ukraine (Decision on Jurisdiction and Liability)* (2010) [426–486]; For an instance of a tribunal upholding a claim on moral damages, see *Desert Line v Yemen (Award)* (2008) [284–291].

¹⁸⁷ See Schreuer (n 24) s 10.

CHAPTER 2: SALIENT PROBLEMS WITH INVESTOR-STATE DISPUTE SETTLEMENT

2.1. Method of Arbitrator Appointment: Party-appointment of Arbitrators

In international adjudication, the procedure for the appointment of adjudicators not only has a direct impact on the quality and acceptance of a dispute settlement forum, as well as its proper functioning, but also has an impact on its effectiveness and potentially even the enforcement of its decisions.¹⁸⁸ For a dispute settlement forum to be accepted, its adjudicators must be independent, impartial, and neutral in relation to any dispute.¹⁸⁹

ISDS is characterized by party-appointment of arbitrators. This has drawn increased criticism against the dispute settlement mechanism. Such criticism arises from the perception that even though an impartial outcome is expected in any given case, the system of appointment of the members of the tribunal is inherently based on the search for partiality, where parties select arbitrators that are either considered to be pro-state or pro-arbitrator.¹⁹⁰ Indeed, arbitrators face the ethical burden of detaching themselves from the interest of the parties to the dispute who appoint them. This creates an unnecessary barrier to pure objectivity and an undesirable conflict of interest which pervades the proceedings.¹⁹¹

Concerns pertaining to party-appointment of arbitrators, however, are rather contentious. While one may argue that bias manifests in the outcomes of the proceedings as 94% of arbitrators issue dissenting opinions against arbitral decisions that go against the parties that appointed them, and very often rule in favour of their appointees,¹⁹² the large majority of arbitral awards

¹⁸⁸ Bungenberg and Reinisch (n 10) para 15.

¹⁸⁹ *ibid* 155.

¹⁹⁰ See the opinion of Ecuador in Anthea Roberts, 'UNCITRAL and ISDS Reforms: Concerns about Arbitral Appointments, Incentives and Legitimacy' (*EJIL: Talk!*, 6 June 2018) <<https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-arbitral-appointments-incentives-and-legitimacy/>> accessed 17 July 2022.

¹⁹¹ *Supervision y Control SA v Republic of Costa Rica, Dissenting Opinion by Joseph P Klock* [2017] ICSID Case No. ARB/12/4 13–15.

¹⁹² Sergio Puig, 'Blinding International Justice' (14 November 2016) 41–42 <<https://papers.ssrn.com/abstract=2829098>> accessed 17 July 2022.

are unanimous.¹⁹³ This implies that at least one arbitrator usually rules against its appointing party. Moreover, research has shown that out of a sample of 528 ISDS cases concluded as of September 2017, dissenting opinions were issued against only 102 of them (19.31% of the total).¹⁹⁴ This indicates that dissenting opinions are rather rare in ISDS, and as such, not a definitive reflection of the whole system.

Nonetheless, the lopsided nature of dissenting opinions cannot be disregarded, especially in international adjudication aimed at the search and administration of justice. One possible explanation for such outcomes is based on the allegation that arbitrators currently rely heavily on good relationships with the parties to ensure their appointments and re-elections by parties in various disputes.¹⁹⁵ This leads to some form of dependency and greater incentive by arbitrators to rule in favour of their appointees.¹⁹⁶ Moreover, given the relatively small global arbitrator pool,¹⁹⁷ appointment and reappointments of arbitrators are inherently significant for arbitrators to remain in practice. This entails why arbitrators may not have the incentive to rule against parties that appointed them. While the re-appointment of arbitrators by certain parties may motivate them to rule in favour of their appointees and help them remain in practice, such creates a problem from the standpoint of justice and negates the requirement of neutrality of the outcomes of arbitral decisions.

2.2. Diversity Deficit: Issues of Legitimacy

ISDS has drawn criticism due to the lack of diversity. The pool of arbitrators is virtually homogenous in terms of regional origin, education, professional experience, and gender.¹⁹⁸

¹⁹³ See Rodrigo Polanco Lazo and Valentino Desilvestro, 'Does an Arbitrator's Background Influence the Outcome of an Investor-State Arbitration?' (2018) 17 *The Law & Practice of International Courts and Tribunals* 18, 27.

¹⁹⁴ *ibid.*

¹⁹⁵ See the views of Australia and Canada in Roberts, 'UNCITRAL and ISDS Reforms' (n 190); see also Puig (n 192).

¹⁹⁶ Another explanation could simply be that in all those cases with dissenting opinions, the reasoning adopted by the tribunal is not sound and convincing. The extremely high level of lopsidedness, however, would raise significant questions with this approach.

¹⁹⁷ Roberts, 'UNCITRAL and ISDS Reforms' (n 190).

¹⁹⁸ See the views of Poland, Indonesia, Mauritius and Colombia in *ibid.*

Such a lack of diversity may affect the correctness of awards and undermines the legitimacy of the ISDS system.

ISDS is incontrovertibly not geographically diverse. It is mainly characterized by arbitrators from Western countries. As of August 2018, only 35% of the 695 individual arbitrators who were appointed in at least one ISDS case were from non-Western countries.¹⁹⁹ Out of the non-Western arbitrators, half are from Latin America and the Caribbean. Only a negligible 2% of arbitrators are from Sub-Saharan Africa.²⁰⁰ These non-Western arbitrators are mainly appointed by respondent States or arbitral institutions.²⁰¹ While it may be argued that most international arbitrators have elite educational backgrounds,²⁰² and as such arbitrator appointment might be a reflection of competence, a dispute settlement system with such a lopsided representation of adjudicators would receive a negative perception of bias and diminish its acceptance around the globe, even if the perceived bias is not backed by empirical evidence.²⁰³

Similarly, ISDS is characterized by the lack of sufficient female representation in arbitrator appointments. Studies carried out in early 2000s indicated that the number of female arbitrators in ICSID cases was between 3% and 7%.²⁰⁴ Recently, another study encompassing arbitrators appointed in both ICSID and non-ICSID cases established that only 11% of arbitrators were female;²⁰⁵ Out of which, only two women account for 57% of all female appointments.²⁰⁶ An

¹⁹⁹ Malcolm Langford, Daniel Behn and Maxim Usynin, 'The West and the Rest: Geographic Diversity and the Role of Arbitrator Nationality in Investment Arbitration' in Daniel Behn, Malcolm Langford and Ole Kristian Fauchald (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press 2022).

²⁰⁰ Won L Kidane, *The Culture of International Arbitration* (Oxford University Press 2017) 134–135.

²⁰¹ Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?' (2020) 21 *The Journal of World Investment & Trade* 188, 134–135.

²⁰² See Michael Waibel and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' (2017) 15 <<http://www.yanhuiwu.com/documents/arbitrator.pdf>> accessed 3 October 2022. More than 90% of presiding arbitrators were educated in Organisation for Economic Cooperation and Development (OECD) countries.

²⁰³ Colombia, amongst several other countries, for instance, contends that such is not normal, and that both actual and perceived bias affect the legitimacy of ISDS. See Roberts, 'UNCITRAL and ISDS Reforms' (n 190).

²⁰⁴ See Andrea K Bjorklund and others, 'The Diversity Deficit in International Investment Arbitration' (2020) 21 *The Journal of World Investment & Trade* 410, 416, and fn 17.

²⁰⁵ Taylor St John and others, 'Glass Ceilings and Arbitral Dealings: Explaining the Gender Gap in International Investment Arbitration' (23 March 2017) <<https://papers.ssrn.com/abstract=3782593>> accessed 3 October 2022.

²⁰⁶ Behn, Langford and Létourneau-Tremblay (n 201).

assessment of the most active female arbitrators establishes that the top 25 women arbitrators have all arbitrated more than one case, and they account for 86% of all female appointments.²⁰⁷ This data illustrates the minimal role that women play in arbitration in comparison to men. While the appointment of arbitrators, whether male or female, is carried out by the disputing parties, the societal drive for gender inclusiveness calls for a remedy to arbitrator appointment in ISDS, affording equal opportunities without discrimination and increasing the arbitrator pool without compromising the competence of arbitrators and quality of decisions.²⁰⁸

2.3. Democratic Concerns: Restrictions on Governments' Public Policy Space

Democratic concerns over the restrictions ISDS imposes on governments' policy space has brought the dispute settlement system under increased criticism.²⁰⁹

International investment agreements grant protection to foreign investors against adverse measures adopted by host states. To determine the violation of a treaty by a host state, unelected arbitral tribunals decide on a broad-spectrum of governmental measures which arose from different processes of decision-making. Often times, foreign investors use investment treaties to dispute legislation adopted by democratically elected parliaments, regulations enforced by specialized agencies following a lobbying procedure, and the discretionary use of executive power to suppress popular protest or social unrest.²¹⁰ The impact of such disputes, however, is felt not only by the host state and investor, but also by a wide range of third parties—citizens, domestic industries and civil society groups.²¹¹ This has led to debates primarily focused on the legitimacy of the authority of arbitral tribunals and the extent to which investment treaties limit

²⁰⁷ *ibid.*

²⁰⁸ See Jamal Seifi, 'Legitimacy of Investor-State Arbitration: Addressing Development Bias Among International Arbitrators' in Jamal Seifi, *Identity and Diversity on the International Bench* (Oxford University Press 2020) 164–166 <<https://academic.oup.com/book/32069/chapter/267882253>> accessed 8 October 2022.

²⁰⁹ Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 4–7.

²¹⁰ Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press 2013); Lorenzo Cotula and Mika Schröder, 'Community Perspectives in Investor-State Arbitration' (International Institute for Environment and Development (IIED) 2017); Jonathan Bonnitcha and Zoe Williams, 'Politically Motivated Conduct in Investment Treaty Arbitration – Investment Treaty News' (*International Institute for Sustainable Development*, 23 April 2019) <<https://www.iisd.org/itn/en/2019/04/23/politically-motivated-conduct-in-investment-treaty-arbitration-jonathan-bonnitcha-zoe-williams/>> accessed 15 September 2022.

²¹¹ Bonnitcha and Williams (n 210).

governments' ability to realize specific policy goals, such as in the sphere of public health,²¹² environmental protection²¹³ and financial stability.²¹⁴

While BITs do not grant arbitral tribunals the power to revoke national laws or regulations,²¹⁵ occasionally, states have done so on their own volition in order to put investor-state disputes to an end.²¹⁶ Similarly, states have in like circumstances refrained from adopting certain measures in order to avert ISDS. These have, thus, aroused concern about the regulatory chill that ISDS could have on decision and policymakers.²¹⁷ A prominent example cited by the proponents of the regulatory chill argument is the case concerning proposals by Canadian provinces to provide public automobile insurance after private insurance rates significantly increased between 2003 and 2005.²¹⁸ While a Select Committee on Public Automobile Insurance carried out a legal analysis of the proposed measure before a public debate and determined that it was both NAFTA and General Agreement on Trade in Services (GATS)

²¹² Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Routledge 2013) <<https://cadmus.eui.eu/handle/1814/23315>> accessed 15 September 2022; Tania Voon and Andrew Mitchell, 'Implications of International Investment Law for Plain Tobacco Packaging: Lessons from the Hong Kong-Australia BIT', *Public health and plain packaging of cigarettes: Legal issues* (2012).

²¹³ Kyla Susanne Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University 2009).

²¹⁴ Christian J Tams, Stephan W Schill and Rainer Hofmann (eds), *International Investment Law and the Global Financial Architecture* (Edward Elgar 2017) <<https://www.e-elgar.com/shop/international-investment-law-and-the-global-financial-architecture>> accessed 15 September 2022.

²¹⁵ Treaties are typically explicit about available remedies to investors. Most BITs usually circumscribe remedies to compensation. For instance the 2012 U.S. Model Bilateral Investment Treaty art 34 limits remedies to monetary damages and property restitution.

²¹⁶ The *Ethyl Corporation v The Government of Canada* (Initiated in 1997) (NAFTA / UNCITRAL) is a notable example that ended with a negotiated settlement and the revocation of a ban on gasoline additive MMT by Canada.

²¹⁷ The postulation that ISDS causes a regulatory chill on decision-makers is contentious. While proponents claim that ISDS inhibits states from adopting laws and policies that are necessary for their population and society, opponents contend that such a view is merely theoretical with no concrete evidence. They further assert that arbitral tribunals are highly sensitive towards public order concerns, particularly pertaining to environmental issues. Whatever view is taken, it cannot be neglected that several states have terminated BITs and even MITs such as the NAFTA, getting rid of the ISDS clauses. This indicates that the perception that ISDS encroaches on governments' policy space may be deeply imbued in the minds of policymakers to act in such a manner. For the two opposing views, see Christian Tietje, Trent Buatte and Freya Baetens, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership' (2014) 42–48, 79–80 <https://www.eumonitor.eu/9353000/1/j4nvgs5kjg27kof_j9vvik7m1c3gyxp/vjn8exgvufya/f=blg378683.pdf>; Schreuer (n 24) s 14.3; Miller and Hicks (n 20) 13.

²¹⁸ Shrybman Steven and Sinclair Scott, 'Public Auto Insurance and Trade Treaties' (2004) 5 Canadian Centre for Policy Alternatives <https://www.citizen.org/sites/default/files/newbrunswick_auto.pdf>.

consistent,²¹⁹ both Canadian and foreign insurance companies made lobbies against it, claiming that they would have to institute international investment and trade proceedings against the government. Specifically, insurance companies claimed that the proposed measure would contravene NAFTA Article 1114 (financial services) and GATS market access guarantees. Eventually, on June 30, 2004, Premier Bernard Lord announced that the government would abnegate the measure. Another example is when Indonesia had to create an exemption for certain foreign companies when considering a ban on open-pit mining in protected forests in 2002. This came after a group of foreign-owned mining companies allegedly threatened to initiate arbitral proceedings against the Government under BITs if the measure were to be adopted.²²⁰

While the actual impacts of such reported threats by investors may be disputed, in both cases, commenters draw a causal link between the threat and decisions adopted by the governments owing to the timing of the decisions and statements to the media.²²¹

Notwithstanding the above cases, which might be indicative of regulatory chill, case-specific examples, as such, should not be construed as being reflective of the entire ISDS system. In fact, various studies over the subject-matter tend to have contrasting or varied results.²²² One study, focusing on the extent to which regulators internalize the potential costs of ISDS, establishes that “there is no consistent observable evidence to suggest the possibility of

²¹⁹ Legislative Assembly of New Brunswick, Select Committee on Public Automobile Insurance, ‘Final Report on Public Automobile Insurance in New Brunswick’ (2004) <http://www.consumer.ca/uploads/general/2004_04_final_report_public_auto_insurance_NewBrunswick.pdf>.

²²⁰ Stuart Gross, ‘Inordinate Chill: Bits, Non-NAFTA MITs, and Host-State Regulatory Freedom- An Indonesian Case Study’ (2003) 24 Michigan Journal of International Law 893; In a similar example, Ghana backtracked on its plans to adopt mining regulations after threats of ISDS. Certain companies were allowed to conduct mining in protected forests, notwithstanding a 1996 moratorium on such mining activities. See Kyla Tienhaara, ‘Mineral Investment and the Regulation of the Environment in Developing Countries: Lessons from Ghana’ (2006) 6 International Environmental Agreements: Politics, Law and Economics 371, 388–389.

²²¹ Steven and Scott (n 218); Kyla Tienhaara, ‘Regulatory Chill and the Threat of Arbitration: A View from Political Science’ in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 621.

²²² See Tarald Laudal Berge and Axel Berger, ‘Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Capacity’ (20 January 2020) <<https://papers.ssrn.com/abstract=3522366>> accessed 3 November 2022.

regulatory chill”.²²³ Another study into the regulatory processes in the province of Ontario, Canada, concludes that regulators changed their regulations, especially in environmental measures, owing to ISDS concerns.²²⁴ Finally, a series of case studies from Nigeria, Turkey, and Uzbekistan establish that regulators hardly take into account the risks of IIAs when drafting new regulations.²²⁵ This, thus, presents a rather ambiguous result of the impact of ISDS on regulators.

In any event, even if the regulatory chill argument were to be accepted, the number of cases that support this argument is significantly low. 2014 research established that foreign investors rarely challenged legislative acts.²²⁶ A large majority of the “regulatory” ISDS claims are, in fact, administrative in nature, concerning pre-existing contractual obligations, permits, licenses, or governmental pledges to investors.²²⁷ They challenge the decisions of the executive branch rather than the legislative. Analyzing all concluded ICSID cases at that time, the research posited that 47% of cases were linked with ministries or agencies whereas only 9% (14 total cases) arose from legislative acts.²²⁸ Given the very few number of cases involving the activities of the legislative branch, claims that ISDS may impinge on the legitimate powers of domestic governments, thus, appear to be overblown.²²⁹

In this regard, a conclusive determination that the entire ISDS system causes regulatory chill on policymakers cannot be made.

2.4. Inconsistencies in Decisions

²²³ See Christine Côté, ‘A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment’ (phd, London School of Economics and Political Science 2014) 187 <<http://etheses.lse.ac.uk/897/>> accessed 3 November 2022.

²²⁴ Gus Van Harten and Dayna Scott, ‘Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada’ [2016] Osgoode Legal Studies Research Paper Series <<https://digitalcommons.osgoode.yorku.ca/olsrps/151>>.

²²⁵ Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart Publishing 2018).

²²⁶ See Jeremy Caddel and Nathan M Jensen, ‘Which Host Country Government Actors Are Most Involved in Disputes with Foreign Investors?’ <<https://doi.org/10.7916/D8M32SWK>> accessed 3 November 2022.

²²⁷ Tietje, Buatte and Baetens (n 217) 46–48.

²²⁸ Caddel and Jensen (n 226).

²²⁹ See *ibid.*

By its very nature, international arbitration creates its own problems. The one-off character of arbitral decisions coupled with the lack of an appellate mechanism to ensure substantive correctness makes the dispute settlement system susceptible to inconsistencies in decision-making. This causes problems with legal certainty, the rule of law, and the democratic principle of equality,²³⁰ thus, undermining the fundamental objective of the investment treaty regime.

ISDS tribunals have been criticized for interpretive divergencies in the determination of like issues –treating “like” questions in an “unlike” manner.²³¹ Identical and similar treaty terms are sometimes interpreted in completely different ways by tribunals, leading to jurisprudential inconsistency that can be a key factor in the determination of certain cases. Indeed, the most striking instances of inconsistency are cases “where the same investment treaty standard or same rule of customary international law was interpreted differently” by arbitral tribunals.²³² Other cases of problematic inconsistencies arise in situations where too much of formal distinctions in the text of BITs are drawn by arbitral tribunals.

Jurisprudential inconsistency is best illustrated by two cases concerning the determination of the claims of expropriation in two separate proceedings against Czech Republic. Although the two proceedings ensued from the same measure, the arbitral tribunals reached opposite conclusions. The first tribunal in *Lauder v. Czech Republic* found that for a claim of expropriation to succeed, three requisite elements must be met: (i) state measure (ii) taken for state benefit (iii) that seriously interfered with an investor’s property rights.²³³ The tribunal held that neither of the elements was found in the case. More specifically, it found that even if the measure had been taken by the state, a claim of expropriation would not hold as the measure was neither taken for the benefit of the state, nor was it for any public purpose.²³⁴ Conversely, the second tribunal in *CME v. Czech Republic* only paid regard to the first and third elements -

²³⁰ Stephan W. Schill (n 2) 5.

²³¹ Julian Arato, Chester Brown and Federico Ortino, ‘Parsing and Managing Inconsistency in Investor-State Dispute Settlement’ (2020) 21 *The Journal of World Investment & Trade* 336.

²³² UNCITRAL, ‘Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session (New York, 23–27 April 2018)’ (2018) UN Doc A/CN.9/935 para 21. See cases discussed below.

²³³ *Ronald S Lauder v Czech Republic (Final Award)* [3 September 2001] (UNCITRAL) [202].

²³⁴ *ibid* 303.

substantial state interference with or deprivation of the investor of the value of its investment.²³⁵ The tribunal contended that in the determination of expropriation, it is “*immaterial whether the State itself...economically benefits from its actions*”;²³⁶ it also took a broad approach to the determination of “substantial interference” or “deprivation” by finding that the requirement was met when Czech Republic “coerced” the Claimant’s company to give up its contractual protections and legal certainty, and as such caused a “substantial devaluation of the Claimant’s investment.”²³⁷ Czech Republic lost the case and opted for judicial review through national courts. However, it still did not succeed.²³⁸

While the tribunal in *CME v. Czech Republic* bases its broad interpretation of expropriation on the particular wording of the BIT under which the dispute arose,²³⁹ such a decision nevertheless undermines legal certainty regarding the act of expropriation. Nonetheless, it would be fundamentally injudicious to pursue uniformity when uniformity is not warranted. As the common intent of treaty-parties is best expressed in the wording of treaty provisions, it will amount to a serious violation if a tribunal departs from a careful consideration of the wordings of each relevant provision when faced with disputes under distinct treaties.²⁴⁰

²³⁵ *CME Czech Republic BV v Czech Republic (Partial Award)* [13 September 2001] (UNCITRAL) [150].

²³⁶ *ibid.*

²³⁷ *ibid* 599.

²³⁸ *Challenge of Arbitral Award (Judgment)* [2003] SVEA Court of Appeal, 42 ILM 919.

²³⁹ As the tribunal noted, the Netherlands/Czech BIT under which the dispute arose did not even use the term ‘expropriation’, rather, it stipulates that neither ‘Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments’. See *CME Czech Republic B.V. v. Czech Republic (Partial Award)* (n 235) paras 149–150.

²⁴⁰ In similar cases, tribunals engaged in the assessment of treaty-specific requirements by analyzing the “grammatical and syntactic structure of the BIT and the context in which a term was employed”. See, for example, *Orascom v. Algeria*, *Tenaris and Talta v. Venezuela*, and *Capital Financial Holdings Luxembourg v. Cameroon in Mintewab Abebe*, ‘Claims Brought by a Company Controlled by an Egyptian Billionaire against Algeria Are Held Inadmissible – Investment Treaty News’ (21 December 2017) <<https://www.iisd.org/itn/en/2017/12/21/claims-brought-by-company-controlled-egyptian-billionaire-against-algeria-held-inadmissible-orascom-tmt-investments-people-democratic-republic-algeria-icsid-case-arb-12-35-mintewab-abebe/>> accessed 4 November 2022. All three cases came with a different determination of “siège social” under ‘different’ BITs (emphasis added). *Orascom* tribunal found “siège social” to mean “registered office”; *Tenaris* tribunal determined that it meant “effective seat”; whereas *Capital Financial Holdings*’ tribunal found that it was “actual headquarters”.

In any event, it should be noted that in the instance of the *Lauder* and *CME*, legal uncertainty might have been avoided if the Czech Republic had agreed to consolidate both cases as the Claimants' had requested.²⁴¹

Similarly, albeit based on the same treaty provision, five tribunals reached different conclusions in the determination of “necessity” for the protection of an “essential security interest” invoked by Argentina as a defence under Art. XI of the Argentina –U.S BIT for measures taken to stabilize its economy, following its economic crisis, from late 2001.²⁴² Three of the tribunals, *CMS v Argentina*, *Enron v Argentina*, and *Sempra v Argentina*, determined that the assessment of “necessity” for the protection of an “essential security interest” under Art. XI of the constituent BIT equates to a test of “necessity” under Art. 25 of ARSIWA,²⁴³ which essentially justifies a measure only if it is the sole means for a State to safeguard an essential interest against a grave and imminent peril.²⁴⁴ Given the availability of other measures advanced by policymakers, Argentina lost the cases on this claim. Being dissatisfied with the rulings,

²⁴¹ *Ronald S. Lauder v. Czech Republic (Award)* (n 227) para 173; *CME Czech Republic B.V. v. Czech Republic (Partial Award)* (n 229) para 412; While not directly related to the expropriation claim, Czech's refusal to consolidate the claims might have had an effect on the tribunal's receptiveness of Czech's arguments against jurisdiction. This opened the door for the determination of the merits. In any event, it must not be disregarded that the two cases emanated from two different BITs with a different wording of 'expropriation', which 'might' be indicative of a distinct intent of the different parties. See Lise Johnson, 'CME v. Czech Republic, Lauder v. Czech Republic' (*Investment Treaty News*, 18 October 2018) <<https://www.iisd.org/itm/en/2018/10/18/cme-v-czech-republic-lauder-v-czech-republic/>> accessed 1 October 2022; Other subsequent examples of disputes arising as a result of the same state actions include those between Orascom and Algeria. These disputes were initiated by Orascom before the PCA (under UNCITRAL Rules) or ICSID under three different BITS: Egypt–Algeria BIT; Italy–Algeria BIT; and the Belgo-Luxembourg Economic Union and Algeria BIT. However, jurisprudence has evolved over 15 years since the Lauder and CME cases. The tribunal in ICSID contended that Orascom's actions of instituting multiple claims arising from the same harm by several entities in Orascom's vertical chain of companies amounted to an abuse of rights that defeats the very purpose of investment treaties, which is “to promote the economic development of the host state and to protect the investments made by foreigners that are expected to contribute to such development”. This further risks “multiple recoveries, conflicting decisions and wasted resources on proceedings”. Considering a settlement agreement reached by both parties, which was recorded by PCA/UNCITRAL forum, the ICSID tribunal dismissed the case as inadmissible. See *Orascom TMT Investments Sà r.l v People's Democratic Republic of Algeria* [2017] ICSID Case No. ARB/12/35 [542]; See also Abebe (n 234).

²⁴² The Argentina - United States of America BIT (1991) art XI stipulates that ‘This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security or the protection of its own essential security interests’.

²⁴³ See *CMS Gas Transmission Company v Argentine Republic (Award) (CMS)* [2005] ICSID Case No. ARB/01/8 [315–317]; *Enron Corporation Ponderosa Assets, LP v Argentine Republic (Award)* [2007] ICSID Case No. ARB/01/3 [334]; *Sempra Energy International v Argentina (Award)* [2007] ICSID Case No. ARB/02/16 [375].

²⁴⁴ ARSIWA art 25 (1) (a).

Argentina appealed to the ICSID Annulment Committee to annul the awards. The Annulment Committees disagreed with the reasoning of the tribunals in all three cases. Specifically, the Committees in *Enron v Argentina* and *Sempra v Argentina* deemed the arbitral decisions liable for annulment, given the tribunals' failure to accept Argentina's Art. XI defence on the basis that the measures adopted by Argentina did not meet the necessity test under Art. 25 of ARSIWA.²⁴⁵ Notwithstanding its disagreement with the tribunal's reasoning and the recognition that it would have had to reconsider the award if an appeal were possible, the Annulment Committee in *CMS v Argentina* refrained from interfering with the award on the basis that it was not acting as an appellate court; in specific, it could not overturn an award owing to "errors in law," no matter how serious.²⁴⁶

The fourth tribunal in *LG&E v Argentina* treated necessity in the essential security interest clause autonomously from necessity under ARSIWA, and found there to be no treaty violations since the requirement for the invocation of the standard is met.²⁴⁷ The tribunal noted that "Article XI refers to situations in which a State has no choice but to act",²⁴⁸ and since the situation at hand justifies Argentina's responsive measure, "Argentina is excused under Art. XI from liability for any breaches of the Treaty" for the period of the crisis.²⁴⁹ The tribunal's ruling follows the line of reasoning which sets a clear distinction between "necessity" as part of an essential security interest clause, which exists as a treaty provision, and "necessity" defence under customary international law. It follows that if the requirements to fulfil an essential security interest clause are met, there would be no treaty violation in the first place. However, necessity defence under customary international law simply excludes international responsibility for an otherwise wrongful act.²⁵⁰ In this regard, conflating the two standards

²⁴⁵ See *Enron Creditors Recovery Corp Ponderosa Assets, LP v Argentine Republic (Decision on the Application for Annulment of the Argentine Republic)* [2010] ICSID Case No. ARB/01/3 [405]; *Sempra Energy International v Argentina, (Decision on the Argentine Republic's Application for Annulment of the Award)* [2010] ICSID Case No. ARB/02/16 [160–165].

²⁴⁶ *CMS Gas Transmission Company v Argentine Republic (Decision of the Ad Hoc Committee on the Application for Annulment)* [2007] ICSID Case No. ARB/01/8 [135–136].

²⁴⁷ *LG&E Energy Corporation and Others v Argentine Republic (Award)* [2007] ICSID Case No. ARB/04/4.

²⁴⁸ *ibid* 239.

²⁴⁹ *ibid* 229.

²⁵⁰ August Reinisch, 'Necessity in Investment Arbitration' in IF Dekker and E Hey (eds), *Netherlands Yearbook of International Law Volume 41, 2010: Necessity Across International Law* (TMC Asser Press 2011) 149 <https://doi.org/10.1007/978-90-6704-737-1_6> accessed 2 October 2022.

would result in unintended consequences for parties to the treaty since the necessity defence, in principle, is always available to a State under customary international law, even in the absence of an essential security interest clause in the treaty.²⁵¹

The fifth tribunal in *Continental Casualty Co. v Argentina* took a starkly different approach to the determination of necessity in the essential security interest clause.²⁵² After analysing the history of the Argentina – U.S BIT,²⁵³ it adopted a “least restrictive alternative” approach developed by GATT Panels and the WTO Appellate Body by establishing that the analysis of necessity in the essential security interest clause under Art. XI of the BIT is the same as the assessment of necessity under Art. XX of the GATT.²⁵⁴ GATT Art. XX requires a process of weighing and balancing of three essential factors: (i) the importance of societal interests or values (ii) the contribution of a measure to the protection/promotion of interests or values pursued, and the (iii) trade restrictiveness of the measure. This is followed by a subsequent assessment of whether there is a reasonably available, less restrictive alternative measure which equally protects/promotes the interests or values pursued.²⁵⁵

This approach, thus, significantly changes the margin of appreciation and policy space afforded to states in comparison to customary international law. Where customary international law would only permit a justification of necessity when a measure adopted is the “only” available means to safeguard an interest, the GATT approach allows for justification of a measure even in the presence of “other alternatives”, provided that none of the alternatives is reasonably available, less restrictive and equally achieves the objective pursued. In this regard, burden of proof shifts from the state to the claimant, which must prove the existence of a reasonably available alternative.²⁵⁶ Having carried out its assessment, the tribunal in *Continental Casualty* established that the Claimant failed to do so.²⁵⁷ Consequently, the Claimant lost the case on this

²⁵¹ Jeswald W Salacuse, *The Law of Investment Treaties* (Second edition, Oxford University Press 2015) 384.

²⁵² *Continental Casualty Company v Argentine Republic (Award)* [2008] ICSID Case No. ARB/03/9.

²⁵³ See *ibid* 164.

²⁵⁴ See *ibid* 192. The tribunal held that ‘it is more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in the GATT’.

²⁵⁵ See *ibid* 194–195; See also *Korea — Various Measures on Beef* [2000] WTO WT/DS161/AB/R; WT/DS169/AB/R, ABR [152–185]; *Brazil — Retreaded Tyres* [2007] WTO WT/DS332/AB/R, ABR [133–212].

²⁵⁶ *Continental Casualty Company v Argentine Republic (Award)* (n 252) paras 200–219.

²⁵⁷ *ibid*.

claim. While this decision is favourable for Argentina, it nevertheless created a onerous process of annulment initiated by the Claimant.

Based on the above, one may argue that inconsistency pervades ISDS proceedings, which undermines legal certainty, the rule of law and equality in the dispute settlement system. However, the fact that tribunals usually rule on cases emanating from different treaties must not be overlooked. It is only appropriate that divergencies in interpretation may exist where the wording of different treaty provisions is peculiar and warrants distinction.

2.5. Transparency

While confidentiality is one of the core features of arbitration,²⁵⁸ increasing public interest in ISDS issues has led to demands for more transparency and openness in the dispute settlement system. Indeed, transparency and openness would reinforce the legitimacy of ISDS by keeping the public informed about the claims made against a state, the State response, and the tribunal's decisions.

The debate on transparency typically centres around the secrecy of tribunals, access to information and third-party participation. ISDS has come under scrutiny on the grounds that arbitrations are sometimes conducted in secret by trade lawyers who do not benefit from the typical safeguards of judicial independence and procedural fairness, whose income depends on the initiation of arbitral disputes, their appointments by disputing parties and the dispute resolution, and who are neither accountable to the public nor required to factor in broader constitutional and international human rights norms in their decisions.²⁵⁹ While confidentiality may be warranted where trade secrets may be jeopardized, the Peterson Institute for

²⁵⁸ See 1.2.6 (Confidentiality)

²⁵⁹ See Gus Van Harten, 'OECD Document Discusses Investor – State Dispute Settlement' (2011) <<https://web.archive.org/web/20190104082333/http://justinvestment.org/2011/05/oecd-document-discusses-investor-state-dispute-settlement/>>; Gus Van Harten, 'Comments on the European Commission's Approach to Investor-State Arbitration in TTIP and CETA' (3 July 2014) <<https://papers.ssrn.com/abstract=2466688>> accessed 11 October 2022; Organisation for Economic Co-operation and Development, 'Harnessing Freedom of Investment for Green Growth - Freedom of Investment Roundtable 14' (2011) 3; Organisation for Economic Co-operation and Development, 'Investor-State Dispute Settlement Public Consultation: 16 May - 9 July 2012' 91–92 <<https://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf>>.

International Economics notes "that secrecy has gone too far" in many ISDS cases.²⁶⁰ This view is consolidated by an UNCTAD report on ISDS reforms which indicates that, out of the 85 cases adjudicated by the PCA, only 18 were made public.²⁶¹ And even when arbitral institutions, such as ICSID, keep a public registry of cases, settlements are often undisclosed, and some cases may remain confidential if both parties agree.²⁶² This, however, may be particularly counterproductive in two instances: (i) instances where a dispute clearly relates to issues of public interest—such as Australia’s battle with tobacco labelling requirements;²⁶³ and (ii) instances in which the size of the claim could gravely impact public finances.²⁶⁴

Nevertheless, confidentiality in ISDS creates a constructive, de-politicized and fact-oriented atmosphere of dispute resolution, which could be beneficial for disputing parties.²⁶⁵ Further, traditional confidentiality is mainly limited to disputes that affect the disputants and not the general public. Moreover, even though most ICSID awards are confidential, they are de facto published with the consent of the parties. It should be noted that this, however, is not necessarily reflective of arbitration under other rules.

To address criticisms pertaining to the confidentiality of arbitral proceedings and foster access to information, ICSID introduced a rule in 2006, which permits tribunals, under specific circumstances, to allow other persons to attend the whole or part of the hearings.²⁶⁶ More assertively, some investment treaties stipulate that ISDS hearings “shall” be open to the public.²⁶⁷ However, no investment treaty allows other parties who have an interest in the dispute apart from the disputants to obtain standing in the arbitral process.

²⁶⁰ Peterson Institute for International Economics, ‘Assessing the Trans-Pacific Partnership, Volume 1: Market Access and Sectoral Issues’ (2016) PIIE Briefing 16-1 117.

²⁶¹ UNCTAD, ‘Reform of Investor-State Dispute Settlement: In Search of a Roadmap’ (n 18).

²⁶² See 1.2.6 (Confidentiality)

²⁶³ See Peterson Institute for International Economics (n 260) 91.

²⁶⁴ See, for instance, cases brought against Argentina in the wake of its economic crisis discussed in 2.4

²⁶⁵ See Polanco (n 33) 36–37.

²⁶⁶ ICSID Arbitration Rules r 32.

²⁶⁷ See, for instance, the Trans-Pacific Partnership (TPP) 2016 art 9.24, ‘the tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements’. The treaty mandates hearings to be held in public, and only allows closing certain parts temporarily; See also UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014 art 6 which also subjects ISDS to public hearings. However, the public hearings here are subject to certain conditions.

Where necessary, ICSID tribunals allow non-disputing parties to submit amicus curiae briefs. In some instances, they may, as well, allow an entity that is not a party to file a written submission regarding a matter within the scope of the dispute after consulting the parties.²⁶⁸ In determining whether to allow such a submission, tribunals consider whether the non-disputing party has a significant interest in the proceeding, and the extent to which its submission would assist the tribunal in deciding the dispute, amongst other things.

Similarly, non-ICSID tribunals, such as under the NAFTA and UNCITRAL Rules, allow third parties to make written submissions.²⁶⁹

2.6. Excessive Cost and Cost Recoverability

ISDS concerns relating to costs generally focus on claims of its “excessiveness” – sometimes associated with the duration of proceedings, and the difficulties disputing parties face in recovering costs/damages awards.

With regard to excessiveness, users have consistently branded the cost of ISDS proceedings as its worst characteristic by a “significant margin”.²⁷⁰ Indeed, ISDS is a sophisticated method of dispute resolution, which involves, inter alia, setting up an international tribunal, the usual participation of an international administering institution, the use of legal counsels and experts who are capable of effectively standing before international arbitrators, and the usual travelling of witnesses and other persons involved in the proceedings to hearings conducted in countries other than the one where the facts of the case took place.²⁷¹ Consequently, even if the arbitral

²⁶⁸ ICSID Arbitration Rules art 37.2.

²⁶⁹ For an assertive statement on this, see NAFTA, ‘Free Trade Commission Statement on Non-Disputing Party Participation of October 7, 2003’ (2003) <http://www.sice.oas.org/tpd/nafta/commission/nondispute_e.pdf>; See also UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration arts 4, 5; Concerning amicus curiae submissions see, for instance, 2012 U.S. Model Bilateral Investment Treaty art 23 (2).

²⁷⁰ See Queen Mary University of London and White & Case, ‘International Arbitration Survey: The Evolution of International Arbitration’ (2018) 7 <[www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey--The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey--The-Evolution-of-International-Arbitration-(2).PDF)>; Gabriel Bottini and others, ‘Excessive Costs and Recoverability of Costs Awards in Investment Arbitration’ (2020) 21 *The Journal of World Investment & Trade* 251, 253–254.

²⁷¹ Bottini and others (n 270) 253–254.

proceedings are conducted efficiently, the associated costs are generally substantial.²⁷² This makes critics regard it as excessive.

Excessive costs render ISDS inefficient for both disputing parties. For Claimants, excessive costs particularly hamper the access to justice²⁷³ for individuals and small and medium-sized enterprises (SMEs) within the investment treaty regime.²⁷⁴ In contrast, states usually incur high costs when defending themselves from claims they may consider weak or even unfounded, which negatively impacts their budgets both if they win and are unable to recover the costs from the claimant and if they lose and have to bear the excessive costs, coupled with any potential damages.²⁷⁵ In addition, excessive costs are also a burden for home states to the degree that they have an interest in facilitating access to international dispute settlement mechanisms for their nationals investing abroad, despite the general prohibition of home state intervention during arbitral proceedings.²⁷⁶

Putting the above into perspective, a study conducted in 2021 established that Respondent states incur a mean cost of about US\$ 4.7 million and a median of US\$ 2.6 million in ISDS proceedings.²⁷⁷ For Claimant investors, the mean costs exceed US\$ 6.4 million, whereas the median figure is about US\$ 3.8 million.²⁷⁸ The research found no significant difference in party costs awarded by ICSID and UNCITRAL tribunals. Whereas the mean costs awarded by ICSID tribunals were established at US\$ 958,000, that of UNCITRAL were US\$ 1.05 million.²⁷⁹ The

²⁷² J Sullivan and D Ingle, 'Interim Costs Orders: The Tribunal's Tool to Encourage Procedural Economy' (2014) 11 *Transnational Dispute Management (TDM)* 2; Jean E Kalicki and Mohamed Abdel-Raouf (eds), 'Costs in International Arbitration: Navigating Through the Devil's Sea', *Evolution and adaptation: the future of international arbitration* (Kluwer Law International B V 2019) 465–466.

²⁷³ Access to justice here implies cost of arbitration, i.e 'having or acquiring the financial resources needed to bring your claim or muster your defense in international arbitration'. See Victoria Shannon Sahani, 'A Thought-Experiment Regarding Access to Justice in International Arbitration' in Jean Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration* (Kluwer Law International BV 2019) 506; See also Bottini and others (n 270) 254.

²⁷⁴ See UNCTAD, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session (New York, 23–27 April 2018)' (2018) UN Doc A/CN.9/935 para 91; Bottini and others (n 270) 254.

²⁷⁵ See Bottini and others (n 270) 254.

²⁷⁶ See ICSID Convention art 27(1).

²⁷⁷ Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, 'Costs, Damages and Duration in Investor-State Arbitration' (1 June 2021) 4 <<https://papers.ssrn.com/abstract=3859112>> accessed 5 November 2022.

²⁷⁸ *ibid.*

²⁷⁹ *ibid.*

median for both were established at US \$ 745,000 and US\$ 775,000 respectively.²⁸⁰ This study indicates that party costs are significantly higher than tribunal costs, with the former usually accounting for more than 90% of the total costs.²⁸¹ Equally significant is the cost associated with annulment processes. A separate study established that the average fees incurred by an Applicant in ICSID annulment process were found at US\$ 1.36 million, while for a Respondent were US\$ 1.45 million.²⁸²

The above data illustrates that ISDS involves significant costs.²⁸³ While such costs may be reasonable for the Claimant investor if its investment is large and understands that there is no other effective remedy at its disposal, this may not be the case for SMEs.²⁸⁴ On the side of the Respondent state, these costs are typically higher than those required for adjudication at its national courts.

Nonetheless, the high costs of ISDS may not be tagged as “excessive” in some instances since they are “necessary” or “justifiable”.²⁸⁵ High costs in ISDS proceedings may be justified depending on the complexity and novelty of the issue at dispute; the number of procedural, jurisdictional, merits, and damages issues that have to be determined by the tribunal; as well as the number of parties and their conduct throughout the course of the arbitral proceedings, amongst other things.²⁸⁶ Indeed, the specific nature of a dispute may be determinative of the

²⁸⁰ *ibid.*

²⁸¹ See also Bottini and others (n 270) 255.

²⁸² Jeffery Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration* (Oxford University Press 2018) para 10.20.

²⁸³ See Karl P Sauvant, ‘An Advisory Centre on International Investment Law: Key Features’ (Academic Forum on ISDS Concept Paper 2019) 2019/14 2.

²⁸⁴ See Bottini and others (n 264) 256; Van Harten Gus, ‘Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants’ in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press 2020). Van Harten posited that a large majority of small investors “spent more on ISDS costs than they received in ordered transfers”; Conversely, he noted that ‘ISDS - approached as a process that generates ordered financial transfers –has primarily benefited extra-large or large companies and super wealthy individuals’. See Gus Van Harten and Pavel Malysheuski, ‘Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants’ (11 January 2016) 2 <<https://papers.ssrn.com/abstract=2713876>> accessed 6 October 2022.

²⁸⁵ See UNCITRAL Working Group III, ‘Possible Reform of Investor-State Dispute Settlement (ISDS) – Cost and Duration, Note by the Secretariat, Thirty-Sixth Session Vienna, 29 October – 2 November 2018’ (2018) UN Doc A/CN.9/WG.III/WP.153 para 12 <<https://undocs.org/en/A/CN.9/WG.III/WP.153>>; Bottini and others (n 270) 253.

²⁸⁶ See Bottini and others (n 270) 253.

costs and duration necessary for its determination. The amount in dispute and values at stake necessitate a certain degree of care, focus, and precision, which influences the costs and duration of a dispute resolution.²⁸⁷ In this regard, it is only right that arbitral tribunals strike a balance between the quality of outcomes, on the one hand, and the desire to reduce costs and duration, on the other hand.²⁸⁸ In any event, the time required for ISDS proceedings of an average between 3.25 to 5.6 years is not unusual for international adjudication,²⁸⁹ and tribunals adopt cost-adjustment measures to mitigate the costs.²⁹⁰ These measures have been instrumental in reducing the party costs between 2017 to 2020. The mean costs of Claimant investors reduced by 3% (from US\$7.4 million in 2017 to US\$7.2 million in 2020) while for Respondent states fell by 15% (from US\$5.2 million to US\$4.4 million over the same period).²⁹¹ Similarly, the median costs for Claimant investors slightly decreased from US\$4.2 million in 2017 to US\$4.1m in 2020, whereas those for Respondent states dropped by 32% (from US\$3.4 million to US\$2.3 million).²⁹² The measures adopted by arbitral tribunals include, for instance, a fee cap adopted by ICSID tribunals for their proceedings,²⁹³ and a system of “cost follow events”²⁹⁴ which rewards expediency and deters “tactical” delays²⁹⁵ by any of the

²⁸⁷ This does not mean, however, that substantial costs may not be incurred for small value claims. See Hodgson, Kryvoi and Hrcka (n 277) 4; Susan D Franck, ‘ITA Expansion, Time, and Costs’ in Susan D Franck (ed), *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Oxford University Press 2019) 123 <<https://doi.org/10.1093/oso/9780190054434.003.0004>> accessed 5 November 2022.

²⁸⁸ UNCITRAL Working Group III, ‘Cost and Duration’ (n 285) para 12.

²⁸⁹ Depending on the year of research and number of cases in a sample, various studies show that ISDS cases last between 3.25 to 5.6 years from 2015-2020. Compare that with adjudication at the ICJ which takes about 4 years on average. See ICSID Secretariat, ‘Annual Report’ (2015) 31 <https://icsid.worldbank.org/en/Documents/resources/ICSID_AR15_ENG_CRA-highres.pdf> accessed 20 October 2022; Bottini and others (n 270) 266; Hodgson, Kryvoi and Hrcka (n 277) 13; Franck (n 287) 122-.

²⁹⁰ ICSID costs are regulated by ICSID Convention ch VI as well as the Administrative and Financial Regulations; See Hodgson, Kryvoi and Hrcka (n 277).

²⁹¹ Hodgson, Kryvoi and Hrcka (n 277) 4.

²⁹² *ibid.*

²⁹³ For instance, arbitrators are entitled to up to about \$3,000 for each day of work related to a case in accordance with ICSID Schedule of Fees, Regulation 14 of ICSID Administrative and Financial Regulations.

²⁹⁴ See Hodgson, Kryvoi and Hrcka (n 277) 4.

²⁹⁵ Some disputing parties may benefit from strategical delays and slower procedure. See Franck (n 287) 122.

disputing parties.²⁹⁶ These considerations should, thus, be factored in when challenging ISDS costs.

Concerning cost/damages recoverability, states have particularly raised concerns regarding the difficulties faced in recovering costs awards.²⁹⁷ These concerns are not without merit. A survey conducted by ICSID in 2017 found that from a total of 41 awards of costs and/or damages reportedly in favour of the Claimant, there were no cases of non-compliance with the awards.²⁹⁸ Conversely, from a total of 34 awards of costs and/or damages in favour of the states, there was a report of non-compliance with awards in 12 cases, four of which the status was unknown.²⁹⁹ Notwithstanding the small size of the sample, and the observation by ICSID that, in reality, most awards in favour of states are enforced,³⁰⁰ the fact that there are instances of non-compliance in about 35% of the cases in favour of states calls into question the incentives states may have to consent to ISDS as opposed to dispute settlement by their national courts, where enforcement actions are easily tenable. On the other hand, while the sample shows no instances of non-compliance with awards by states, such is not necessarily always true as some investors have faced difficulties in enforcing awards against some states.³⁰¹ Where a state elects not to comply voluntarily with ISDS awards, enforcement becomes difficult as it is shielded by the doctrine of sovereign immunity from execution.³⁰²

Indeed, part of the problem is that ISDS, much like international adjudication under other forums of dispute settlement,³⁰³ lacks an enforcement mechanism comparable to that of

²⁹⁶ See discussions on costs in ICSID Secretariat, 'ICSID Working Paper №4, Proposal for Amendment of the ICSID Rules, Volume 1' (2020); see also Hodgson, Kryvoi and Hrcka (n 277) 6–7.

²⁹⁷ Behn, Langford and Létourneau-Tremblay (n 201) 188–250.

²⁹⁸ ICSID Secretariat, 'Survey for ICSID Member States on Compliance with ICSID Awards' 4 <<https://icsid.worldbank.org/en/Documents/about/Report%20on%20ICSID%20Survey.pdf>> accessed 6 October 2022.

²⁹⁹ *ibid.*

³⁰⁰ *ibid.* 5.

³⁰¹ See for example discussions on this in Emmanuel Gaillard and Ilija Penusliski, 'State Compliance with Investment Awards' (2021) 35 *ICSID Review - Foreign Investment Law Journal*; 'ICSID Awards' <<https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/icsid-awards>> accessed 29 December 2022.

³⁰² See for example, ICSID's recognition of this doctrine in ICSID Convention art 55.

³⁰³ With the exception of the WTO, most other forums of international dispute settlement lack an enforcement mechanism. This even includes the International Court of Justice. See Aloysius P Llamzon, 'Jurisdiction and

domestic courts.³⁰⁴ As a result, enforcement is largely within the purview of the disputing parties, despite their general commitment to enforce the decisions.³⁰⁵ Specifically, in the case of investors, the high cost of ISDS sometimes necessitates some impecunious investors to use third party funding to initiate claims against states.³⁰⁶ While this may remove their barriers to justice, it may create a burden on them when the case does not succeed. As costs may not be recouped when the case fails, the high cost of proceedings as well as the credit obtained to initiate ISDS, may, thus, serve as a direct impediment to enforcement.

2.7. Presumption of Pro-investor Bias

Over the last few years, arbitral tribunals have increasingly faced criticism over “pro-investor bias”. Statistics, however, do not support these claims.

Known Treaty-based ISDS Cases (As of 31 December 2021)	
Total	1190
Pending	368
Concluded	809
Unknown	13

Compliance in Recent Decisions of the International Court of Justice’ (2007) 18 *European Journal of International Law* 815.

³⁰⁴ See Lan Nguyen and Minh Vu Truong, ‘After the Arbitration: Does Non-Compliance Matter?’ (*Asia Maritime Transparency Initiative*, 22 July 2016) <<https://ami.csis.org/arbitration-non-compliance-matter/>> accessed 13 October 2022.

³⁰⁵ See Schreuer (n 24) s 13; ICSID Convention art 54.

³⁰⁶ See Bottini and others (n 270) 280–286.

Concluded Original Arbitration Proceedings:

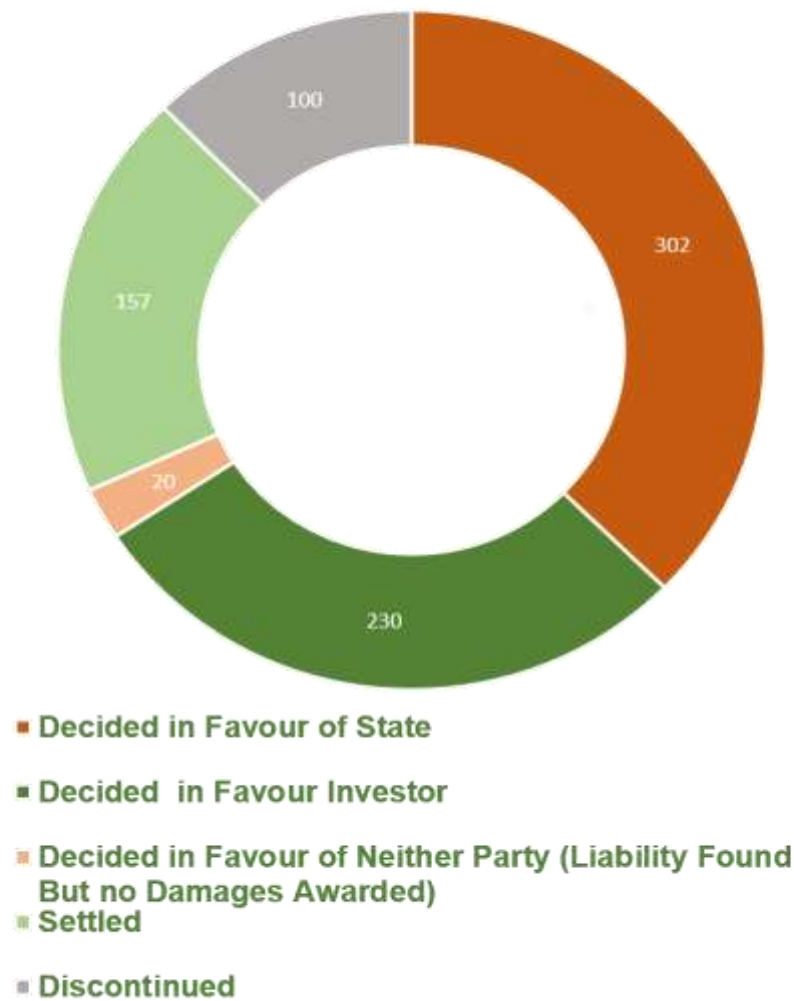


Figure 2.1: Concluded Original Arbitration Proceedings as of 31 Dec. 2021

Source: [United Nations UNCTAD – Investment Policy Hub](https://investmentpolicy.unctad.org/investment-dispute-settlement)

The Chart above by UNCTAD shows that out of the 809 concluded ISDS cases as of 31 December 2021, majority were decided in favour of states, at 302, whereas only 203 were in favour of investors. The rest were neither in favour of any party, settled or discontinued.³⁰⁷ An earlier institution-specific survey for ICSID shows similar results:

³⁰⁷ 'Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' <<https://investmentpolicy.unctad.org/investment-dispute-settlement>> accessed 7 October 2022.

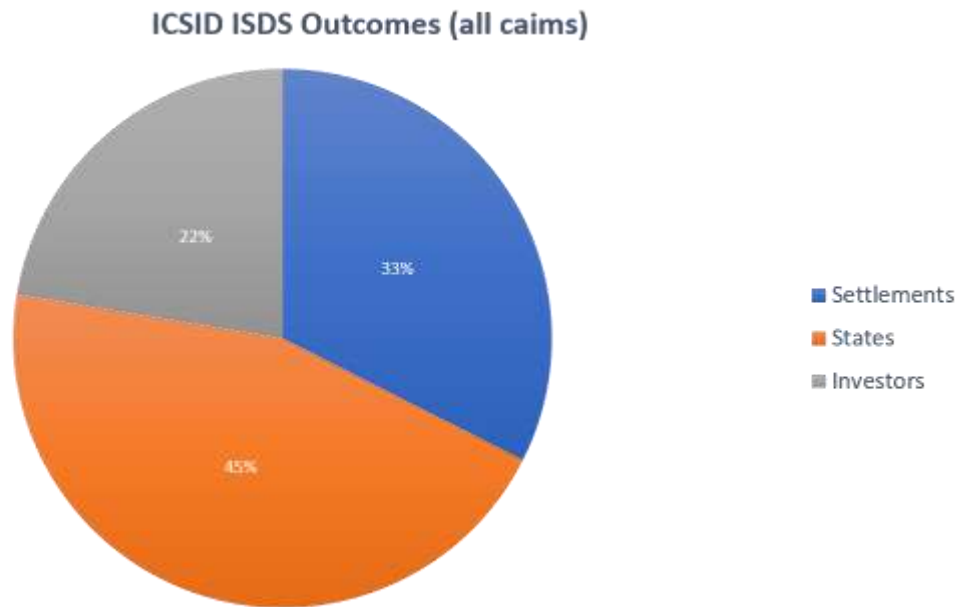


Figure 2.2: ICSID ISDS Outcomes (all claims) as of January 2015

Number of cases: 268

Source: [Scott Miller and Gregory N Hicks, Investor-State Dispute Settlement: A Reality Check: A Report of the CSIS Scholl Chair in International Business \(Center for Strategic and International Studies 2015\) 9](#); [The ICSID Caseload – Statistics](#)

The Chart above illustrates that, out of a total of 268 ICSID cases with known outcomes as of January 2015, almost twice as many cases were settled in favour of states at 45% (121 claims) as those in favour of investors at 22% (60 claims). The rest were settled by the parties before decisions were rendered by arbitral tribunals.³⁰⁸

Thus, concerns of pro-investor bias are subjective and unfounded. Moreover, a large number of cases are dismissed at an early jurisdictional stage. Out of those that advance to the merits, almost half are subsequently dismissed. Even when investors succeed in the arbitral proceedings, tribunals usually award only a fraction of the relief sought.³⁰⁹

³⁰⁸ Miller and Hicks (n 20) 9; See also Michael Reisman W, ‘International Investment Arbitration and ADR: Married but Best Living Apart’ (2009) 24 ICSID Review 187.

³⁰⁹ Schreuer (n 24) s 14.4.

Lastly, tribunals are usually strict when they discover illegal or improper conduct by investors. This includes, inter alia, acts of corruption, misleading information, illegality under host state law, and abuse of process. A finding of this nature generally leads to the dismissal of a claim.³¹⁰

CHAPTER 3: THE MULTILATERAL INVESTMENT COURT AND THE FEASIBILITY OF ITS ESTABLISHMENT

3.1. The Debates Leading up to the MIC Initiative

³¹⁰ *ibid.*

As noted earlier in Chapter 1, developing countries were the key supporters of the Calvo Doctrine, which advances state sovereignty over foreign investments and the subjection of investors and their investments to the same treatment as state nationals, whereas developed countries espoused a high level of protection afforded to foreign investors.³¹¹ The dynamics of ISDS, however, have changed over the last few decades as both developed and developing countries share virtually identical concerns.³¹²

To begin with, developing countries gave up their conservative position in the last few decades of the 20th century by subscribing to BITs with a high level of protection for investors and largely ratified ICSID with the perception that such would attract foreign direct investments in their territories. Research, however, has presented diverging results as to the correlation between the high level of investment protection and enforcement, on the one hand, and the inflow of foreign direct investment, on the other hand. While some established that there was no correlation,³¹³ others established that correlation existed.³¹⁴ While the actual impact of high investment protection on the attraction of foreign direct investment can only be determined in the availability of sufficient data on the inflow and outflow of foreign direct investment, which must be country-specific and vary across time,³¹⁵ such does little to dispel “a” perception that

³¹¹ See 1.1.2 (Historical Development of ISDS), 1.1.3 (Modern Practice of ISDS)

³¹² See Polanco Lazo (n 32).

³¹³ See Jeswald W Salacuse and Nicholas P Sullivan, ‘Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain’ (2005) 46 Harv. Int’l L.J 67, 111; Singh and Sharma (n 39) 93; International Bank for Reconstruction and Development, ‘Convention on Settlement of Investment Disputes between States and Nationals of Other States, and Report of the Executive Directors’ (1965) 4 ILM 524; World Bank, ‘Global Economic Prospects and the Developing Countries 2003: Investing to Unlock Global Opportunities’ (World Bank 2003) 17 <<https://openknowledge.worldbank.org/handle/10986/14781>> accessed 14 October 2022; See a concise country-specific study in Global Citizen Trade Watch, ‘Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries’ Foreign Direct Investment Inflows (Public Citizen Research Brief) (2018) <https://www.citizen.org/wp-content/uploads/pcgtw_fdi-inflows-from-bit-termination_0.pdf>.

³¹⁴ See Rodrigo Polanco Lazo, Valentino Desilvestro and Azernoosh Bazrafkan, ‘Missing Investment Treaties’ (2018) 21 Journal of International Economic Law 703; Rodolphe Desbordes, ‘A Granular Approach to the Effects of Bilateral Investment Treaties and Regional Trade Investment Agreements on Foreign Direct Investment’ <https://www.academia.edu/71291576/A_Granular_Approach_to_the_Effects_of_Bilateral_Investment_Treaties_and_Regional_Trade_Investment_Agreements_on_Foreign_Direct_Investment> accessed 25 December 2022.

³¹⁵ See the major shortcomings of the different research on the impacts of BITs on the attraction of foreign investment in Polanco Lazo (n 314)

the balance struck between high investment protection and the expectation of attracting foreign investment was flawed.³¹⁶

On a factual ground, several developing countries, ended up being embroiled in a series of ISDS proceedings.³¹⁷ Foreign investors initiated claims challenging the laws or measures adopted by states in the interest of a whole society over different processes of decision-making, which raised concern about how ISDS undermines state sovereignty and constricts their decision-makers from achieving legitimate policy objectives. The very fact that, in some cases, exemptions had to be made for foreign investors when adopting certain measures – an opportunity that domestic investors did not have, triggered an alarm for a reconsideration of whether this was what the developing countries signed up for.³¹⁸

What follows was a series of termination of BITs with ISDS clauses by “some” developing countries – a movement that marks the early 21st century. Leading the race for BIT terminations were countries like Ecuador,³¹⁹ Bolivia,³²⁰ Venezuela,³²¹ South Africa,³²² Indonesia,³²³

³¹⁶ See 1.1.3 (Modern practice of investor-state dispute settlement); see also Roberts, ‘State-to-State Investment Treaty Arbitration’ (n 44) 25; Anthea Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2013) 107 *The American Journal of International Law* 45, 75-76,78; Singh and Sharma (n 39) 93; Salacuse (n 1) 67, 111; International Bank for Reconstruction and Development (n 313); World Bank (n 313) 17.

³¹⁷ ISDS cases are overwhelmingly filed against developing countries. See UNCTAD, ‘Investor–State Dispute Settlement Cases Pass The 1,000 Mark: Cases And Outcomes In 2019’ (2020) Issue 2 <<https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf>>.

³¹⁸ See Indonesia for example in 2.3 (Democratic concerns: Restrictions of Governments’ policy space). See also Miller and Hicks (n 20) 1, 2.

³¹⁹ ‘Ecuador | International Investment Agreements Navigator | UNCTAD Investment Policy Hub’ <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/61/ecuador>> accessed 25 December 2022.

³²⁰ ‘Bolivia, Plurinational State of | International Investment Agreements Navigator | UNCTAD Investment Policy Hub’ <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/24/bolivia-plurinational-state-of>> accessed 25 December 2022.

³²¹ Out of this list, Venezuela has only terminated two BITs. See ‘Venezuela, Bolivarian Republic of | International Investment Agreements Navigator | UNCTAD Investment Policy Hub’ <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/228/venezuela-bolivarian-republic-of>> accessed 25 December 2022.

³²² ‘South Africa | International Investment Agreements Navigator | UNCTAD Investment Policy Hub’ <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa>> accessed 25 December 2022.

³²³ ‘Indonesia | International Investment Agreements Navigator | UNCTAD Investment Policy Hub’ <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/97/indonesia>> accessed 25 December 2022.

India,³²⁴ and Pakistan.³²⁵ While some of these countries have taken a very radical approach by terminating all or a considerable number of their BITs, others, such as Venezuela, have only terminated a few. Further, some of them have even gone as far as to denounce the ICSID dispute settlement forum. These include Bolivia (2007) and Venezuela (2012). Ecuador had also initially denounced ICSID in 2009, however, it ratified the Convention again in 2021.³²⁶ While at the same time some investment agreements have emerged, state-state adjudication is now gaining more attention and explored by some states as an alternative to ISDS,³²⁷ and some other states are limiting the possibility of exposure to ISDS in their negotiated agreements.³²⁸ In essence, the trend of the discussed section of developing countries' withdrawals from BITs with ISDS clauses is indicative of their reversion to the Calvo Doctrine³²⁹— subjecting investors to the same treatment as the nationals of the host states and limiting the settlement of investment disputes to the exclusive jurisdiction of the national courts.³³⁰ It should be noted, however, that this is not reflective of the entire developing countries as “conventional” BITs ratified by a majority of them are still in force.

For the developed countries, their roles as Respondents in ISDS proceedings came as a shock. As a group of the so-called “civilized countries” whose laws were the basis for the high investor

³²⁴ ‘India | International Investment Agreements Navigator | UNCTAD Investment Policy Hub’ <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india>> accessed 25 December 2022.

³²⁵ ‘Pakistan | International Investment Agreements Navigator | UNCTAD Investment Policy Hub’ <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan>> accessed 25 December 2022.

³²⁶ ‘Ecuador Ratifies the ICSID Convention | ICSID’ <<https://icsid.worldbank.org/news-and-events/news-releases/ecuador-ratifies-icsid-convention>> accessed 25 December 2022.

³²⁷ Since 2014, Brazil has negotiated investment agreements based on a state–state dispute settlement model in place of ISDS. See ‘The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?’ (*Investment Treaty News*, 4 August 2015) <<https://www.iisd.org/itn/es/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/>> accessed 17 October 2022; Similar examples with state-state dispute settlement include the Southern African Development Community (SADC) amended Finance and Investment Protocol 2016, and the Australia – China FTA.

³²⁸ See India for example in Alison Ross, ‘India’s Termination of BITs to Begin’ (*Global Arbitration Review*, 22 March 2017) <<https://globalarbitrationreview.com/article/indias-termination-of-bits-begin>>; See also Singh and Sharma (n 39) 93. Some other countries such as Chile, Colombia, Mexico, Peru, amongst others, follow the same path.

³²⁹ See Henkin L, *Basic Documents Supplement to International Law: Cases and Materials* (3rd edn, West Pub Co 1993) 685.

³³⁰ See Santiago (n 75) 19–21.

protection, the idea that ISDS – a device of their own creation could be used against them was almost inconceivable.³³¹ Strikingly, these claims did not come from investors from developing countries; rather, they came from investors from fellow developed countries challenging each other's governments.³³² Indeed, that was the case between U.S and Canadian investors under the NAFTA agreement.³³³ The support that the U.S and Canadian governments had for ISDS began to fade after experiencing the Respondent's perspective, and, much like developing countries, they began to raise complaints of infringement on national sovereignty, citing how ISDS “undermines legitimate governmental regulations, challenged legislative prerogatives and opened decision-making to ill-informed foreign tribunals”.³³⁴ Additionally, they also complained about the confidentiality of NAFTA proceedings, uncertainty, and lack of judicial accountability.³³⁵ Evidently, these developments called for a rethink of ISDS. Since developed countries did not conclude early investment protection treaties with the main goal of preserving their domestic regulatory autonomy but to protect foreign investors abroad, the “perception of the ideal balance changed dramatically” when investors began to challenge them in ISDS proceedings.³³⁶

After much criticism, NAFTA eventually got terminated, and a new treaty came into force –the United States Mexico Canada Agreement (USMCA).³³⁷ This treaty abandoned ISDS and replaced it with state–state dispute settlement. Outside the NAFTA framework, U.S has still maintained its BITs with other countries. However, various initiatives, such as the Kerry

³³¹ See Polanco Lazo (n 32) 183. Discussing the ISDS claims that emerged after the coming into force of NAFTA and the exposure of developed countries to ISDS claims after signing similar agreements, Rodrigo noted: ‘So now, developed countries can be the target of investor–State arbitration. And they do not like it’.

³³² *ibid.*

³³³ See Nicola W Ranieri, ‘Investors’ Rights, Legal Concepts, and Public Policy in the Nafta Context’ in Leon Trakman and Nicola Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press 2013) 405; Polanco Lazo (n 32) 183.

³³⁴ Alejandro Alvarez, ‘Latin America and International Law’ (1909) 3 370–371.

³³⁵ *ibid.*; Polanco Lazo (n 32) 183.

³³⁶ See Roberts, ‘State-to-State Investment Treaty Arbitration’ (n 44) 25.

³³⁷ See Agreement Between the United States Of America, the United Mexican States, And Canada; See also Gordon (n 161).

Amendment,³³⁸ and the Bipartisan Congressional Trade Priorities Act introduced in 2014, clearly aim at setting a bar to the expected type of treatment that could be afforded to foreign investors. In particular, the Trade Priorities Act aims at ensuring that “foreign investors in the United States are *not accorded greater substantive rights* with respect to investment protections than United States investors in the United States”.³³⁹ In effect, U.S’ growing impetus to ensure that foreign investors are not accorded greater substantive rights than domestic investors is reflective of its espousal of the Calvo doctrine.³⁴⁰

Yet, this attitude prevails even beyond the U.S.³⁴¹ In 2011, following the infamous *Phillip Morris* case,³⁴² which challenged Australian tobacco Advertising Restrictions, Australia’s government announced that it would stop including ISDS provisions in trade agreements. The government affirmed that it “*supports the principle of national treatment — that foreign and domestic businesses are treated equally under the law. However, the Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. Nor will the Government support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses.*”³⁴³ In line with this policy, Australian courts would have exclusive jurisdiction over investment disputes, particularly those involving investors from countries

³³⁸ John Kerry, ‘Amendment No. 3430 to the Bipartisan Trade Promotion Authority Act of 2002’ (US Senate 2002) Congressional Record s 4529. This proposal, however, did not garner enough support; hence, it was defeated.

³³⁹ Bipartisan Congressional Trade Priorities Act of 2014, HR3830, 113th Congress 2014 (MRW14007) 12. This Bill virtually mirrors the Kerry Amendment, albeit with support from both Democrats and Republicans this time around.

³⁴⁰ Polanco Lazo (n 32) 185.

³⁴¹ See ‘The Arbitration Game’ *The Economist* <<https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game>> accessed 19 October 2022.

³⁴² *Philip Morris Asia Limited v The Commonwealth of Australia* [2012] UNCITRAL, PCA Case No. 2012-12.

³⁴³ See Government of Australia, ‘Trading Our Way to More Jobs and Prosperity (Trade Policy Statement)’ (2011) 14; This position was maintained by Australia when rejecting the inclusion of ISDS in the Australia-US Free Trade Agreement (AUSFTA). See Kyla Tienhaara and Patricia Ranald, ‘Australia’s Rejection of Investor-State Dispute Settlement: Four Potential Contributing Factors’ (*Investment Treaty News*, 12 July 2011) <<https://www.iisd.org/itn/fr/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/>> accessed 19 October 2022; It similarly held the same position during the TPP negotiations. See Polanco Lazo (n 32) 186–187.

without a treaty providing ISDS.³⁴⁴ This position by Australia endorses the principle of national treatment and draws attention to the legitimacy concerns relating to ISDS constraints on government policy space. Such signals a significant change in attitude from the developed world to that which aligns with that of developing countries.

In Europe, negative sentiments towards ISDS particularly intensified after the *Vattenfall* case, in which the investor sought compensation following Germany's decision to phase out nuclear energy.³⁴⁵ Thereafter, public and official opinions decisively drifted against ISDS and its inclusion in trade agreements.³⁴⁶ The opinions questioned the necessity of investment protection and ISDS stipulations in agreements between parties in which “*a resilient legal system and sufficient legal protection from independent national courts*” is guaranteed.³⁴⁷ These opinions were particularly vocal during the Transatlantic Trade and Investment Partnership (TTIP) negotiations as several members of the European Parliament called for the exclusion of ISDS from the agreement.³⁴⁸ Indeed, ISDS would continue to be an issue of great discourse in Europe up until the adoption of the *Achmea* decision,³⁴⁹ which led to the termination of intra-EU BITs.³⁵⁰ While this decision was premised on the incompatibility of intra-EU BITs with

³⁴⁴ See Polanco Lazo (n 32) 187.

³⁴⁵ *Vattenfall AB and others v Federal Republic of Germany* [2018] ICSID Case No ARB/12/12.

³⁴⁶ Nathalie Bernasconi-Osterwalder and Rhea Tamara Hoffmann, ‘Nathalie Bernasconi-Osterwalder and Rhea Tamara Hoffmann, “The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the New Dispute *Vattenfall v Germany* (II)”’ (Intl Inst for Sustainable Development 2012) 2 2–3; Polanco Lazo (n 32) 186.

³⁴⁷ Letter Dated 26 June 2014 and Written in Response to an Enquiry from a Greens Lawmaker, Reprinted in ‘Germany to Reject EU-Canada Trade Deal - Sueddeutsche Newspaper’ *Reuters* (26 July 2014) <<https://www.reuters.com/article/germany-canada-trade-idUSL6N0Q10CS20140726>> accessed 19 October 2022; Polanco Lazo (n 27) 186.

³⁴⁸ James Kilcourse, ‘TTIP Faces Political Hurdles on Both Sides of the Atlantic’ (Institute of International and European Affairs 2014) <<http://www.iiea.com/blogsphere/ttip-faces-political-hurdles-on-both-sides-of-the-atlantic>> accessed 19 October 2022.

³⁴⁹ *Slovak Republic v Achmea BV* [2018] Court of Justice of the European Union Case C-284/16.

³⁵⁰ See UNCTAD, ‘Fact Sheet on Intra-European Union Investor-State Arbitration Cases’ (United Nations 2018) 3 <<https://investmentpolicy.unctad.org/publications/1193/fact-sheet-on-intra-european-union-investor-state-arbitration-cases>> accessed 19 October 2022; See also Clement Fouchard and Marc Krestin, ‘The Judgment of the CJEU in *Slovak Republic v. Achmea* – A Loud Clap of Thunder on the Intra-EU BIT Sky!’ (*Kluwer Arbitration Blog*, 7 March 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/>> accessed 19 October 2022.

EU law, it is largely reflective of the public concern arising from increased use of ISDS by EU investors to challenge each other's governments.³⁵¹

Further, both developing and developed countries have converged in their opinions regarding the systemic problems with ISDS in terms of asymmetry and decentralization.

With regard to asymmetry, providing investors with legal standing to initiate ISDS proceedings gave them substantial "agenda-setting power".³⁵² Since investors did not need the consent of their home states to initiate claims, they could push for broad interpretations of investment protections beyond the common intent of the treaty parties.³⁵³ This possibility was compounded by several factors. Arbitral tribunals were appointed by the disputing parties instead of the treaty parties; this meant that the tribunals were often not aware that they were agents of the treaty parties.³⁵⁴ A large number of the arbitrators appointed, especially by investors, had displayed a particular commercial orientation in their approach and/or profile, especially in comparison to judges of international courts and tribunals.³⁵⁵ This raised concerns that arbitral tribunals were interpreting broad and vague treaty language in a manner that was unduly protective of the commercial interests of investors and insufficiently considerate of the regulatory needs of states.³⁵⁶

As regards decentralization, several states, such as Argentina, Ecuador, Venezuela, and the Czech Republic, were engaged in multiple proceedings arising out of the same or virtually identical facts,³⁵⁷ which sometimes took place concurrently. This was highly burdensome for the states considering the time and financial cost associated with arbitrating disputes. Additionally, the lack of an appellate mechanism to ensure control and correct erroneous

³⁵¹ By 31 July 2018, a total of 174 ISDS cases initiated against EU members came from EU investors. This constituted about 20% of the 904 ISDS cases known globally. See UNCTAD, 'Fact Sheet on Intra-European Union Investor-State Arbitration Cases' (n 349).

³⁵² Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 *International Organization* 457, 462.

³⁵³ *ibid* 459.

³⁵⁴ Roberts, 'State-to-State Investment Treaty Arbitration' (n 44) 25.

³⁵⁵ Roberts, 'Clash of Paradigms' (n 315) 77 fn. 131.

³⁵⁶ See Roberts, 'State-to-State Investment Treaty Arbitration' (n 44) 25.

³⁵⁷ See *italaw*, 'Respondent State | Itlaw' <<https://www.italaw.com/browse/respondent-state>> accessed 20 October 2022.

decisions led to diverging treaty interpretations and applications, raising concerns of inequality and inconsistency, as shown by the CME and Lauder cases.³⁵⁸

Finally, it became apparent that necessary measures need to be taken to address the foregoing ISDS concerns. This prompted a collective action by states under the auspices of the United Nations to find solutions.

3.2. The Multilateral Investment Court as a Proposed Solution for Investor-state

Dispute Settlement

3.2.1. The Multilateral Investment Court Initiative

The discussions surrounding the establishment of permanent international judicial bodies to settle investment claims and the multilateralization of the investment regime have been going on for many decades.³⁵⁹ Various proposals have been put forward over the years, however, none has come to fruition.³⁶⁰

In Europe, this idea began to crystalize in 2014 after European Commission's 2014 public consultation on investment protection, where some stakeholders called for multilateral reforms as a more effective way to tackle ISDS concerns than bilateral ones.³⁶¹ This idea was advanced by the Commission during the TTIP negotiations in its Concept Paper on 5 May 2015, setting the stage for the reform of ISDS through the establishment of a multilateral system.³⁶² In parallel, the EU would engage in reform processes on a bilateral plane, advocating for an ICS in the TTIP and subsequent trade and investment agreements.³⁶³ While such agreements

³⁵⁸ See 2.4 (Inconsistencies in Decision-making); See also Roberts, 'State-to-State Investment Treaty Arbitration' (n 44) 26.

³⁵⁹ See Lillich (n 55) 6–11.

³⁶⁰ See for example Draft Convention on Investments Abroad 1959; Draft Convention on the Responsibility of States for Injuries to the Economic Interests of Aliens 1961; Draft Convention on the Protection of Private Foreign Investment 1967; See also Roberto Ago, 'First Report on State Responsibility (7 May 1969-20 January 1970)' (1970) UN Doc. A/CN.4/217,101 141–154. It should be noted that, while the Energy Charter Treaty was successful, it is mainly targeted at energy cooperation rather than creating a comprehensive investment regime.

³⁶¹ European Commission, 'Multilateral Investment Court Project' (n 5).

³⁶² *ibid*; European Commission, 'Concept Paper 'Investment in TTIP and beyond – the Path for Reform' (2015) UTF-8 3 <<https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/84f1ee41-1c66-4bd2-adda-47f074336110/details>>.

³⁶³ The ICS was first advanced by the EU in the TTIP negotiations in November 2015. While the TTIP negotiations did not conclude with an agreement, the ICS was successfully negotiated in subsequent EU agreements: EU –

concluded with Canada, Singapore, Vietnam, Mexico and recently with Chile envisage transition from an ICS to MIC when it is realized,³⁶⁴all of them are yet to come into force due Members not ratifying them, including key ones such as France, Belgium and Germany.³⁶⁵ In the meantime, the ICS is planned to replace ad-hoc ISDS with a WTO court-like forum with a first and appellate instance to settle international investment disputes involving EU investors, EU Members and EU partners in a “modern, efficient, transparent and impartial manner”.³⁶⁶ Understanding that bilateral reforms may not sufficiently contribute to the objective pursued,³⁶⁷ the Commission fundamentally set itself the objective of engaging with partners on the global stage to garner support for a full-blown permanent MIC to build a “coherent, unified, and effective policy” for investment dispute settlement in October 2015.³⁶⁸It began an impact assessment process on options for multilateral reform of ISDS, including the potential

Canada CETA; EU – Vietnam Investment Protection Agreement 2019; EU - Singapore Investment Protection Agreement 2018; the revised EU – Mexico Global Agreement 2020; and the recently concluded EU–Chile Association Agreement 2022; see European Commission, ‘EU Finalizes Proposal for Investment Protection and Court System for TTIP’ (2015) <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6059>.

³⁶⁴ EU – Canada CETA art 8.29; EU – Vietnam IPA art 3.41; EU – Mexico GA art 14; EU – Singapore IPA art 3.9; EU–Chile AA art 10.36. All these agreements virtually have the same reading as provided in the CETA: ‘The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements’.

³⁶⁵ see ‘CETA Ratification Tracker - Jean Monnet Network on Transatlantic Trade Politics’ <<https://carleton.ca/tradenetwork/research-publications/ceta-ratification-tracker/>> accessed 25 December 2022; ‘EU-Singapore’ <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/singapore/eu-singapore-agreement_en> accessed 25 December 2022; ‘EU-Mexico’ <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement_en> accessed 25 December 2022; ‘EU Trade Relations with Vietnam’ <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam_en> accessed 25 December 2022; ‘EU-Chile’ <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement_en> accessed 25 December 2022.

³⁶⁶ European Parliament, ‘Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)’ (2015) P8_TA(2015)0252 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0252+0+DOC+PDF+V0//EN>>; European Commission, ‘EU Finalizes Proposal for Investment Protection and Court System for TTIP’ (n 362); The attitude of the EU towards ISDS at this stage is best reflected in the European Commission, ‘A New EU Trade Agreement with Japan’ (2018) <https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.pdf>. ‘Anything less ambitious, including coming back to the old Investor-to-State Dispute Settlement, is not acceptable. For the EU ISDS is dead’.

³⁶⁷ see European Commission, ‘A Multilateral Investment Court: A New System For Resolving Disputes Between Foreign Investors And States In A Fair And Efficient Way’ (2017) <<https://trade.ec.europa.eu/doclib/html/156042.htm>>.

³⁶⁸ See European Commission, ‘Trade for All Communication’ (2015) 52015DC0497 <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex:52015DC0497>>; European Commission, ‘Multilateral Investment Court Project’ (n 5).

establishment of an MIC on 1 August 2016;³⁶⁹ subsequently, it issued a recommendation to the European Council on 13 September 2017 to authorise the negotiations for a convention to establish an MIC.³⁷⁰ The initiative is aimed at “*having one multilateral institution to rule on investment disputes covered by all the bilateral agreements in place*” instead of an investment court for each bilateral investment protection agreement.³⁷¹ A couple of months later, the Court of Justice of the European Union (CJEU) delivered a verdict that ISDS clauses contained in intra-EU BITs are incompatible with EU law on 6 March 2018 in the *Achmea* case.³⁷² This led to the termination of the BITs between the Union Members, with the exception of Austria, Finland, Ireland, Sweden and the (United Kingdom as a Member at that time).³⁷³ Eventually, the European Council gave the Commission a mandate to negotiate the MIC later in the same month on 20 March 2018.³⁷⁴

Meanwhile, discussions were taking place on the global stage. In July 2017, UNCITRAL Working Group III, comprising of 60 voting members and about 120 observers,³⁷⁵ began to explore options for ISDS reforms. The Working Group received a mandate from the Commission to (i) identify the problems with the ISDS regime, (ii) determine whether reform was desirable, and (iii) recommend any relevant solutions to address the ISDS concerns.³⁷⁶ Following this mandate, the EU made a submission to the Working Group discussing the

³⁶⁹ European Commission, ‘Consultation Strategy - Impact Assessment on the Establishment of a Multilateral Investment Court for Investment Dispute Resolution’ (2016) <<https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/1dd88340-8881-4e48-abf0-d3a7a02836fc/details>>.

³⁷⁰ European Commission, Recommendation for a COUNCIL DECISION authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes 2017 [COM/2017/0493 final].

³⁷¹ See *ibid.*

³⁷² *Slovak Republic v. Achmea B.V* (n 348).

³⁷³ The EU Members (excluding Austria, Finland, Ireland, Sweden and the [United Kingdom]) decided to terminate all intra-EU BITs after the *Achmea* decision through the signing of a termination agreement in May 2020. See European Commission, ‘EU Member States Sign an Agreement for the Termination of Intra-EU Bilateral Investment Treaties’ <https://finance.ec.europa.eu/publications/eu-member-states-sign-agreement-termination-intra-eu-bilateral-investment-treaties_en> accessed 23 October 2022.

³⁷⁴ Council of the EU (n 11).

³⁷⁵ UNCITRAL (n 6) 1,3, 42–47; CI Arb (n 6); Roberts, ‘UNCITRAL and ISDS Reforms’ (n 6).

³⁷⁶ UNCITRAL (2017a) (n 5).

problems with current ISDS regime,³⁷⁷ and subsequently made a formal submission advocating for the establishment of an MIC as the most suitable solution for ISDS in January 2019.³⁷⁸ Later in its Thirty-seventh Session from 1-5 April 2019, the UNCITRAL Working Group reached the conclusion that reform was desirable,³⁷⁹ and formally began to develop reform options, including the possible establishment of an MIC.³⁸⁰ A few days later, the CJEU delivered an opinion on 30th April, confirming the compatibility of the ICS that the EU negotiated with its partners.³⁸¹ This reinforced the discourse on the ICS and bolstered the Union's proposal of the MIC at the UNCITRAL setting.³⁸²

3.2.2. The Multilateral Investment Court: Objectives and Feasibility of Establishment

Concerning the establishment of a standing investment court, UNCTAD observed:

“A standing investment court would be an institutional public good serving the interests of investors, States and stakeholders. The court would address most of the problems outlined above; it would go a long way to ensure the legitimacy and transparency of the system, facilitate consistency and accuracy of decisions and ensure independence and impartiality of - investors. However, this solution would also be the most difficult to implement as it would require a

³⁷⁷ UNCITRAL Working Group III, ‘Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the European Union, Thirty-Fifth Session, New York, 23–27 April 2018’ (2017) A/CN.9/WG.III/WP.145 <<https://undocs.org/en/A/CN.9/WG.III/WP.145>>.

³⁷⁸ See UNCITRAL Working Group III, ‘Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the European Union and Its Member States, Thirty-Seventh Session, New York, 1–5 April 2019’ (n 13).

³⁷⁹ UNCITRAL (2017b) (n 8) paras 264, 447.

³⁸⁰ The exploration of reform options began on 10 July 2017. See European Commission, ‘Factsheet of 10.7.2017’ (n 9).

³⁸¹ See Court of Justice of the European Union, ‘OPINION 1/17 OF THE COURT’ (30 April 2019) ECLI:EU:C:2019:341 para 106 <<https://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=707133>>.

³⁸² UNCITRAL Working Group III, ‘Possible Reform of Investor-State Dispute Settlement (ISDS), Note by the Secretariat, Thirty-Eighth Session, Vienna, 14–18 October 2019’ (2019) A/CN.9/WG.III/WP.166/Add.1 <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/082/01/PDF/V1908201.pdf?OpenElement>>; See also European Commission, ‘UNCITRAL Working Group III, 38th Session, Vienna, 20-24 January 2020, - Structural Reform of ISDS: The Establishment of a Multilateral Investment Court The European Union and Its Member States’ (2020) <<https://trade.ec.europa.eu/doclib/html/159425.htm>>.

complete overhaul of the current regime through a coordinated action by a large number of states.”³⁸³

Indeed, a multilateral solution for ISDS may bring about greater legitimacy of the system and facilitate the resolution of some of its salient problems, such as the lack of consistency and accuracy of decisions, and conflicts of interest, amongst others, “if properly implemented”.³⁸⁴ It is for this reason that the MIC has been proposed. The objectives of the MIC are encapsulated in Art. 28 of a proposed Draft Statute of the Court:

“The MIC establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Members in accordance with the principle of reciprocity and due process before an independent and impartial adjudicator. By performing their duties, the judges of the MIC shall:

(a) adhere to the Rule of Law;

(b) promote the transparency of the proceedings through application of the rules, inter alia on transparency, ethics and conduct which govern them;

(c) ensure that the proceedings are carried out efficiently and expeditiously;

(d) secure uniform and consistent interpretation of the law, taking into consideration previous decisions without establishing a doctrine of precedent, particularly where there exists sufficient uniformity in previous case law; and

*(e) take into account the Members' right to regulate”.*³⁸⁵

The MIC objectives, thus, objectify a new system of ISDS with a more consistent and predictable case law that will increase the acceptance and legitimacy of the investment regime. This might serve as the ideal solution to ISDS concerns as experts tend to concur that “*a single, preferably institutionally-managed and widely-accepted mechanism for reviewing investor-*

³⁸³ UNCTAD, ‘Reform of Investor-State Dispute Settlement: In Search of a Roadmap’ (n 18).

³⁸⁴ See the researcher’s views on this in Chapters 4 and 5.

³⁸⁵ Bungenberg and August (n 4) art 28.1.

*state arbitral awards would be best suited to address the risk of fragmentation of the dispute settlement system that might otherwise ensue.*³⁸⁶

Nevertheless, it is for the same multilateralized nature of the reform that complexities exist. Unlike the model for the MIC, the WTO DSS, which has been largely successful due to its single, comprehensive and integrated structure,³⁸⁷ the current decentralized network of BITs and IIAs, containing standards of protection, would apply and function as the material basis for the institutionalized and multilateralized MIC.³⁸⁸ Given the distinctive nature of each of these agreements and the unique conceptualization of the standards by parties, problems may arise in developing a harmonious and coherent system that ensures legal certainty. Drafters have, however, envisaged a solution to counteract this drawback through the development of an “opt-in convention” with a multilateralized consolidation of the standards if it becomes necessary in the future.³⁸⁹ The feasibility however is very questionable as that would depend on each state’s national policies and general orientation towards permanent international courts.

The MIC initiative has been met with skepticism by various states for the very same reason that all previous initiatives of such nature were never actualized. Despite the interest in attracting foreign investment, states do not want to “be unwittingly subordinated to the safeguarding of foreign capital” in a manner that undermines their sovereignty and right to regulate.³⁹⁰ Indeed, a multilateral initiative in the form of a permanent international court exercises a certain level of international public authority that its decisions may not only have implications for disputing parties due to the institutional rationale of forming coherent jurisprudence and applying precedents developed by the institution in future decisions.³⁹¹ For this reason, various states like the U.S, Japan, Chile and Russia have objected to a systemic reform of ISDS, advocating

³⁸⁶ Erin Gleason, ‘International Arbitral Appeals: What Are We So Afraid Of?’ (2012) 7 *Pepperdine Dispute Resolution Law Journal* 286 <<https://digitalcommons.pepperdine.edu/drlj/vol7/iss2/5>>.

³⁸⁷ Bossche and Zdouc (n 15) 196.

³⁸⁸ Bungenberg and Reinisch (n 10) 2.

³⁸⁹ *ibid.*

³⁹⁰ See Lim, Ho and Paparinskis (n 21) 64.

³⁹¹ Stephan W. Schill (n 2) 5; Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 321–357 <<https://www.cambridge.org/core/books/multilateralization-of-international-investment-law/65B7AD2B553B62B2F3D7F398E8698689>> accessed 5 January 2022; See also Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking on Public Authority and Democratic Legitimation in Global Governance* (2012).

for bilateral instruments and drafting techniques to address the problems with the current regime.³⁹² Currently, only the EU and Canada,³⁹³ out of about 116 states that have taken part in the UNCITRAL negotiations clearly support the establishment of an MIC.³⁹⁴

While some other options, such as the Multilateral Advisory Centre or the setting up of a stand-alone Appellate Review Mechanism, are also explored by UNCITRAL,³⁹⁵ these alternatives are beyond the scope of this research. In any event, they are equally problematic,³⁹⁶ and might not address ISDS concerns as efficiently as the MIC.³⁹⁷

³⁹² Roberts, 'UNCITRAL and ISDS Reforms' (n 6).

³⁹³ While the EU has signed agreements with ICS clauses with countries such as Canada, Singapore, Vietnam, Mexico and Chile, none of these except Canada has clearly demonstrated support for the MIC.

³⁹⁴ See Roberts, 'UNCITRAL and ISDS Reforms' (n 6); CI Arb (n 6). UNCITRAL Working Group III consists of 60 voting member states and about 120 non-voting observers. While the EU has signed agreements with ICS clauses that envisage transition to an MIC with Canada, Singapore, Vietnam, Mexico and Chile, none of these countries, except Canada has clearly supported EU in its advocacy for an MIC at the UNCITRAL negotiations; See also UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Republic of Korea, Thirty-Eighth Session Vienna, 14–18 October 2019' (2019) A/CN.9/WG.III/WP.179 <<https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CN.9/WG.III/WP.179&Lang=E>>.

³⁹⁵ Proposals for a Multilateral Advisory Centre were made by Morocco, Thailand, Costa Rica, Turkey and Korea, whereas the establishment of a stand-alone Appellate Review Mechanism was advocated by the European Union, Morocco, Chile, Israel, Japan, Ecuador and China. See UNCITRAL Working Group III, 'Thirty-Eight Session, Possible Reform of Investor-State Dispute Settlement (ISDS), Note by the Secretariat' (2019) A/CN.9/WG.III/WP.166, 2019 <<https://undocs.org/en/A/CN.9/WG.III/WP.166>>.

³⁹⁶ See Bungenberg and Reinisch (n 10) 198–214.

³⁹⁷ *ibid* 23.

CHAPTER 4: ADDRESSING INVESTOR-STATE DISPUTE SETTLEMENT CONCERNS UNDER A WTO-MODEL MULTILATERAL INVESTMENT COURT

4.1. Overview of Key Areas of Investor-state Dispute Settlement Reform under the Multilateral Investment Court

During the course of the UNCITRAL negotiations for ISDS reforms, various proposals have been made to address the problems with the ISDS regime. These proposals can be divided into 6 groups,³⁹⁸ most of which might be examined simultaneously: (1) tribunals, ad hoc and standing multilateral mechanisms;³⁹⁹ (2) arbitrators and adjudicators appointment methods and ethics;⁴⁰⁰ (3) treaty parties' involvement and control mechanisms on treaty interpretation;⁴⁰¹ (4) dispute prevention and mitigation;⁴⁰² (5) cost management and related procedures;⁴⁰³

³⁹⁸ UNCITRAL Working Group III, 'ISDS Reforms 2019' (n 381).

³⁹⁹ See for example UNCITRAL Working Group III, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session (Vienna, 5–9 October 2020)' (2020) A/CN.9/1044 para 102ff <<http://undocs.org/en/A/CN.9/1044>>; UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the European Union and Its Member States, Thirty-Seventh Session, New York, 1–5 April 2019' (n 13).

⁴⁰⁰ ICSID and UNCITRAL Secretariats are working on Code of Conduct for adjudicators, which is accessible for comments by stakeholders. See 'Code of Conduct | United Nations Commission On International Trade Law' <<https://uncitral.un.org/en/codeofconduct>> accessed 6 November 2022.

⁴⁰¹ UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Interpretation of Investment Treaties by Treaty Parties, Note by the Secretariat, Thirty-Ninth Session New York, 30 March–3 April 2020' (2020) A/CN.9/WG.III/WP.191 <<http://undocs.org/en/A/CN.9/WG.III/WP.191>>.

⁴⁰² UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS), Dispute Prevention and Mitigation - Means of Alternative Dispute Resolution, Note by the Secretariat, Thirty-Ninth Session, New York, 30 March–3 April 2020' (2020) A/CN.9/WG.III/WP.190 <<http://undocs.org/en/A/CN.9/WG.III/WP.192>>; UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS), Multiple Proceedings and Counterclaims, Note by the Secretariat, Thirty-Ninth Session, New York, 30 March–3 April 2020' (2020) A/CN.9/WG.III/WP.193 <<http://undocs.org/en/A/CN.9/WG.III/WP.193>>.

⁴⁰³ UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Security for Cost and Frivolous Claims, Note by the Secretariat, Thirty-Ninth Session New York, 30 March–3 April 2020' (2020) A/CN.9/WG.III/WP.192 <<http://undocs.org/en/A/CN.9/WG.III/WP.191>>.

and (6) third-party funding.⁴⁰⁴ Equally, a means of implementation of any proposal, for example, through a multilateral convention has been discussed.⁴⁰⁵

One of the proposals for the implementation of ISDS reforms was the establishment of an MIC, based on a three-year research project – “Draft Statute of the Multilateral Investment Court”.⁴⁰⁶ The research established that the establishment of an MIC is feasible, and that such a court is capable of addressing all the ISDS areas of concern enumerated above.⁴⁰⁷ It provided concrete steps for the implementation of ISDS reforms and the provisions for the functioning of the court. However, the enumerated proposals and how they would be incorporated into the MIC are still being discussed at the UNCITRAL forum. Hence, all explicit references to the Draft Statute in this research only rely on tentative provisions.

Nonetheless, both the Draft Statute and the UNCITRAL discussions significantly converge in the determination of the framework of the MIC.

The court is envisaged to function on a multilateral level and be open for accession to all interested states. It would be a permanent adjudicatory institution with First and Appellate Instance Tribunals to adjudicate legal disputes arising in connection with investment under existing and future investment treaties.⁴⁰⁸ It shall have the competence to adjudicate both investor-state and state-state disputes.⁴⁰⁹

⁴⁰⁴ UNCITRAL Working Group III, ‘Possible Reform of Investor-State Dispute Settlement (ISDS), Third-Party Funding – Possible Solutions, Note by the Secretariat, Thirty-Eighth Session Vienna, 14–18 October 2019’ (2019) A/CN.9/WG.III/WP.172 <<http://undocs.org/en/A/CN.9/WG.III/WP.172>>.

⁴⁰⁵ UNCITRAL Working Group III, ‘Possible Reform of Investor-State Dispute Settlement (ISDS), Multilateral Instrument on ISDS Reform, Note by the Secretariat, Thirty-Ninth Session New York, 30 March–3 April 2020’ (2020) A/CN.9/WG.III/WP.194 <<http://undocs.org/en/A/CN.9/WG.III/WP.194>>; Bungenberg and August (n 4) 11.

⁴⁰⁶ Bungenberg and August (n 4).

⁴⁰⁷ *ibid* 12.

⁴⁰⁸ Draft Statute of the Multilateral Investment Court 2019 arts 1; sections 3, 4; See also UNCITRAL Working Group III, ‘Possible Reform of Investor-State Dispute Settlement (ISDS), Multilateral Instrument on ISDS Reform, Note by the Secretariat, Thirty-Ninth Session New York, 30 March–3 April 2020’ (2020) A/CN.9/WG.III/WP.194 3 <<http://undocs.org/en/A/CN.9/WG.III/WP.194>>.

⁴⁰⁹ Draft Statute of the Multilateral Investment Court arts 21, 22; Whether the MIC will only allow for state-state, investor-state dispute resolution or both is still under discussion at the UNCITRAL. See UNCITRAL Working Group III, ‘Multilateral Instrument on ISDS’ (n 404) 3.

Judges would no longer be appointed by the disputing parties but rather by states through an objective and transparent process.⁴¹⁰ The appointment process shall take into account regional balance, gender representation, and qualifications of judges comparable to those of permanent international courts such as the ICJ and WTO Appellate Body.⁴¹¹ Judges would be subject to very strict ethical standards (rules on ethics and conflict of interest, which includes a code of conduct for members of the court).⁴¹² They would be permanently remunerated by state parties to the MIC in order to safeguard all necessary guarantees of impartiality and independence.⁴¹³

Unlike the current ISDS regime characterized by ad-hoc arbitrators appointed on a case-by-case basis, MIC tribunals would be composed of full-time judges appointed for a fixed term.⁴¹⁴ The term would be long and possibly non-renewable to provide security of tenure.⁴¹⁵

The appellate instance shall have similar principles to the WTO Appellate Body. The judges would be appointed on a random basis and shall have the power to review decisions of the First Instance Tribunal and ensure both substantive and procedural issues.⁴¹⁶ This means that the review of arbitral awards would no longer be limited to annulment proceedings circumscribed to a determination of the legitimacy of the process.

⁴¹⁰ Draft Statute of the Multilateral Investment Court arts 9, 12; UNCITRAL Working Group III, ‘Possible Reform of Investor-State Dispute Settlement (ISDS), Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters, Note by the Secretariat, Forty-Second Session, New York, 14–18 February 2022’ (2021) A/CN.9/WG.III/WP.213 5, 17 <<http://undocs.org/en/A/CN.9/WG.III/WP.213>>.

⁴¹¹ Draft Statute of the Multilateral Investment Court 9, 12, 13; UNCITRAL Working Group III, ‘Appointment of ISDS Tribunal Members’ (n 409) 8, 11, 12.

⁴¹² Draft Statute of the Multilateral Investment Court art 8(4); UNCITRAL Working Group III, ‘Appointment of ISDS Tribunal Members’ (n 409) 17.

⁴¹³ Draft Statute of the Multilateral Investment Court art 13; UNCITRAL Working Group III, ‘Appointment of ISDS Tribunal Members’ (n 409) 4.

⁴¹⁴ Draft Statute of the Multilateral Investment Court arts 13, 14; Whether judges will be required to work full time is still discussed at the UNCITRAL. see UNCITRAL Working Group III, ‘Appointment of ISDS Tribunal Members’ (n 409) 6.

⁴¹⁵ Draft Statute of the Multilateral Investment Court art 14; Whether judges would serve a short or long term, and whether they would have a renewable or non-renewable term is still discussed at the UNCITRAL. See UNCITRAL Working Group III, ‘Appointment of ISDS Tribunal Members’ (n 404) s II (D).

⁴¹⁶ Draft Statute of the Multilateral Investment Court 13, 46, 47; see also UNCITRAL Working Group III, ‘Appointment of ISDS Tribunal Members’ (n 409) 17.

To tackle cost-related issues, the establishment of an Advisory Center is envisaged to provide legal assistance to Respondent states classified as “developing economies” and SMEs in proceedings before the MIC.⁴¹⁷ The costs shall be determined by the Court.⁴¹⁸

The Statute of the Court might provide procedural safeguards against frivolous claims and require security for costs from disputing parties, amongst other things.⁴¹⁹ Investors would be limited to initiating ISDS proceedings over a precisely defined scope of disputes.⁴²⁰ States' right to regulate would be clearly defined.⁴²¹

The Statute might also include amicable dispute resolution mechanisms,⁴²² and other procedural provisions on, inter alia, parallel claims or joint interpretations.⁴²³ As a single institution with exclusive jurisdiction,⁴²⁴ forum shopping would no longer be possible if all states acceded to the MIC.⁴²⁵

⁴¹⁷ Draft Statute of the Multilateral Investment Court art 10; See also Bungenberg and August (n 4) 19, 28; UNCITRAL Working Group III, ‘Appointment of ISDS Tribunal Members’ (n 409) 4; UNCITRAL Working Group III, ‘Multilateral Instrument on ISDS’ (n 404) 5.

⁴¹⁸ Draft Statute of the Multilateral Investment Court art 54; In the case of UNCITRAL, draft provision 3 stipulates that operational costs shall be determined by the Committee of Parties. See UNCITRAL Working Group III, ‘Appointment of ISDS Tribunal Members’ (n 409) 4.

⁴¹⁹ UNCITRAL Working Group III, ‘Security for Cost and Frivolous Claims’ (n 402).

⁴²⁰ *ibid* 8.

⁴²¹ Draft Statute of the Multilateral Investment Court art 28; UNCITRAL Working Group III, ‘Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session (Vienna, 5–9 October 2020), Fifty-Fourth Session, Vienna, 28 June–16 July 2021’ (2020) A/CN.9/1044 para 23 <<https://undocs.org/en/A/CN.9/1044>>.

⁴²² This includes consultation. See Draft Statute of the Multilateral Investment Court art 40; See also UNCITRAL Working Group III, ‘Dispute Prevention and Mitigation’ (n 401) 3, 9, 10.

⁴²³ UNCITRAL Working Group III, ‘Treaty Interpretation by Parties’ (n 400); See also Draft Statute of the Multilateral Investment Court art 8. Explicit interpretative powers of MIC state parties are recognized by the Draft Statute.

⁴²⁴ Draft Statute of the Multilateral Investment Court art 23; The scope of jurisdiction of the MIC is still being discussed at the UNCITRAL. Currently, the drive is towards creating a system with in-built flexibility to attract maximum participation. See UNCITRAL Working Group III, ‘Multilateral Instrument on ISDS’ (n 404) paras 14–16; UNCITRAL Working Group III, ‘Appointment of ISDS Tribunal Members’ (n 409) para 7.

⁴²⁵ UNCITRAL Working Group III, ‘Security for Cost and Frivolous Claims’ (n 402) 8.

The Court would make a detailed publication of all its work online, including decisions; open hearings to the public; and allow third parties to submit amicus curiae briefs.⁴²⁶ Likewise, there would be disclosure obligations for third-party funding.⁴²⁷

Finally, enforcement shall be carried out in a manner similar to ICSID, where states are to enforce MIC decisions as if they were final decisions of their highest domestic courts.⁴²⁸

4.2. WTO Dispute Settlement System as a Model for the Systemic Reform of Investor-state Dispute Settlement under the Multilateral Investment Court

The WTO DSS has been an effective mechanism for the settlement of international trade disputes since its establishment in 1995. Over the short period of its existence, it has registered about 614 disputes and issued more than 350 rulings.⁴²⁹ This makes it the most successful permanent international adjudication institution with a global reach by a very wide margin.⁴³⁰ Indeed a number of factors have been instrumental in the success of the WTO DSS. These have been proposed for the reform of ISDS under the MIC.

As a proposed solution to ISDS concerns, the MIC is modelled after the WTO DSS. It is envisaged to share common features with the WTO DSS, such as the nature of jurisdiction, two-instances of adjudication, and involvement of treaty parties in interpretation, amongst others.

⁴²⁶ Draft Statute of the Multilateral Investment Court art 8(4), 55; see also UNCITRAL Working Group III, 'Multilateral Instrument on ISDS' (n 404) 6.

⁴²⁷ Draft Statute of the Multilateral Investment Court art 52; Submissions at the UNCITRAL require security for cost in the existence of third-party funding. See UNCITRAL Working Group III, 'Security for Cost and Frivolous Claims' (n 402) 5; Others call for regulation or prohibition of third-party funding entirely. See UNCITRAL Working Group III, 'Third-Party Funding' (n 403).

⁴²⁸ Draft Statute of the Multilateral Investment Court art 56.

⁴²⁹ 'WTO | Dispute Settlement Gateway' <https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm> accessed 12 November 2022.

⁴³⁰ In comparison to the WTO, the ICJ has only registered about 184 disputes since its establishment in 1945. See 'Cases | International Court of Justice' <<https://www.icj-cij.org/en/cases>> accessed 12 November 2022; ITLOS has recorded about 30 cases since establishment in 1982. see 'International Tribunal for the Law of the Sea: List of Cases' <<https://www.itlos.org/en/main/cases/list-of-cases/>> accessed 12 November 2022; whereas the International Criminal Court has recorded about 31 cases since establishment in 2002. see 'About the Court' (*International Criminal Court*) <<http://www.icc-cpi.int/about/the-court>> accessed 12 November 2022; see also Bossche and Zdouc (n 14) 173.

Nevertheless, divergencies exist between the two systems to a certain extent. The MIC is adapted in a manner that best suits the investment dispute settlement framework and addresses the concerns associated with the current regime.

The subsequent sections of this chapter will analyse how the MIC addresses ISDS concerns in comparison with the WTO DSS used for the settlement of international trade disputes. The analysis will focus on key areas of convergence and divergence between the proposal for the establishment of an MIC under the “Draft Statute of the Multilateral Investment Court” and the existing framework under the WTO DSS. To recall, the Draft Statute is largely an academic endeavour which has neither been endorsed nor adopted by states.⁴³¹ Where appropriate, specific reference shall be made to proposals for ISDS reform at the UNCITRAL Working Group III negotiations. The analysis shall also capture the potential problems that may arise with each reform proposal.

4.2.1. Jurisdiction

Dispute settlement under the WTO is characterized by the compulsory and exclusive jurisdiction of the WTO DSS.⁴³² Pursuant to Art. 23.1 of the WTO Dispute Settlement Understanding (DSU) “*when Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this understanding*”.⁴³³ This implies that Members shall not have recourse to any other forum for the resolution of a part or whole of their dispute once it arises on the bases of rights and obligations under a WTO covered agreement.⁴³⁴ It also entails a prohibition of unilateral conduct by Members to the effect of determining violations of rights and obligations subject to the exclusive jurisdiction of the multilateral system.⁴³⁵ In that regard, a complaining Member is under the obligation to submit any disputes under a WTO-covered

⁴³¹ See 4.1 (Overview of Key Areas of ISDS Reform under the MIC).

⁴³² See Bossche and Zdouc (n 10) 177; see also DSU arts 6.1, 23.

⁴³³ DSU art 23.1.

⁴³⁴ Bossche and Zdouc (n 15) 178; Gabrielle Zoe Marceau, ‘The Primacy of the WTO Dispute Settlement System’ (2015) 23 Questions of International Law 3.

⁴³⁵ Bossche and Zdouc (n 14) 178, section 4.3; see also *EC — Commercial Vessels* [2005] WTO WT/DS301/R, PR [7.193]; This is further elucidated by DSU art 23.2(a).

agreement to the WTO DSS,⁴³⁶ whereas a responding Member has no choice but to accept the WTO jurisdiction.⁴³⁷ Such acceptance is automatic by virtue of WTO membership, and unlike other forums of international dispute settlement such as the ICJ, there is no need for confirmation in writing.⁴³⁸

Similarly, the MIC is envisaged to have compulsory and exclusive jurisdiction.⁴³⁹ Pursuant to Art. 23.1 of the Draft Statute, “*Consent of the parties to the jurisdiction of the MIC shall be deemed consent to the exclusion of any other remedy*”.⁴⁴⁰ Art. 23.2 further states that “*Where any investment agreement between two Members of the MIC calls for recourse to Investor-State Arbitration, the Members agree to regard it as prescribing recourse to the MI*”.⁴⁴¹ Similar to the WTO, consent to MIC jurisdiction by Members may be expressed by virtue of accession to the MIC Statute; for investors, however, consent may be expressed by filing a written request to initiate ISDS proceedings.⁴⁴² Conversely, UNCITRAL negotiations do not currently envisage a compulsory and exclusive jurisdiction for the MIC. This is so because the MIC supporters prioritize creating a system with in-built flexibility to attract maximum participation.⁴⁴³ To that end, the UNCITRAL proposals envisage the possibility to make reservations and retain the possibility to pursue ad-hoc arbitration, amongst others.⁴⁴⁴

An MIC with compulsory and exclusive jurisdiction, as envisaged by the Draft Statute, might potentially improve the quality of ISDS decisions by addressing concerns relating to inconsistency and lack of coherence. That might be the case if implemented under a system with uniform laws and integrated structure as in the case of the WTO. However, that is not the case for ISDS today. ISDS is characterised by a myriad of investment treaties which are each distinct in their own nature, and the conceptualization of substantive standards by treaty parties

⁴³⁶ see *US — Section 301 Trade Act* [2000] WTO WT/DS152/R, PR [7.43].

⁴³⁷ see DSU art 6.1; Bossche and Zdouc (n 15) 177.

⁴³⁸ see Bossche and Zdouc (n 15) 178.

⁴³⁹ See Draft Statute of the Multilateral Investment Court arts 19, 20, 23.

⁴⁴⁰ *ibid* 23.1.

⁴⁴¹ *ibid* 23.2.

⁴⁴² *ibid* 20.

⁴⁴³ see UNCITRAL Working Group III, ‘Multilateral Instrument on ISDS’ (n 404) paras 14–22; UNCITRAL Working Group III, ‘Appointment of ISDS Tribunal Members’ (n 409) para 7.

⁴⁴⁴ UNCITRAL Working Group III, ‘Multilateral Instrument on ISDS’ (n 404) paras 14–22.

differ. In that regard, it would be fundamentally injudicious for judges to issue consistent judgments disregarding the common intent of treaty parties and treaty differences. Nonetheless, consistency may be achieved but not under a single uniform model that reads out treaty differences.

Likewise, should the reform be in accordance with the UNCITRAL proposals, i.e an MIC with no compulsory and exclusive jurisdiction, it is implausible that the fragmentation of international investment law would cease to exist. As ad-hoc arbitration continues to exist alongside the MIC, and tribunals continue to rule on distinct treaties, diverging opinions may still prevail in the absence of a uniform law consolidating the standards. Moreover, practice shows that there exists little or no coordination between ad-hoc arbitral tribunals and permanent international courts as exemplified by the *Yukos Shareholders vs Russia* cases. While three arbitral tribunals found Russia's tax evasion measures against Yukos to be illegitimate and constitute an act of expropriation,⁴⁴⁵ the European Court of Human Rights (ECtHR) did not.⁴⁴⁶ Additionally, the arbitral tribunals made explicit references to the rulings of ECtHR to, inter alia, justify or clarify their positions,⁴⁴⁷ whereas the Court's judgment only focuses on how its investigation and ruling is not affected by the arbitral decisions and proceedings.⁴⁴⁸ Its "Just satisfaction" judgment dealing with compensation did not even take into account the awards rendered by the arbitral tribunals owing to the case file not containing "information regarding the enforcement of these awards",⁴⁴⁹ even though the respondent Government had initially called the Court's attention to the finality of two awards.⁴⁵⁰ While one could argue that the

⁴⁴⁵ *RosInvestCo UK Ltd v The Russian Federation* [2010] SCC Case No. V079/2005 [621]; *Quasar de Valores and others v Russia* [2012] SCC Case No. 24/2007 [128]; *Yukos Universal Limited (Isle of Man) v The Russian Federation* [2014] PCA Case No. 2005-04/AA227 [1580–1586, 1758].

⁴⁴⁶ *Case of OAO Neftyanaya Kompaniya Yukos v Russia, (First Section) (Merits)* [2012] ECtHR Application no. 14902/04 [666].

⁴⁴⁷ For instance, see the following paragraphs in *Quasar de Valores and others v. Russia* (n 444) para 16, 19, 34, 42, 125, 158; *RosInvestCo UK Ltd. v. The Russian Federation* (n 444) paras 89, 64, 547; *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (n 444) paras 718, 753, 778, 987, 1043, 1575.

⁴⁴⁸ see *Case of OAO Neftyanaya Kompaniya Yukos v. Russia, (First Section) (Merits)* (n 445) para 524; *Case of OAO Neftyanaya Kompaniya Yukos v Russia ((Just satisfaction)* [2014] ECtHR Application no. 14902/04 43–44.

⁴⁴⁹ *Case of OAO Neftyanaya Kompaniya Yukos v. Russia ((Just satisfaction)* (n 447) para 44.

⁴⁵⁰ *ibid* 43.

focus of the analysis of the Court and the arbitral tribunals,⁴⁵¹ as well as the disputing parties, and constituent laws differ, it is unquestionable that the proceedings emanated from the same measure and the institutions were all ruling on the same standard of expropriation. This situation reflects the autonomy of international courts and arbitral tribunals from each other. Ad-hoc arbitral tribunals are free to diverge from the reasoning adopted by permanent international courts, as could be seen in the two latter judgments of the *Yukos* cases⁴⁵² after ECtHR's merit judgment on the same standard,⁴⁵³ and vice versa. In this regard, the opposite should not simply be expected to be case by the mere establishment of an MIC.

4.2.2. Two-instance Permanent Court

In terms of institutional framework, both the nature of the MIC as an institution and the structure of its DSS are modelled after the WTO with subtle differences in some respects. The adoption of these reform options for ISDS would have implications for, inter alia, its legitimacy, costs and quality of decisions.

Concerning the nature of the institution, the WTO is a permanent institution with a global reach, whose funding, including of the dispute settlement institutions, is provided by WTO Members through a quota established on the basis of each Member's share of international trade in relation to other WTO Members.⁴⁵⁴ Similarly, the MIC shall be a permanent institution with a global reach, whose budget, including that of its courts, shall be borne by MIC Members based on a quota determined by each Member's share of foreign direct investment in relation to the share of the total investment of all MIC Members.⁴⁵⁵

The reform of ISDS under a permanent institution with a global reach may bring about greater legitimacy and acceptance of the system if accepted by states. However, the true nature of such acceptance would only be determined based on the effect of its decisions on state sovereignty

⁴⁵¹ see for instance, Conor McCarthy, 'The ECtHR's Largest Ever Award for Just Satisfaction Rendered in the Yukos Case' (*EJIL: Talk!*, 15 August 2014) <<https://www.ejiltalk.org/the-ecthrs-largest-ever-award-for-just-satisfaction-rendered-in-the-yukos-case/>> accessed 26 December 2022.

⁴⁵² *Quasar de Valores and others v. Russia* (n 444) paras 125–128; *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (n 444) paras 1580–1586, 1758.

⁴⁵³ *Case of OAO Neftyanaya Kompaniya Yukos v. Russia, (First Section) (Merits)* (n 445) para 666.

⁴⁵⁴ 'WTO | Members Contributions to the Secretariat and to the Appellate Body for Year the 2015' <https://www.wto.org/english/thewto_e/secret_e/contrib_e.htm> accessed 19 November 2022.

⁴⁵⁵ Draft Statute of the Multilateral Investment Court arts 1, 7.

and policy space and the general attitude of states towards permanent international courts, amongst other things. Notably, out of the 5 permanent members of the United Nations Security Council, only UK has accepted ICJ's compulsory jurisdiction.⁴⁵⁶ Virtually the same situation could be seen in the case of the International Criminal Court.⁴⁵⁷ This means that key states like China, Russia, and US cannot be subject to dispute settlement proceedings under these courts without their prior consent. Even where, for example, the US accepted the compulsory jurisdiction of the ICJ and WTO DSS, the decisions rendered by these institutions led to US withdrawing its consent to the compulsory jurisdiction of the former as well as from specific treaty provisions that exposed it to such jurisdiction,⁴⁵⁸ and triggered an existential crisis for the latter for encroaching on domestic policy space, amongst other things.⁴⁵⁹ While the actions of these key states might not necessarily be indicative of the entire international community, their influence on the general perception of international courts cannot be overlooked.

Further, the funding of the dispute settlement institutions by MIC Members would relieve the disputing parties from the payment of administrative costs, such as tribunal fees, however, it should be noted that such is only about 10% of total cost of ISDS proceedings at about US\$ 1 million on average per case.⁴⁶⁰ According to WTO Annual Report, the total budget for the WTO in 2020 was about CHF 197 million.⁴⁶¹ This amount, albeit modest in comparison to other international organizations, such as the CJEU,⁴⁶² is not insignificant. Over the last 5 years, only

⁴⁵⁶ See 'Declarations Recognizing the Jurisdiction of the Court as Compulsory | International Court of Justice' <<https://www.icj-cij.org/en/declarations>> accessed 26 December 2022.

⁴⁵⁷ 'The States Parties to the Rome Statute | International Criminal Court' <<https://asp.icc-cpi.int/states-parties>> accessed 27 December 2022.

⁴⁵⁸ See Scott R Anderson, 'Walking Away from the World Court' (*Lawfare*, 5 October 2018) <<https://www.lawfareblog.com/walking-away-world-court>> accessed 26 December 2022; Roberta Rampton, Lesley Wroughton and Stephanie van den Berg, 'U.S. Withdraws from International Accords, Says U.N. World Court "Politicized"' *Reuters* (3 October 2018) <<https://www.reuters.com/article/us-usa-diplomacy-treaty-idUSKCN1MD2CP>> accessed 26 December 2021.

⁴⁵⁹ See Peter Van den Bossche, 'Is There a Future for the WTO Appellate Body and WTO Dispute Settlement?', *WTI Working Paper No. 01/2022* (2022); Manfred Elsig, Rodrigo Polanco and Peter van den Bossche (eds), *International Economic Dispute Settlement: Demise or Transformation?* (Cambridge University Press 2021); For a discussion on the crisis of permanent international courts, see Stephan W. Schill (n 2).

⁴⁶⁰ See 2.6 (Excessive Costs and Costs Recoverability)

⁴⁶¹ WTO, 'Annual Report 2020' (2020) 179.

⁴⁶² The CJEU and General Court require up to about EUR 380 Million. see Bungenberg and Reinisch (n 10) para 603; See comparisons with the World wildlife Fund, which has about three times the resources of the WTO in Bossche and Zdouc (n 15) 166–167.

about 66 ISDS cases have been recorded per year on average.⁴⁶³ Thus, should the MIC have a budget similar to that of the WTO, such would be about three times more than required for ad-hoc ISDS proceedings over the same yearly period. Moreover, MIC Members would have to fund the Court even if it is not used. This therefore indicates that ISDS under a permanent institution would not be more cost-effective than under ad-hoc tribunals. For the MIC state parties, the financing of a permanent institution would only make sense from an economic perspective if a lot of states become signatories to the MIC. Should the MIC budget be around or beyond the WTO sum, having a global participation would be more advantageous for Members to ensure that contributions would only be made at a minimum level; otherwise, that would constrain their budgets for other national objectives.

With regards to the dispute settlement institutions, both the WTO DSS and the MIC consist of two institutions of adjudication: First Instance and Appellate Instance Tribunals. Their nature and mandate, as well as competence and manner of operation, have notable aspects of convergence and divergence

The WTO First Instance Tribunal comprises of ad-hoc Panels, whose establishment depends on the request of a Complainant.⁴⁶⁴ Panels are composed of panelists proposed by the WTO Secretariate to the disputing parties, who may oppose the nomination of any panelist if there are compelling reasons.⁴⁶⁵ Where a dispute involves developing and developed country Members, the Panel shall include at least one panelist from a developing country Member, if the developing country to the dispute so requests.⁴⁶⁶ Conversely, the MIC's First Instance Tribunal shall be composed of a permanent bench of judges.⁴⁶⁷ The WTO Panels have the mandate to examine matters⁴⁶⁸ referred to the Dispute Settlement Body (DSB) and to make

⁴⁶³ Only about 329 ISDS cases were recorded from 2018 to 2022, with the highest in 2018 at 94 and the lowest in 2022 at 23. This is about 65.8 cases per year on average for the 5 year period. See 'Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (n 307).

⁴⁶⁴ DSU art 6.1.

⁴⁶⁵ *ibid* 8.6.

⁴⁶⁶ *ibid* 8.10.

⁴⁶⁷ Draft Statute of the Multilateral Investment Court art 9.1.

⁴⁶⁸ This consists of two elements: (i) the specific measure(s) at issue; (ii) the legal basis of complaint. See *Guatemala — Cement I* [1998] WTO WT/DS60/AB/R, ABR [72, 76].

such findings as will assist the DSB in making recommendations or in giving rulings.⁴⁶⁹ Similarly, the MIC First Instance Tribunal shall entertain admissible disputes referred to it by parties.⁴⁷⁰

At the appellate level, both the WTO and the MIC have standing appellate bodies that issue rulings on decisions of First Instance Tribunals appealed by disputing parties.⁴⁷¹ While the WTO Appellate Body consists of 7 members, 3 of whom shall serve on a case,⁴⁷² the MIC Appellate Instance Tribunal is envisaged to have 9 judges, three or more (in odd number) of whom could serve in a chamber.⁴⁷³ In terms of mandate, the WTO Appellate Body is restricted to the determination of issues of law covered in the panel report and legal interpretations developed by the panel.⁴⁷⁴ However, it is empowered to decide whether or not a panel has made an objective assessment of the relevant facts of a case under Art. 11 of the DSU. In this regard, a factual finding may be subject to appellate review if an appellant alleges that a Panel finding was not reached in a manner consistent with Art. 11 of the DSU.⁴⁷⁵ By contrast, the MIC Appellate Instance Tribunal has a broader mandate. It shall have the power to review both substantive and procedural aspects of a dispute.⁴⁷⁶ Art. 46 of the Draft Statute specifies 7 grounds for appeal, including the lack of jurisdiction of the First Instance Tribunal, grave errors in the application or interpretation of applicable law, and manifest errors in the appreciation of the facts, including the appreciation of the relevant domestic law, amongst others. These grounds for appeal go beyond the five conditions for annulment proceeding, which is only concerned with the legitimacy of an arbitral process, under the ICSID Convention.⁴⁷⁷

⁴⁶⁹ DSU art 7.1.

⁴⁷⁰ See Draft Statute of the Multilateral Investment Court arts 40, 41.

⁴⁷¹ See DSU art 17; Draft Statute of the Multilateral Investment Court art 18.

⁴⁷² DSU art 17.1.

⁴⁷³ Draft Statute of the Multilateral Investment Court art 18.1, 18.3.

⁴⁷⁴ DSU art 17.6.

⁴⁷⁵ *Bossche and Zdouc* (n 15) 260.

⁴⁷⁶ See UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS), Note by the Secretariat, Thirty-Sixth Session, Vienna, 29 October–2 November 2018' (2018) A/CN.9/WG.III/WP.149 para 40; Draft Statute of the Multilateral Investment Court art 46.

⁴⁷⁷ See ICSID Convention art 52.

In terms of competence, the WTO Appellate Body and the MIC Appellate Instance Tribunal may equally uphold, modify, or reverse the decision of the First Instance Tribunal and the legal findings and conclusions of the Panel, respectively.⁴⁷⁸ By manner of operation, both the WTO Appellate Body and the MIC Tribunals are required to decide cases in chambers.⁴⁷⁹ However, the WTO Appellate Body Working Procedures requires the different chambers to exchange views prior to the finalization of any appellate report in order to foster consistency and coherence of decisions.⁴⁸⁰ While highly relevant for ISDS, this requirement is not envisaged in the MIC Draft Statute. However, it is currently contemplated in the UNCITRAL reform proposals concerning a stand-alone appellate mechanism.⁴⁸¹

With the existence of two levels of adjudication, erroneous decisions of the First Instance Tribunal may be reviewed and corrected at the appellate level. The correctness of decisions may presumably strengthen the legitimacy of decisions in ISDS, whereas the existence of an Appellate Instance Tribunal addresses the problem of the lack of a control mechanism in ISDS.⁴⁸² The MIC may incorporate the requirement of the exchange of views in a manner similar to the WTO when determining issues under the same treaty in order to ensure correctness and consistency. However, that should not lead to a situation of rulemaking outside the treaty parties' common intent, or conflict of interest.

Notwithstanding the above, the mere possibility of two-instance adjudication under the MIC warrants caution for several reasons:

(I). This jeopardizes the finality of awards and creates the potential to lengthen ISDS proceedings and increase costs.⁴⁸³ Unless the timeframes of proceedings under the MIC are strictly adhered to, disputes, especially in complicated cases, may go well beyond the average

⁴⁷⁸ Draft Statute of the Multilateral Investment Court art 47(3); DSU art 17(13).

⁴⁷⁹ DSU art 17.1; Draft Statute of the Multilateral Investment Court art 47(2).

⁴⁸⁰ See Working Procedures for Appellate Review 2010 (WT/AB/WP/6) r 4.

⁴⁸¹ See UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Appellate and Multilateral Court Mechanisms, Note by the Secretariat, Thirty-Eighth Session (Resumed) Vienna, 20–24 January 2020' (2019) A/CN.9/WG.III/WP.185 para 50; see also Bungenberg and Reinisch (n 10) para 637.

⁴⁸² Bungenberg and Reinisch (n 10) para 56.

⁴⁸³ Juan Pablo Charris-Benedetti, 'The Proposed Investment Court System: Does It Really Solve the Problems?' [2019] *Revista Derecho del Estado* 83, 83–115; See also CCIAG, 'Submission by the Corporate Counsel International Arbitration Group (CCIAG) to UNCITRAL Working Group III' (2019) para 52 <https://uncitral.un.org/sites/uncitral.un.org/files/cciag_isds_reform_0.pdf> accessed 23 November 2022.

duration for ISDS proceedings under the current single instance ad-hoc arbitration regime.⁴⁸⁴ Further, with broader merits-based grounds for appeal under the MIC, the potential for a rise in appeal and length of proceedings also increase. Finally, the possibility for further delays and the incurrence of additional costs also increases if the Appellate Instance Tribunal decides to remand a claim back to the First Instance Tribunal for reconsideration.⁴⁸⁵ Note that this does not exist under the WTO DSS.

(II). It cannot be expected that having an appellate tribunal will bring about general consistency and coherence in the system when the substantive laws that the tribunal is ruling on are usually different.

(III). With broader merits-based grounds for assessment and appeal, including the appreciation of domestic law, legitimacy challenges may arise against the court for judicial overreach and activism.

4.2.3. Adjudicator Appointment and Term of Office

The method of adjudicator appointment under the MIC and the term of office are some of the most significant departures of the MIC from the current ISDS regime under. While the changes under the MIC are modelled after the WTO, there are obvious distinctions between the two systems.

The appointment of judges at the WTO is carried out by WTO Members acting as the DSB – a political institution actively involved in WTO DSS.⁴⁸⁶ The DSB establishes WTO Panels⁴⁸⁷ as well appoints judges of the standing Appellate Body.⁴⁸⁸ Similarly, the appointment of judges at the MIC starts with a nomination by Members.⁴⁸⁹ These nominated judges shall be subsequently evaluated by the Plenary, a political body comprising of the representatives of all MIC

⁴⁸⁴ See 2.6 (Excessive Costs and Costs Recoverability)

⁴⁸⁵ This is considered at the UNCITRAL negotiations. See UNCITRAL Working Group III, ‘Appellate and Multilateral Court Mechanisms’ (n 480) para 24.

⁴⁸⁶ See *Bossche and Zdouc* (n 15) 224–225.

⁴⁸⁷ DSU art 2.1.

⁴⁸⁸ *ibid* 17.1.

⁴⁸⁹ Draft Statute of the Multilateral Investment Court art 12.1.

Members, acting as a screening committee.⁴⁹⁰ While Art. 2.4 of the DSU stipulates that decision making by the WTO DSB shall be carried out by consensus,⁴⁹¹ Art. 12.6 of the Draft Statute envisages a simple majority system for the election of judges.

A reform of this nature for ISDS would entail stripping away the right of the disputing parties to appoint arbitrators for their disputes. While this is aimed at enhancing independence and impartiality of judges, it risks creating the opposite as judges may now be subject to state influences, and the potential for politicization of ISDS increases.⁴⁹² A major achievement of ISDS over the past decades is the subjection of ISDS to party control. This allows disputing parties to appoint arbitrators that best suit their cases and as such grants them legitimacy even if there sometimes may be concerns of conflict of interest. Subjecting the appointment of MIC judges to a direct influence of its “political” Members may serve as an impediment to an objective selection process, leading to a situation where the appointment of judges unduly depends on their “good” relationship with MIC members instead of their competence to adjudicate investment disputes. This would be counterproductive to ensuring that only the best candidates serve as judges, especially if reappointment is concerned. UNCITRAL proposals, however, envisage a possibility to appoint judges through a selection panel comprising of former members of the Tribunal or members of international or national supreme courts, acting in their personal capacity without acceptance of instruction from any party or state.⁴⁹³ This would help address the conflicts of interest that may arise in the nomination of judges. Also, MIC’s departure from the consensus mechanism used by the WTO for the appointment of judges to a simple majority, as provided by the Draft Statute, is a positive development, which gives minimal possibilities for MIC Parties to block the appointment of competent candidates as judges – a problem that the WTO is currently facing.

Further, apart from the requirement to demonstrate expertise in law, international trade and the subject matter of covered agreements, the appointment of Judges at the WTO requires broad representation of its members.⁴⁹⁴ In that regard, factors such as geographical areas, levels of

⁴⁹⁰ *ibid* 12.2, 8; Bungenberg and Reinisch (n 10) para 106.

⁴⁹¹ Regarding the implication of consensus, see 5.4.

⁴⁹² UNCITRAL Working Group III, ‘Appointment of ISDS Tribunal Members’ (n 409) para 36.

⁴⁹³ *ibid* 40.

⁴⁹⁴ DSU art 17.3.

development, and legal systems are taken into consideration.⁴⁹⁵ Similarly, appointment at the MIC shall take into account the competence of nominated judges in, inter alia, international investment law and dispute settlement, regional diversity and principal legal systems.⁴⁹⁶ However, the MIC goes further than the WTO to require gender balance and linguistic diversity.⁴⁹⁷ Once appointed, both the WTO and the MIC subject the judges to strict rules of conduct to ensure independence and impartiality throughout their work.⁴⁹⁸ The judges shall work full-time, and shall refrain from engaging in any activity that would create a conflict of interest or external work without permission.⁴⁹⁹ Their assignment to different cases is on a random basis,⁵⁰⁰ and their remuneration shall come from their respective institutions and not from the disputing parties.⁵⁰¹

This ISDS reform that considers geographical, regional and gender diversity, amongst others, under the MIC would bring about greater legitimacy and acceptance of the system. Moreover, depending on who is appointed, this may improve the quality of ISDS decisions, as the bench of judges adjudicating disputes would be exposed to different perspectives, especially from different cultures and different levels of economic development. Such could foster more balanced decision making.⁵⁰² However, this reform entails a deviation from the principle that only the most qualified candidates should be appointed as judges.

The full-time appointment of judges and restriction from external work, assignment to cases on a random basis, and their remuneration directly coming from MICs budget may prevent conflict of interest and enhance their independence and impartiality. However, random assignment to cases, much like the appointment of judges by MIC Members in general undermines party

⁴⁹⁵ See 'Recommendations by the Preparatory Committee for the WTO Approved by the Dispute Settlement Body on 10 February 1995, Establishment of the Appellate Body, 10 February 1995' (1995) WT/DSB/1 para 6.

⁴⁹⁶ Draft Statute of the Multilateral Investment Court art 12.2.

⁴⁹⁷ UNCITRAL Working Group III, 'Appointment of ISDS Tribunal Members' (n 409) paras 18, 19, 36, 40, 44.

⁴⁹⁸ See Working Procedures for Appellate Review Annex II Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes; Draft Statute of the Multilateral Investment Court art 8.4, 18.1(b).

⁴⁹⁹ DSU art 17.3; Draft Statute of the Multilateral Investment Court arts 9, 13.

⁵⁰⁰ Working Procedures for Appellate Review r 6.2; UNCITRAL Working Group III, 'Appointment of ISDS Tribunal Members' (n 409) paras 60–63; Draft Statute of the Multilateral Investment Court art 44.4, 47.2.

⁵⁰¹ DSU art 17.8; Draft Statute of the Multilateral Investment Court 13.2.

⁵⁰² See UNCITRAL Working Group III, 'Appointment of ISDS Tribunal Members' (n 409) para 29.

autonomy and might even reduce the quality of decisions due a limitation on expertise and the number of judges. Given the very high technical and complex nature of arbitral disputes, subjecting their settlement to a limited pool of judges under an MIC might lead to a situation where the judges simply do not possess the requisite competence to deliver an effective judgment. Moreover, research has shown that it is untypical of permanent international courts to engage technical expertise, as well as demonstrated their lack of suitability for certain disputes, which are typical in arbitration, for the same reason.⁵⁰³

ICSID experience with the reliance on a limited roster to choose the Chair of a tribunal from the Panel of Arbitrators, composed of members mostly selected by ICSID state parties, when parties do not agree on a single candidate as a Chair legitimately warrants caution. At some point, the Secretariat and ICSID users became frustrated by the lack of qualified, non-conflicted, and available arbitrators.⁵⁰⁴ Furthermore, at times the ICSID Secretariat experienced situations in which, as a result of many cases filed against a particular sovereign, there were simply not enough members on the roster with the language skills required by the parties, and the “Secretariat was forced to seek agreements of the parties to depart from the roster.”⁵⁰⁵ In this regard, the current method of arbitrator appointment which allows disputants to have maximum flexibility in deciding on the appropriate arbitrators for each case remains the most viable option for ISDS. As each arbitration case is characterized by distinct legal and factual issues, the disputants are best positioned to appoint arbitrators in each case who will deliver a correct judgment that will be accepted by both sides. For instance, each disputant may appreciate certain experiences, knowledge of a pertinent industry or legal system, language skills, or other qualifications. Under the current party-appointment method, the disputants can

⁵⁰³ For the underuse of experts, non-reliance on expert opinions, and difficulties faced by permanent international courts in dealing with technical and scientific issues, see Matthew W Swinehart, ‘Reliability of Expert Evidence in International Disputes’ (2017) 38 62; The ICJ for instance has never used the assessors even though the possibility to use them is provided under Art. 30 (2) of its Statute. See *Internationaler Gerichtshof* (n 121) 27–28. It should be emphasized that arbitration gives more advantage to parties in technical and scientific disputes than permanent courts due to the fact that the selection of arbitrators is not limited to professionals with legal background.

⁵⁰⁴ See ‘Comments: Appointment of Arbitrators, Appellate Mechanism, and Enforcement Submitted by the Corporate Counsel International Arbitration Group and the United States Council for International Business December 4, 2020’ <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/120420_cciag_and_uscib_comments_on_december_15_uncitral_papers.pdf> accessed 11 November 2022.

⁵⁰⁵ *ibid.*

appoint a tribunal that incorporates these preferences. This “makes the arbitration the parties’ arbitration, deciding their dispute with their tribunal”.⁵⁰⁶ The outcome of such, thus, becomes legitimate from the parties’ perspective.

With regard to term of office for judges, a significant divergence exists between the WTO DSS and the MIC. While the WTO designates a 4- year term of office with the possibility for a single reappointment,⁵⁰⁷ the MIC Draft Statute stipulates a 9-year term with no possibility for reappointment.⁵⁰⁸ The long term of office may ensure consistency of ISDS decisions under the institution based on the same treaty provisions since many disputes would be resolved by the same bench of judges for a defined period. Diverging interpretations of the same treaty provision, such as Art. XI of the Argentina - US BIT, by different tribunals may thus be avoided.⁵⁰⁹ Further, the lack of a possibility for re-election would ensure that effective justice dispensation by the judges will not be marred by the fear of losing re-election due to rulings delivered against a particular state.⁵¹⁰ However, it would equally lead to a loss of valuable experience that would otherwise be beneficial for greater consistency and coherence of decisions.

4.2.4. Efficient Dispute Resolution: Alternatives to Adjudication, Advisory Centre, Timeframe of Proceedings

Under the WTO, various mechanisms are put in place to ‘promote’ the efficiency of the dispute settlement framework. These include consultation and alternative dispute resolution, provision of legal assistance to Members through an advisory centre, and short time frames for proceedings. These mechanisms are targeted at ensuring that only disputes with no possibility for mutually agreed solutions reach adjudication, mitigating costs, and limiting proceedings to

⁵⁰⁶ VV Veeder, ‘The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator—From Miami to Geneva’, *Practising Virtue* (Oxford University Press 2015) 387, 401.

⁵⁰⁷ DSU art 17.2.

⁵⁰⁸ Draft Statute of the Multilateral Investment Court art 14.1; Reappointment is, however, contemplated at the UNCITRAL. See UNCITRAL Working Group III, ‘Appointment of ISDS Tribunal Members’ (n 409) para 50.

⁵⁰⁹ See 2.4 (Inconsistencies in Decision-making)

⁵¹⁰ See why U.S blocked the re-election of WTO Appellate Body member Seung Wha Chang in Van den Bossche (n 15).

a reasonable timeframe,⁵¹¹ amongst other things. Given their significance, they have been proposed for ISDS reforms under the MIC.

First, consultation under the WTO system is a mandatory step for dispute settlement provided under Art. 4 of the DSU. The significance of consultation is recognized by the Appellate Body in *Mexico – Corn Syrup (Article 21.5 – US)(2001)*: “Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties, as well as to third parties and to the dispute settlement system as a whole”.⁵¹² Indeed, consultation has proven to be effective in WTO DSS as 40% of the disputes initiated between 1995 and December 2021 were resolved through it.⁵¹³ Moreover, since it provides a forum for disputing parties to find amicable solutions, and delimits the scope of dispute advancing to adjudication, it is both more cost-effective and preferable for the preservation of long-term trade relationships between the parties in comparison to adjudication.⁵¹⁴

While mandatory consultation is not envisaged under the Draft Statute of the MIC, this reform option is under consideration at the UNCITRAL.⁵¹⁵ Requiring mandatory consultation as a prerequisite for adjudication under the MIC would be essential for success of this dispute settlement mechanism. While investment treaties foresee a “cooling-off” period, ranging from three to eighteen months, and some IIAs provide for mandatory consultation, during which the disputing parties may attempt amicable settlement, before initiating arbitration,⁵¹⁶ practice

⁵¹¹ see DSU art 3.7.

⁵¹² *Mexico – Corn Syrup (Recourse To Article 215 Of The Dsu By The United States)* [2001] WTO WT/DS132/AB/RW, ABR [54].

⁵¹³ Only about 60% of the disputes initiated have led to panel establishment. See ‘WTO | Dispute Settlement - Dispute Settlement Activity — Some Figures’ <https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm> accessed 16 November 2022.

⁵¹⁴ Bossche and Zdouc (n 15) 285.

⁵¹⁵ see UNCITRAL Working Group III, ‘Dispute Prevention and Mitigation’ (n 401) paras 32, 46.

⁵¹⁶ *ibid* III; Bungenberg and Reinisch (n 10) 80–82.

shows that parties typically disregard consultation or do not engage with each other with the aim of having a constructive solution to their dispute where required under BITs.⁵¹⁷ In this regard, the success of consultation at the WTO could be replicated at the MIC only if implemented as a mandatory requirement. Nonetheless, where mandatory consultation already exists at the IIA level under some treaties, disputing parties should be exempted from this requirement at the MIC. Consultations could help reduce the rate of investment disputes that reach the stage adjudication.⁵¹⁸ However, there should be no persistence on this if the parties are already resolved to adjudicate their dispute. In addition, the MIC may be vested with screening power to register disputes, and tribunals the power to dismiss unfounded claims as it exists under ICSID.⁵¹⁹ This could help dismiss frivolous claims that could not be resolved through consultation at an early stage. However, it should only be used on an objective basis so as not to prevent access to justice through adjudication.

In parallel with consultations, albeit not a mandatory requirement, other alternative means of dispute resolution, such as good offices, mediation and conciliation, are provided under Art. 5 of the DSU. These, however, have not achieved the same success as consultation under the WTO DSS as there have been no reported cases of their use.⁵²⁰ Similarly, these means of dispute settlement have been advocated for ISDS reforms under the MIC.⁵²¹ Incorporating them into the framework of the MIC would be good for the promotion of amicable dispute settlement. However, whether they would actually be used by disputing parties is questionable. For

⁵¹⁷ see Jin Woo Kim and Lucy M Winnington-Ingram, 'Investment Court System Under EU Trade and Investment Agreements: Addressing Criticisms of ISDS and Creating New Challenges' (2021) 16 *Global Trade and Customs Journal* 182 <<https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/16.5/GTCJ2021020>> accessed 22 October 2022; Bungenberg and Reinisch (n 10) 81.

⁵¹⁸ Tackling investment complaints and grievances at an early stage to prevent escalation is a primary goal of dispute prevention and mitigation. See UNCITRAL Working Group III, 'Dispute Prevention and Mitigation' (n 384); See also UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of Thailand, Thirty-Seventh Session, New York, 1–5 April 2019' (2019) A/CN.9/WG.III/WP.162 para 25 <<https://undocs.org/en/A/CN.9/WG.III/WP.162>>.

⁵¹⁹ See 'Screening and Registration - ICSID Convention Arbitration | ICSID' <<https://icsid.worldbank.org/node/20116>> accessed 29 December 2022; ICSID Convention art 36(3).

⁵²⁰ To date, there have been no reported cases of the use of dispute settlement mechanisms under DSU Art. 5. see Bossche and Zdouc (n 15) 198.

⁵²¹ see UNCITRAL Working Group III, 'Dispute Prevention and Mitigation' (n 401) 45–48; UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of Thailand, Thirty-Seventh Session, New York, 1–5 April 2019' (n 517) para 24.

instance, mediation has existed in ICSID since its inception in 1966, but it has been rarely used.⁵²² Perhaps, that might be indicative of a preference for binding dispute settlement.

Second, the Advisory Centre on WTO Law (ACWL) – an organization independent of the WTO, has been set up to provide legal services to developing and least-developed countries.⁵²³ It provides free legal advice and training on WTO law and assists these countries in WTO dispute settlement proceedings at discounted rates.⁵²⁴ Since its establishment in 2002, the organization has assisted in 70 WTO dispute settlement proceedings, and has issued more than 200 legal opinions yearly.⁵²⁵ Its functioning enables developing and least developed countries to obtain a full understanding of their rights and obligations under WTO law, which is instrumental for both their development of national policies in a manner that will not be WTO-inconsistent, and dispute prevention and mitigation. It also affords them an equal opportunity to defend their interests in WTO dispute settlement proceedings.

Similarly, an Advisory Centre on International Investment Law (ACIIL) is envisaged under the MIC.⁵²⁶ The ACIIL, independent of other MIC organs, shall be set up to provide legal assistance to small and medium enterprises (SMEs), as well as developing countries, which lack the resources and institutional capacity to effectively respond to Investor-state disputes.⁵²⁷ In a similar fashion to the ACWL, the ACIIL may provide training on international investment law and further education to members of the MIC.

⁵²² See ‘Overview of a Mediation - ICSID Mediation (2022) | ICSID’ <<https://icsid.worldbank.org/procedures/mediation/overview/2022>> accessed 27 December 2022; ‘ICSID Releases New Caseload Statistics for the 2022 Fiscal Year | ICSID’ <<https://icsid.worldbank.org/news-and-events/news-releases/icsid-releases-new-caseload-statistics-2022-fiscal-year>> accessed 27 December 2022.

⁵²³ See the purpose of this organization in Agreement Establishing the Advisory Centre on WTO Law art 2.

⁵²⁴ see ‘Home’ (ACWL) <<https://www.acwl.ch/>> accessed 17 November 2022; Niall Meagher, ‘Representing Developing Countries before the WTO: The Role of the Advisory Centre on WTO Law (ACWL)’ <<https://cadmus.eui.eu/handle/1814/35747>> accessed 17 November 2022.

⁵²⁵ see ACWL, ‘Report on Operations 2021’ 17, 26 <https://www.acwl.ch/download/dd/reports_ops/Final-Report-on-Operations-2021-FOR-WEBSITE.pdf> accessed 17 November 2022.

⁵²⁶ see UNCITRAL Working Group III, ‘Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of Thailand, Thirty-Seventh Session, New York, 1–5 April 2019’ (n 482) paras 26–27; Draft Statute of the Multilateral Investment Court art 10; UNCITRAL Working Group III, ‘Dispute Prevention and Mitigation’ (n 384) paras 27–28, 47–48. The UNCITRAL also considers setting up the Advisory Centre as an alternative dispute settlement institution.

⁵²⁷ Draft Statute of the Multilateral Investment Court art 10; see also UNCITRAL Working Group III, ‘Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of Thailand, Thirty-Seventh Session, New York, 1–5 April 2019’ (n 517) para 26.

This initiative may be very significant for the investment regime if implemented. Not only would it reduce barriers to access to justice for SMEs and developing countries, it would also provide them a better understanding of their rights and obligations under investment treaties. This would help address their investment-related grievances/complaints at an early stage and prevent escalation into legal disputes. Likewise, it may help to ward off frivolous claims by investors as they would have a better understanding of the prospects for success of their disputes if they reach adjudication. However, the Centre must be equipped with experts comparable to the best available in the market to provide states and investors the incentive to use its services. Equally, it should be noted that the establishment of ACIIL would also increase the cost of the system as it will require funding. The cost of maintaining the ACIIL should not financially constrain the MIC members, especially those who do not use its services.

Finally, unlike dispute settlement under most international courts and tribunals, short time frame of proceedings is a defining feature of the WTO DSS. Dispute settlement proceedings at the WTO are limited to clearly defined timeframes. The same is envisaged under the MIC, albeit with negligible modifications.

Under the WTO, Panel proceedings shall, as a general rule, not exceed 6 months (or 3 months in cases of urgency) from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties.⁵²⁸ This period may be extended to a maximum of 9 months if a Panel considers it infeasible for any given case.⁵²⁹ Similarly, the MIC limits First Instance proceedings to 6 months,⁵³⁰ and may allow extension to a maximum of 9 months if infeasible.⁵³¹ In the case of appeal proceedings, the WTO, as a general rule, sets a limit of 60 – 90 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report.⁵³² However, the MIC

⁵²⁸ DSU art 12.8.

⁵²⁹ *ibid* 12.9.

⁵³⁰ Draft Statute of the Multilateral Investment Court art 43.1.

⁵³¹ *ibid* 43.2.

⁵³² DSU art 17.5. Although the DSU does not provide any specific timeframe for urgent proceedings on the appellate level, it does specify that both disputing parties as well as Panels and the Appellate body ‘shall make every effort to accelerate the proceedings to the greatest extent possible’ under Art. 4.9. Practice shows that urgent cases are generally treated in half the timeframe required for standard appeal proceeding. See Bossche and Zdouc (n 15) 268.

stipulates a timeframe of 90 – 120 days from the date an appeal is lodged by a party to the date of adoption of the decision of the Appellate Instance Tribunal.⁵³³

An initiative to cut down ISDS timeframe from 3 - 5 years on average to just about 6 months by a First Instance Tribunal and 90 days by the Appellate Instance would contribute to the reduction of “excessive” costs and duration of ISDS proceedings. Dispute settlement at the MIC could indeed be accelerated if the judges are vested with sufficient powers to ensure control. However, a fundamental question is whether this short timeframe effectively strikes a balance between cost and duration, on the one hand, and quality of decisions rendered, on the other hand. The WTO experience clearly proves otherwise.⁵³⁴ Given the distinct nature of each ISDS case and its complexities, it is highly unlikely that dispute resolution would be feasible within these time limits. In fact, given the average duration stated above, it should be expected that disputes would often exceed these time limits than meet them. Short time frames may further serve as a constraint on the ability of the judges to deliver judgements of the highest quality, as well as possibly drive a wedge between the MIC members and the DSS as a whole if the judges fail to meet the timeframes.

4.2.5. Transparency

The WTO DSU stipulates that consultations, Panel proceedings, and Appellate Body proceedings shall be confidential.⁵³⁵ This confidentiality requirement is pertinent to: (i) the written submissions of disputing parties, third parties and other participants; (ii) meetings of Panels with parties and the Appellate Body hearings and; (iii) Panel reports, to some extent.⁵³⁶ This has led to criticism of the DSS for lack of transparency in a manner akin to the current

⁵³³ Draft Statute of the Multilateral Investment Court art 48.

⁵³⁴ see Bossche and Zdouc (n 10) 267–269. Panel proceeding at the WTO last 16 months on average, thus exceeding the standard timeframes of 6 and 9 months. Likewise, Appellate Body proceedings have in almost all cases exceeded the 60-90 day timeframe as they take about 141 days on average. See also 5.6.

⁵³⁵ DSU art 4.6 (with regard to consultations), Appendix 3 (with regard to Panel proceedings), and art 17.10 (with regard to Appellate Body proceedings).

⁵³⁶ See *ibid* 4.6, 17.10, 18.2, para 2 of Appendix 3. Interim and final panel reports are confidential as long as they have only been issued to the disputing parties and not circulated to all WTO Members. See discussions on this topic in Bossche and Zdouc (n 15) 269–275.

ISDS regime.⁵³⁷ Consequently, ISDS reforms pertaining to the lack of transparency diverge from the mechanism under the WTO.

Transparency in ISDS is dealt with differently by various institutions. For instance, ICSID subjects issues of transparency concerning whether to keep private or make public written submissions and oral hearings, as well as whether to allow submissions of non-disputing parties to parties' agreement.⁵³⁸ However, the secretariat shall publish a Register for each case containing, inter alia, the names of parties, economic sector, and membership of each tribunal.⁵³⁹ Absent parties consent for the full publication of an award or its redacted version, the Secretariat shall publish an excerpt of the award.⁵⁴⁰ Parties are under the obligation to disclose any third-party funders.⁵⁴¹ Under UNCITRAL, virtually all aspects of the proceedings, including names of parties, written submissions and oral hearings as well as awards, are made public in accordance with the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention).⁵⁴² Third parties may also file written submissions.⁵⁴³ UNCITRAL, however, is yet to have formal provisions on third-party funding.⁵⁴⁴ While the rules under these institutions are largely liberal in nature, such is not the case under other institutions, such as the ICC, especially with regard to public access and access to information while the dispute is going on, as well as disclosure of awards.⁵⁴⁵ For this reason, ISDS reforms pertaining to the lack of transparency under the MIC largely aim at incorporating ICSID and UNCITRAL rules, focusing on disclosure and third-party funding.

⁵³⁷ See Bossche and Zdouc (n 15) 269.

⁵³⁸ ICSID Arbitration Rules 2022 rr 30, 32, 64, 65, 69.

⁵³⁹ ICSID Administrative and Financial Regulations 2022 reg. 26.

⁵⁴⁰ ICSID Arbitration Rules r 62(4).

⁵⁴¹ *ibid* 14.

⁵⁴² See UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration arts 1–7.

⁵⁴³ *ibid* 5.

⁵⁴⁴ See different possible models for third-party funding regulation in 'Initial Draft on the Regulation of Third-Party Funding' <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/210506_tpf_initial_draft_for_comments.docx>.

⁵⁴⁵ See more in-depth discussion on this in 1.2.6 (Confidentiality) and 2.5 (Transparency). With regard to arbitration under the ICC, the case reference number, names of parties and whether the case is ongoing will not be disclosed. Awards shall only be published after two years under certain conditions. See 'ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration' (n 162) s IV.

With regard to disclosure, Art. 8 (4) of the Draft Statute of calls for a direct application of UNCITRAL’s Mauritius Convention under the MIC.⁵⁴⁶ Implementing this reform would necessitate the publication of information upon the submission of a claim, and all subsequent documents related to the dispute (such as parties’ written pleadings and the entire award),⁵⁴⁷ and the conduction of oral hearings in public.⁵⁴⁸ It would also empower the MIC to accept Amicus Curiae briefs from interested third persons in ISDS disputes.⁵⁴⁹ This reform is under the caveat that business and trade secrets would not be disclosed, and the integrity of the arbitral process must not be compromised.⁵⁵⁰

While this reform would address the criticisms against the lack of transparency in ISDS, it goes against the core tenet of this dispute settlement mechanism – confidentiality. Confidentiality is a value appreciated by ISDS parties to the extent that, in some instances, even their names would not be disclosed to avoid public attention and influence, let alone grant full disclosure. It remains to be seen whether they would be willing to give up such “value” in the interest of a greater acceptance and legitimacy of the system. Currently, the prospects for that remain bleak as evidenced by the reluctance of an overwhelming majority of states to ratify the Mauritius Convention.⁵⁵¹ That does not mean, however, that all information about ISDS proceedings may not be available, as the opposite can be seen under ICSID.

Pertaining to third-party funding, Art. 52 of the Draft Statute of the MIC stipulates that in the event of third-party funding, the beneficiary shall disclose to the other disputing party and to the MIC the name and address of the third-party funder at the time of the submission of a claim

⁵⁴⁶ Draft Statute of the Multilateral Investment Court art 8(4); see also UNCITRAL Working Group III, ‘Multilateral Instrument on ISDS’ (n 404) paras 26–28.

⁵⁴⁷ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration arts 2–3.

⁵⁴⁸ *ibid* 6.

⁵⁴⁹ *ibid* 4.

⁵⁵⁰ *ibid* 7.

⁵⁵¹ Currently, only 9 out of a total of 23 signatories have ratified the Mauritius Convention. This means that at least 173 states are not parties to it. See ‘United Nations Treaty Collection’ <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&clang=_en> accessed 27 November 2022; See also Aceris Law LLC, ‘Transparency in Investor-State Arbitration: The Mauritius Convention • Aceris Law’ (*ACERIS LAW*, 23 December 2016) <<https://www.acerislaw.com/transparency-investor-state-arbitration-mauritius-convention/>> accessed 27 November 2022.

or upon receipt of funds. At the UNCITRAL, some proposals have called for an outright ban on third-party funding.⁵⁵²

The disclosure of third-party funding would help give an objective view of the prospects of enforcement of ISDS awards, especially against impecunious investors. While such prospects could be positive or negative in some instances, they should not lead to an outright prohibition of third-party funding as that would likely impede access to justice even for disputes premised on legitimate grounds. Instead, third-party funders could be obliged by the MIC to sign an undertaking of enforcement of ISDS decisions which go against their beneficiaries.⁵⁵³ If infeasible, an objective assessment could be carried out on a case-by-case basis to determine an investor's potential to enforce an award. Regulating third-party funding may discourage frivolous claims and encourage amicable dispute settlement as funders will be aware of the obligations incumbent on them when a dispute that they have funded fails to succeed in adjudication.

4.2.6. Role of Treaty Parties in Treaty Interpretation

Under the WTO DSS, the power to adopt "authoritative" treaty interpretation is exclusively vested in the Ministerial Conference and the General Council in accordance with Art. IX:2 of the WTO Agreement.⁵⁵⁴ The decision to adopt an interpretation of the WTO and WTO Multilateral Trade Agreements shall be carried out by a three-fourths majority of the Members.⁵⁵⁵ Such interpretation shall be of general validity for all WTO Members. While the DSU implicitly recognizes that Panels (and Appellate Body on appeal proceedings) may develop legal interpretations under Art. 17.6 while fulfilling its mandate of clarification of WTO agreements pursuant to Art. 3.2, any such interpretation shall only apply to the parties

⁵⁵² UNCITRAL Working Group III, 'Third-Party Funding' (n 403) para 37.

⁵⁵³ The core problem with this is the determination of the responsibility of a third-party funder under binding arbitration. Since it is not a party to the dispute different legal questions may arise. See *ibid* 29.

⁵⁵⁴ WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, adopted 15 April, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 art IX:2.

⁵⁵⁵ *ibid*.

and to the subject matter of a specific dispute.⁵⁵⁶ In that regard, the DSU mandate to clarify WTO rules shall not prejudice the rights of Members to seek authoritative interpretations.⁵⁵⁷

Similarly, Art. 8.3 of the Draft Statute of the MIC vests the power to adopt an authoritative interpretation of the Statute, which shall apply to all MIC organs, in the Plenary.⁵⁵⁸ However, unlike the WTO, the decision on interpretation shall be adopted by consensus.⁵⁵⁹ The Draft Statute also recognizes the power of the tribunals to adopt legal interpretations pertinent to specific disputes.⁵⁶⁰ Accordingly, both the Plenary and the Courts can adopt interpretations, albeit the former's scope is circumscribed to MIC provisions, whereas the latter to the law of treaty parties applicable to specific dispute. However, substantive treaty interpretation still remains within the purview of treaty parties and is not subject to a multilateral determination under the MIC.⁵⁶¹ As an option, treaty parties may have recourse to the MIC to resolve disputes concerning treaty interpretation.⁵⁶²

Consequently, unlike the WTO, treaty interpretation under the MIC is fragmented. While the interpretation of MIC provisions is multilateral, that of substantive treaty provisions is treaty-party-based. Where each treaty is subject to interpretation by different parties, it cannot be expected that the interpretations will necessarily be the same. Further, while the MIC provides a possibility for treaty parties to resolve disputes concerning treaty interpretation under it, it is questionable whether MIC Members would use it. Under the current investment regime, several investment treaties provide a possibility for the involvement of treaty parties in treaty interpretation by issuing interpretations that become binding on ISDS tribunals;⁵⁶³ some,

⁵⁵⁶ See Asif H Qureshi, *Interpreting WTO Agreements* (2nd edn, Cambridge University Press 2015) 73; See also *US — Clove Cigarettes* [2012] WTO WT/DS406/AB/R, ABR [257–258].

⁵⁵⁷ WTO Agreement art IX:2; DSU art 3.9.

⁵⁵⁸ Draft Statute of the Multilateral Investment Court art 8.3.

⁵⁵⁹ *ibid*; Proposals at the UNCITRAL also call for similar reform options in the form of joint interpretations by treaty parties and a consensus mechanism for the adoption of decisions. See UNCITRAL Working Group III, 'Treaty Interpretation by Parties' (n 400) paras 46–56.

⁵⁶⁰ See Draft Statute of the Multilateral Investment Court art 46(f). This recognizes grave errors in interpretation of applicable law as one of the grounds for appeal.

⁵⁶¹ See UNCITRAL Working Group III, 'Treaty Interpretation by Parties' (n 400) paras 11, 15.

⁵⁶² See Draft Statute of the Multilateral Investment Court arts 20, 22. This subject to parties' consent.

⁵⁶³ See Rodrigo Polanco, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* (1st edn, Cambridge University Press 2019)

however, explicitly foresee the non-applicability of such (joint) interpretations once a tribunal is constituted.⁵⁶⁴Tellingly, treaty parties have rarely made use of such treaty interpretation mechanisms.⁵⁶⁵In this regard, given the reluctance of states and impediments to use the treaty-party interpretation mechanism even on a bilateral setting, an improvement should not necessarily be expected under a multilateral institution. For instance, the WTO has never adopted an authoritative treaty interpretation envisaged by Art. IX:2 of the WTO Agreement.⁵⁶⁶This, perhaps, is indicative of how problematic this mechanism is, as well as the challenges of finding a common opinion on a treaty that has already been adopted, especially since the diverging views may be beneficial for some of the treaty parties in specific cases.

4.2.7. Right to Regulate

In the WTO system, the rights of Members to regulate are explicitly recognized under various WTO-covered agreements. The WTO DSB, Panels and Appellate Body can neither add nor diminish these rights through their rulings or recommendations.⁵⁶⁷Pursuant to GATT Art. XX, Members may take measures necessary for the protection of human, animal or plant life or health, and conservation of exhaustible natural resources, amongst others.⁵⁶⁸This exceptions clause affords Members the policy space to pursue legitimate policy objectives that would otherwise be WTO inconsistent.

Similarly, the MIC aims at safeguarding Members' right to regulate. Art. 28.1(e) of the Draft Statute stipulates that the MIC judges shall "take into account the Member's right to regulate" in their decisions.⁵⁶⁹ This explicit recognition of Members' right to regulate aims to safeguard

<<https://www.cambridge.org/core/product/identifier/9781108628983/type/book>> accessed 5 October 2022; UNCITRAL Working Group III, 'Treaty Interpretation by Parties' (n 400) paras 19, 31, 36–40.

⁵⁶⁴ See UNCITRAL Working Group III, 'Treaty Interpretation by Parties' (n 400) para 19.

⁵⁶⁵ See *ibid* 17.

⁵⁶⁶ see 'WTO ANALYTICAL INDEX WTO Agreement – Article IX (Jurisprudence)' 2–5 <https://www.wto.org/english/res_e/publications_e/ai17_e/wto_agree_art9_jur.pdf>.

⁵⁶⁷ DSU art 3.2, 19.2.

⁵⁶⁸ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 art XX.

⁵⁶⁹ Some IIAs contain this as well as GATT exceptions. See EU – Canada CETA art 8.9, 28.3; USMCA Preamble, art 32; See discussions on this in Céline Lévesque, 'The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy' in Pierre Sauvé and Roberto Echandi (eds), *Prospects in International Investment Law and Policy: World Trade Forum* (Cambridge University Press 2013).

the regulatory autonomy of states against claims that might otherwise impinge on their sovereignty in adopting measures pursuing legitimate objectives.

While this reform is aimed at addressing the regulatory chill of ISDS claims, the mere recognition of such a right by itself under the Statute would not suffice in meeting this objective. Fundamentally, it is improbable that a permanent court of a multilateral nature would have a less chilling effect on states than the current ISDS regime characterized by ad-hoc arbitral tribunals, which cannot invoke institutional authority in their decisions.⁵⁷⁰ In fact, the opposite could be true. Indeed, law, by its very nature chills state conducts,⁵⁷¹ – a consequential effect of which does not depend on the framework or body enforcing it.⁵⁷² Speaking about the effect of international law, the PCIJ in its very first merits judgment, *S.S. Wimbledon*, noted:

*“The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction on the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.”*⁵⁷³ This, thus, affirms that it is characteristic of law to restrain state conduct.

Moreover, even where state right to regulate is explicitly recognized as in the case of the WTO under GATT Art. XX, the invocation of an exception to pursue a legitimate objective is subject to meeting a two-tier test: (i) provisional justification under paragraphs (a)-(j), and (ii) fulfilling the Chapeau requirement.⁵⁷⁴ Out of about 44 cases that have invoked this defence, only one

⁵⁷⁰ The public authority exercised by ISDS tribunals and effect of their decisions is more limited in comparison to permanent international courts. see Stephan W. Schill (n 2) 3–5; See also Armin von Bogdandy and Ingo Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (Oxford University Press 2014) <<https://oxford.universitypressscholarship.com/10.1093/acprof:oso/9780198717461.001.0001/acprof-9780198717461>> accessed 9 September 2022.

⁵⁷¹ See Tietje, Buatte and Baetens (n 217) 80.

⁵⁷² Both international law, enforced by international tribunals and courts, such as the WTO, and domestic law alike, enforced by local courts, chill state conduct, requiring governments to act within certain limits and not breach legitimate expectations. See Miller and Hicks (n 20) 29. ‘ISDS imposes a chill on governments’ ability to “misregulate”, i.e., to act in an arbitrary, discriminatory, unfair, and inequitable manner.’

⁵⁷³ *SS Wimbledon (UK v Japan)* [1923] PCIJ ser. A No. 1 25.

⁵⁷⁴ The chapeau itself requires two conditions to be met (i) a trade restrictive measure must not constitute a ‘means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail’; or (ii) be ‘a disguised restriction on international trade’. See GATT art XX; The WTO sets a restriction on state invocation and potential abuse of the exceptions by requiring the Panels and Appellate Body to strike a balance between the rights of a Member to invoke exceptions, on the one hand, and the substantive rights of other members under the GATT,

has ever succeeded.⁵⁷⁵ Further, in cases where states have tried to use the GATT exceptions as a defence, the states have lost both the case and the defence in more than 97% of the time.⁵⁷⁶ A similar situation could be seen in new treaties that incorporate such GATT exceptions for ISDS.⁵⁷⁷ This thus calls into question whether a shift from ad-hoc arbitration to a permanent institution would provide any remedy to the regulatory chill concerns simply because state right to regulate is recognized under the institution's statute.

4.2.8. Enforcement

Enforcement under the WTO and MIC significantly diverge. This is not surprising considering the differences in operation of both systems of dispute settlement.

While the WTO only entertains trade disputes from states, *mainly* concerning a “class” of goods or services originating from one Member and not a single enterprise,⁵⁷⁸ ISDS is characterized by the settlement of claims filed by, *mainly*, individual investors against sovereign states over violations of specific treaty commitments.⁵⁷⁹ The implication is such that the enforcement of trade disputes would normally require remedying inconsistency of state measures through the withdrawal or modification of terms of trade (for example laws, regulations and/or tariff rates) concerning the goods in question by a losing party, whereas that is not the case for ISDS.⁵⁸⁰ ISDS calls for the compensation of an investor, i.e making the investor whole, following a breach of commitment. The compensation for “past damage”, however, is not available under the WTO DSS.⁵⁸¹

on the other hand. See *US — Shrimp* [1998] WTO WT/DS58/AB/R, ABR [156]; see also *EC — Seal Products* [2014] WTO WT/DS400/AB/R; WT/DS401/AB/R, ABR [5.297]; For a detailed analysis of WTO jurisprudence on the chapeau, see Bossche and Zdouc (n 10) ch 8.

⁵⁷⁵ see Public Citizen, ‘Only One of 44 Attempts to Use the GATT Article XX/GATS Article XIV “General Exception” Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception’ (2015) <https://www.citizen.org/wp-content/uploads/general-exception_4.pdf>.

⁵⁷⁶ *ibid.*

⁵⁷⁷ see Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (Oxford University Press 2021).

⁵⁷⁸ This does not mean that claims on the basis of measures against goods or services from a single enterprise cannot arise.

⁵⁷⁹ See Miller and Hicks (n 20) 1.

⁵⁸⁰ See *ibid.*

⁵⁸¹ Under the WTO DSS, only two categories of remedies exist: (i) final remedies, and (ii) temporary remedies. Final remedies require the withdrawal or amendment of a WTO inconsistent measure (DSU, art 3.7) immediately

Against this backdrop, ISDS reforms concerning enforcement focus on cost recoverability and the mechanism of enforcing awards (including compensation).

With regard to cost recoverability, Art. 58 of the Draft Statute of the MIC envisages the establishment of an “enforcement fund” (security for cost) for the satisfaction of successful costs awards against state parties.⁵⁸² Members shall contribute to the fund upon accession.⁵⁸³ Proposals at the UNCITRAL suggest that the security for cost could be ordered against impecunious investors at the beginning of the proceedings to prevent any potential non-enforcement of costs awards.⁵⁸⁴

A reform of this nature would ensure the enforcement of ISDS cost awards by both states and investors. Ordering the security for costs would deter frivolous claims and ensure that costs would be recovered if a party loses a case. This would, thus, address problems concerning cost recoverability. However, it, at the same time, risks serving as a barrier for SMEs to access justice. Further, ordering the security for costs might be unjustifiable, particularly if the impecuniosity of an investor results from a state measure.⁵⁸⁵

Regarding the enforcement mechanism, Art. 56 of the Draft Statute stipulates that MIC Members shall enforce pecuniary obligations imposed by tribunal decisions as if they were final decisions of their highest domestic courts.⁵⁸⁶ This is akin to enforcement under ICSID Convention Art. 54. Further, since the MIC has its own self-contained system for review of decisions under Art. 46 of the Draft Statute,⁵⁸⁷ decisions are not subject to scrutiny by any national courts as in the case with non-ICSID awards, typically subject to the New York Convention.

or within a reasonable period of time (DSU, art 21.3). Temporary remedies include (i) compensation of “future” damage caused by WTO inconsistent measure (DSU, art 3.7, 22), and (ii) suspension of concessions or other obligations (DSU, art 3.7, 22). These temporary remedies can be applied pending withdrawal or modification of a WTO inconsistent measure. See Bossche and Zdouc (n 15) 210-222 (types of remedies) and 302-312 (enforcement).

⁵⁸² Draft Statute of the Multilateral Investment Court art 58.1, 58.3.

⁵⁸³ *ibid* 8.2.

⁵⁸⁴ See UNCITRAL Working Group III, ‘Security for Cost and Frivolous Claims’ (n 402).

⁵⁸⁵ See *ibid* 6.

⁵⁸⁶ Draft Statute of the Multilateral Investment Court art 56.

⁵⁸⁷ *ibid* 46.

Providing the MIC with its own enforcement mechanism would prevent problems with the enforcement of its decisions, such as the determination of whether MIC decisions could qualify as arbitral awards, which could arise under other forums such as ICSID or the New York Convention.⁵⁸⁸ Further, by not subjecting MIC decisions to scrutiny of national courts, legal uncertainty due to potential divergent rulings on the same treaty provisions may be avoided. Nonetheless, enforcement under the ICSID or New York Convention would offer more advantages as they are well established with global participation. In this regard, the establishment of an independent MIC mechanism of enforcement would only make sense if most states became parties to its Statute. For investors, the MIC enforcement mechanism does not offer any greater advantages than the current system under ICSID in terms of enforcing compensation for damages. Given the almost identical nature of the enforcement mechanisms under both institutions, difficulties may still arise if a state elects not to voluntarily comply with the requirement to pay compensation in arbitral awards since it would then be up to other MIC Members to enforce it. In any event, states are shielded by the doctrine of sovereign immunity which raises problems with the use of their assets to enforce ISDS awards.

CHAPTER 5: LESSONS LEARNED FROM THE WTO

⁵⁸⁸ See discussions on this in Bungenberg and Reinisch (n 10) 155–172.

5.1. Nature of the WTO System and Investment Regime: Issues of Consistency and Coherence

If established, the MIC would mark a significant milestone in ISDS. The departure from an ad-hoc adjudicatory system to one under a permanent court would necessitate a careful consideration of reform measures to be implemented in order to ensure the sustainability of the new system. In that regard, valuable lessons could be learned from the nearly 30 years of experience of the WTO DSS, especially since the MIC is modelled after it.

Of paramount significance is the need to understand the difference between the WTO system and the investment regime. This is crucial is to address ISDS concerns relating to inconsistency and lack of coherence of arbitral decisions.

First, while the WTO has a single, comprehensive and integrated system of laws applicable to all disputes and parties, that is not the case under the investment regime. ISDS is subject to a complex web of IIAs existing in thousands. These laws contain substantive standards that may be “similar” but their conceptualization is distinct to each treaty.

Second, even in the WTO, characterized by a single system, divergencies exist in the interpretation of substantive standards under different and even “the same” treaty articles. Thus, there is no generic rule that applies without taking into consideration the distinctions in the wording and structure of treaty provisions. For instance, the standard of national treatment across various WTO agreements has generated different interpretations and substantial case law. Five of these under the GATT, GATS and Technical Barriers to Trade Agreement (TBT) are illustrated below:

- i. GATT Art. III:2, first sentence, prohibits taxation of imported products in excess of domestic like products.⁵⁸⁹ The wording of this provision does not require a separate demonstration that the measure is applied to provide protection to domestic production. Art. XX exceptions are applicable.

⁵⁸⁹ See jurisprudence on this in ‘WTO ANALYTICAL INDEX GATT 1994 – Article III (Jurisprudence)’ 15–28 <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art3_jur.pdf>.

- ii. GATT Art. III:2, second sentence, applies to the broader class of "directly competitive or substitutable" products.⁵⁹⁰ The wording of this provision requires a separate demonstration that the measure is applied to provide protection to domestic production. Art. XX exceptions are applicable.
- iii. GATT Art. III:4, requires that in respect of all "laws, regulations, and requirements", "treatment no less favourable" be given to domestic like products.⁵⁹¹ Art. XX exceptions are applicable.
- iv. TBT Art. 2.1, similar in its wording to GATT Art. III:4, but in respect of which there is an important structural difference.⁵⁹² GATT Art. XX exceptions are not applicable.
- v. GATS Art. XVII, generally similar to GATT Art. III:4, but which applies to "like services *and* services suppliers".⁵⁹³ General exceptions are available in GATS Art. XIV.

The above, thus, illustrates that even under the same system and treaty, divergencies may exist in the interpretation of substantive standards. In that regard, developing consistency and coherence of the ISDS regime does not entail disregarding the wording and structural differences in investment treaties. A court or tribunal may be acting in excess of its powers to act in such a manner. This would have implications for both the acceptance of the decisions and their enforcement. For this reason, the mere establishment of an MIC will not make a difference from how the system currently operates under ad-hoc arbitral tribunals. While the MIC may be able to achieve consistency within its own system, that may not be possible under a single model, as seen in the case of the WTO.

Lastly, even if consistency is achieved under the MIC with its own model(s), ad-hoc arbitral tribunals would continue to issue their own separate rulings with no obligation to apply MIC

⁵⁹⁰ See *ibid* 29–40.

⁵⁹¹ See *ibid* 42–68.

⁵⁹² ‘WTO ANALYTICAL INDEX TBT Agreement – Article 2 (Jurisprudence)’ 2–14 <https://www.wto.org/english/res_e/publications_e/ai17_e/tbt_art2_jur.pdf>.

⁵⁹³ ‘WTO ANALYTICAL INDEX GATS – Article XVII (Jurisprudence)’ 1–7 <https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art17_jur.pdf>.

models. This, thus, implies that issues of lack of consistency and coherence would continue to exist, and the new model(s) developed by the MIC would only lead to more fragmentation.

5.2. Coordination between First and Appellate Instance Tribunals: Implications of Scope of Mandate and Remand Power

In the WTO DSS, Panels have the mandate to examine matters referred to the DSB and to make such findings as will assist the DSB in making recommendations or in giving rulings.⁵⁹⁴ Such “matters” consist of (i) the specific measure(s) at issue and; (ii) the legal basis of complaint.⁵⁹⁵ On the other hand, the WTO Appellate Body is restricted to the determination of issues of law covered in the panel report and legal interpretations developed by the panel.⁵⁹⁶ Further, the Appellate Body does not possess the authority to remand issues back to the Panel for consideration.

Since the scope of appellate review is limited to issues of law and legal interpretations, and the Appellate Body has no authority to remand cases back to the original panel, it is possible for certain issues in a dispute to be left undetermined. In specific, where the Appellate Body modifies or reverses a panel's legal interpretation, there is the possibility that the Appellate Body may not be able to complete the analysis provided this would require the Appellate Body to make new factual findings.⁵⁹⁷ To resolve this problem, the WTO Panels and the Appellate Body have adopted different approaches.

For its part, the Appellate Body tries to complete the analysis, where possible, based on undisputed facts on record, or based on the existing factual findings contained in the underlying panel report. The Appellate Body has been able to complete the analysis in many cases. However, it has not been able to do so in some.⁵⁹⁸

⁵⁹⁴ DSU art 7.1.

⁵⁹⁵ See *Guatemala — Cement I* (n 467) paras 72, 76.

⁵⁹⁶ DSU art 17.6.

⁵⁹⁷ See for example, *Canada — Feed-In Tariff Program* [2013] WTO WT/DS412/AB/R; WT/DS426/AB/R, ABR [5.224]; *US — Zeroing (EC)* [2006] WTO WT/DS294/AB/R, ABR [228].

⁵⁹⁸ See *ibid.*

The Panels, for their part, sometimes make alternative findings in case their legal interpretation is reversed or modified on appeal.⁵⁹⁹ Such findings could take the form, for example, of a panel finding that a threshold element of a claim or defence has not been met, but proceeding with the analysis on an *arguendo* basis in order to give the Appellate Body the factual findings necessary to complete the analysis.

By contrast, the Draft Statute of the MIC does not set any limitations on the mandate of the Appellate Instance Tribunal. Hence, it can review both issues of law and fact contained in appealed decisions of the First Instance Tribunal.⁶⁰⁰ Given this expansive scope, remand does not appear necessary for MIC Appellate Tribunal. However, this is being considered in the UNCITRAL negotiations.⁶⁰¹

Alternatively, should the MIC's Appellate Tribunal eventually have a limited mandate as in the case of the WTO and have no power to remand disputes to the First Instance Tribunal, the WTO approach may be adopted to ensure that all or most disputes are successfully determined at the appellate level.

In any event, whether the MIC would provide broader merits-based grounds for appeal, or the Appellate Tribunal would be vested with remand authority, both would have implications for the time and costs of ISDS proceedings. The WTO Appellate Body was largely initially able to provide expedient judgments within stipulated time frames and minimize costs due to the limited scope of its mandate and powers. To that end, it would be too ambitious to expect the same or similar outcomes in the context of the MIC when the nature of operation is different.

5.3. Term of Office and Reappointment of Adjudicators: Implications for Independence and Impartiality

One important lesson to be learned is the implication of short term of office for adjudicators and a DSS. The WTO stipulates a four-year term of office for its Appellate Body judges.⁶⁰² This, however, negatively impacted both the DSS and the judges.

⁵⁹⁹ See Joost Pauwelyn (ed), *Appeal without Remand: A Design Flaw in WTO Dispute Settlement and How to Fix It* (International Centre for Trade and Sustainable Development 2007) 22.

⁶⁰⁰ See Draft Statute of the Multilateral Investment Court art 46(f),(g).

⁶⁰¹ See UNCITRAL Working Group III, 'Appellate and Multilateral Court Mechanisms' (n 480) para 24.

⁶⁰² DSU art 17.4.

Given the relatively short nature of the term office,⁶⁰³ reappointment is made available for one more term. This re-election, however, was used as a weapon against certain judges. The United States, in specific, developed an antagonistic approach towards judges that ruled against it, blocking their reappointments in 2007, 2011, 2016, and subsequent (re)appointments from 2017-2019.⁶⁰⁴ This not only undermined the independence and impartiality of the judges, but eventually rendered the whole Appellate Body inoperative.

Accordingly, ISDS reforms under the MIC should remedy this flaw. The eventual Statute of the MIC should stipulate a longer term of office, such as 9 years envisaged in the proposed Draft Statute,⁶⁰⁵ comparable to that of other permanent international courts, such as the ICJ. Should the reappointment of judges ever be considered for the sake of retaining valuable experience, the decision-making mechanism should be one that does not allow a single state the possibility to block such reappointment.

5.4. Consensus: Implications for Decision-making

The most fundamental cause of the WTO Appellate Body existential crisis emanates from Art. 2.4 of the DSU, according to which the decisions of the DSB shall be carried out by consensus. Consensus of the entire WTO Members (acting as the DSB) is required for the appointment of the Appellate Body members. However, this decision-making mechanism has adverse effects in the sense that Members are able to veto the appointment or reappointment of judges if they disagree with their assumption of this role. Such a disagreement made the Appellate Body defunct.

While the MIC departs from the requirement of consensus to a simple majority for the election of judges pursuant to Art. 12.6 of the Draft Statute,⁶⁰⁶ it nevertheless provides for the same

⁶⁰³ Compare, for instance, the ICJ has a 9-year term of office with a possibility for re-election (ICJ Statute, art 13.1); same is provided for ECtHR judges, albeit with no possibility for re-election (ECHR, art 23.1). See discussions on this in Bungenberg and Reinisch (n 6) 56–57.

⁶⁰⁴ See Bossche (n 458); In particular, see grounds for US blocking the reappointment of Appellate Body member Seung Wha Chang in Van den Bossche (n 15) s 4.3; It should be noted that US blocking the (re)appointment of Appellate Body members was only possible due the consensus decision-making mechanism of the DSB. See DSU art 2.4.

⁶⁰⁵ Draft Statute of the Multilateral Investment Court art 14.1.

⁶⁰⁶ This is based on a regional quota. See *ibid* 12.6; A departure from consensus is also favoured at the UNCITRAL negotiations. See UNCITRAL Working Group III, ‘Appointment of ISDS Tribunal Members’ (n 409) para 32.

requirement of consensus for the adoption of decisions on interpretation of the Statute under Art. 8.3.⁶⁰⁷ This thus raises questions on whether the hurdles with consensus can be overcome in this aspect. Indeed, even the WTO does not require consensus for the adoption of authoritative interpretations by the Ministerial Conference and General Council. Pursuant to Art. IX:2 of the WTO Agreement, decisions on interpretation shall be carried by a three-fourths majority.⁶⁰⁸ Even at that, authoritative interpretations under Art. IX:2 of the WTO Agreement have never been adopted at the WTO.⁶⁰⁹

Clearly, decision-making on a multilateral level based on consensus comes with its own difficulties, as all parties would have to agree for it to come into effect. While the same is true for bilateral decisions,⁶¹⁰ the possibility of reaching a consensus on a bilateral plane is more tenable since only a few parties are involved, and their differences can readily be resolved.⁶¹¹ Moreover, this is the natural forum for inter-state decision-making, and significant achievements have been made through it, including in the aspect of treaty interpretation.⁶¹² These, amongst other things, are why countries like Russia, Japan and the US have firmly

⁶⁰⁷ Draft Statute of the Multilateral Investment Court art 8.3. Bear in mind that this does not include the interpretation of substantive treaty standards contained in IIAs which is completely within the jurisdiction of treaty parties. See 4.2.6 (Role of Treaty Parties in Treaty Interpretation).

⁶⁰⁸ WTO Agreement art IX:2.

⁶⁰⁹ See ‘WTO ANALYTICAL INDEX WTO Agreement – Article IX (Jurisprudence)’ (n 565) 2–5.

⁶¹⁰ For example, after disagreeing with the tribunal’s interpretation of denial of justice in *Chevron Corp (US) v Ecuador (Partial Award on the Merits)* [2010] PCA Case No. 34877 [242–244], Ecuador sought an interpretive agreement, however US refused to respond. This made Ecuador to pursue interpretation via state-state arbitration in *Ecuador v United States (Request for Arbitration)* [2011] PCA Case No. 2012-5. This was, however, dismissed by a majority of the tribunal.

⁶¹¹ For the sake of this research, “bilateral agreement” covers any agreement that falls short of a multilateral agreement.

⁶¹² For instance, following the tribunal’s decision in *Pope & Talbot Inc v The Government of Canada (Award on the Merits of Phase 2)* [2001] (UNCITRAL) (NAFTA), which stipulated that fair and equitable treatment (FET) requires a higher than minimum standard of protection for investors, the Parties to the NAFTA treaty sought clarification from the Free Trade Commission of NAFTA, which comprises of representatives of the three treaty Parties. The commission held that FET is tantamount to the international law minimum standard. See Schefer (n 14) 408–410. See also Sylvie Tabet, ‘Treaty Interpretation by State Parties in Investor-State Dispute Settlement - An Overview of Canada’s Experience and Practice’ (Trade Law Bureau, Government of Canada) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/tabet_treatyinterpretationwebinar_en.pdf>.

advocated for bilateralism and improvement of the current system as opposed to multilateral reforms of ISDS at the UNCITRAL negotiations.⁶¹³

Considering the complexities with decision-making under a multilateral framework, the MIC should depart from a consensus decision making mechanism even for the interpretation of its Statute. While it is possible that such may raise concerns of sovereignty for some states, having a functioning and sustainable system under the MIC should be prioritised. In any event, since the interpretation of substantive IIA standards still remain exclusively within the jurisdiction of the specific treaty parties, and only with their consent can such be subject to adjudication under the MIC,⁶¹⁴ states may have a greater incentive to compromise consensus for a majority voting system as MIC authoritative interpretations only concern the functioning of the institution.

5.5. Precedent: Legitimacy Concerns

A major criticism preceding the WTO Appellate Body crisis is premised on the ground that it purportedly treats its rulings as binding precedents.⁶¹⁵ Such a criticism arises because the WTO does not establish a doctrine of binding precedent for its DSS. However, Art. 3.2 of the DSU stipulates that the DSS “is a central element in providing security and predictability to the multilateral trading system.” To that end, the Appellate Body held in *US – Stainless Steel (2008)* that “*Ensuring ‘security and predictability’ in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.*”⁶¹⁶ While not directly obliging WTO Panels to follow Appellate Body rulings, such a position creates legitimate expectations that Panels will follow decisions pertinent to the same issue rendered

⁶¹³ See Anthea Roberts, ‘UNCITRAL and ISDS Reforms: Concerns about Consistency, Predictability and Correctness’ (*EJIL: Talk!*, 5 June 2018) <<https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-consistency-predictability-and-correctness/>> accessed 29 November 2022; Roberts, ‘UNCITRAL and ISDS Reforms’ (n 6).

⁶¹⁴ See 4.2.6 (Role of Treaty Parties in Treaty Interpretation).

⁶¹⁵ Van den Bossche (n 15) s 2.2; United States Trade Representative, ‘Report on the Appellate Body of the World Trade Organization’ (2020) pt II.E <https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf>.

⁶¹⁶ *US — Stainless Steel (Mexico)* [2008] WTO WT/DS344/AB/R, ABR [160]. This responds to the request of the European Communities to the Appellate Body to establish definitively that “all panels are not only expected, but are ‘obliged’ to follow its findings in relation to the same issue” in casu, zeroing. See [51].

by the Appellate body. This thus gives Appellate Body rulings the semblance of a precedent.⁶¹⁷ For this reason, the Appellate Body attracted heavy criticism from the U.S, deeming the whole ruling as “flawed”.⁶¹⁸

In this regard, questions have arisen as to what approach should have been adopted by the Appellate Body. While it is hard to envisage an effective and efficient international adjudicatory system where no precedential value whatsoever could be given to previous decisions that would be “predictable” and “secure”, the position adopted by US is not totally unfounded as the DSU does not foresee such power within the mandate of the Appellate Body. Art. 3.2 of the DSU explicitly limits the DSS to the clarification of existing provisions of WTO covered agreements, and that “*Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.*”⁶¹⁹ Consequently, expecting Panels to follow even “relevant” previous decisions risks adding to Members’ obligations, thus, raising legitimacy concerns.⁶²⁰

Surprisingly, the MIC Draft Statute follows in the footsteps of the WTO by not recognizing its decisions as precedents.⁶²¹ However, it does envisage the consideration of previous decisions, especially where there exists sufficient uniformity in previous case law, in order to secure uniform and consistent interpretation of the law.⁶²² This, thus, gives its Members a clear view of the role of previous decisions in the DSS. For this reason, it overcomes one major flaw of the WTO to some extent. However, in order to accord any precedential weight to decisions and avert any unforeseeable problems after establishment, it would be ideal for the MIC to explicitly

⁶¹⁷ While recognizing the inherent distinctions between precedents under the doctrine of *stare rationibus decisis* and the mandate of the WTO DSS envisaged in Art. 3.2 of the DSU, in that the former, *inter alia*, results in rulemaking, whereas the latter is limited to law clarification, the Appellate Body ruling in *US – Stainless Steel* entails a convergence of both systems in the legitimate expectation for courts to follow the reasoning of judgments already delivered. Further, even the departure from “binding” precedents is justifiable when there are cogent reasons to do so. See G Guillaume, ‘The Use of Precedent by International Judges and Arbitrators’ (2011) 2 *Journal of International Dispute Settlement* 5. See also Alfred Thompson Denning, *The Discipline of Law* (Butterworths 1979) 296.

⁶¹⁸ Amongst other things, U.S contends that an obligation is created by this decision by the Appellate Body for having accorded precedential value to its decisions. See United States Trade Representative (n 527) pt II.E.

⁶¹⁹ DSU art 3.2, see also 19.2.

⁶²⁰ See United States Trade Representative (n 614) pt II.E.

⁶²¹ Draft Statute of the Multilateral Investment Court art 28.1(d).

⁶²² *ibid.*

recognize its decisions as precedents,⁶²³ as a departure from even “binding” precedents may be justified where there are cogent reasons.⁶²⁴ This recommendation, however, does not appear politically feasible as countries like the US might object over concerns of potential encroachment on their national sovereignty.⁶²⁵

5.6. Time Frame of Proceedings

The short and strict time frames of proceedings in the WTO DSS are unique to international adjudication. While these features are aimed at securing an expedient and cost-effective dispute settlement, WTO experience proves that an effective balance has not been struck between the quality of decisions, on the one hand, and the desire to ensure a reduced cost and duration of proceedings, on the other hand. This has, thus, resulted in several problems for the DSS as a whole and the Appellate Body in specific.

First, WTO Panel proceedings are subject to a 6–9-month maximum timeframe,⁶²⁶ whereas Appeal proceedings are limited to 60–90 days.⁶²⁷ These timeframes have hardly been complied with by either the Panels or the Appellate Body. On average, Panel proceedings last 484 days, or approximately 16 months.⁶²⁸ In some cases, Panels go significantly beyond this period. For instance, in *US–Large Civil Aircraft (2nd Complaint) (2012)*, the proceeding lasted 61 months.⁶²⁹ With regard to Appeal proceedings, the appellate review has, in almost all cases, lasted more than 60 days. While a vast majority of the cases met the 90-day maximum time limit before 2011, such has not been the case since then.⁶³⁰ On average, Appeal proceedings last 141 days.⁶³¹ In some instances, Appeal proceedings also significantly go beyond this

⁶²³ It should be noted that proposals at the UNCITRAL have explicitly called for the recognition of a binding precedent. See UNCITRAL Working Group III, ‘ISDS Reforms 2018’ (n 475) paras 36–38.

⁶²⁴ See Guillaume (n 616) 5; Denning (n 616) 296.

⁶²⁵ For US attitude towards permanent international courts, see 4.2.2 (Two-instance Permanent Court)

⁶²⁶ DSU art 12.8, 12.9.

⁶²⁷ *ibid* 17.5 See a detailed discussion on these in ch 4.2.4.

⁶²⁸ See ‘WorldTradeLaw.Net’ <<http://www.worldtradelaw.net/databases/paneltiming.php>> accessed 1 December 2022; See also Bossche and Zdouc (n 15) 267.

⁶²⁹ *US - Large Civil Aircraft (2nd Complaint) [2012] WTO WT/DS353/R, PR*; ‘WorldTradeLaw.Net’ (n 627); Bossche and Zdouc (n 15).

⁶³⁰ Bossche and Zdouc (n 15) 268.

⁶³¹ *ibid*.

period. For instance, in *Australia – Tobacco Plain Packaging (2020)*, it took 691 days to complete the appellate review.⁶³² For this reason, Prof. Peter van den Bossche, a former Appellate Body member, labelled the WTO DSS time frames as “unrealistic”.⁶³³ Indeed, various factors, such as the complexity or size of a dispute and the number of cases before a “limited in size” court, could contribute to a delay in rendering rulings. In this regard, sticking to a maximum and inflexible time frame would be unreasonable.

Second, notwithstanding the excessively short and demanding time frames for both disputing parties and adjudicators,⁶³⁴ some WTO Members, such as US and Japan, repeatedly criticized the Appellate Body, in specific, for failing to meet them.⁶³⁵ This, however, runs contrary to the view of the majority of WTO Members, which recognize that the caseload of the Body and the complexity of disputes make it impossible to always deliver rulings within the 90-day maximum timeframe.⁶³⁶

While a short and strict timeframe *may* be justifiable in the case of the WTO DSS since there is no compensation for past damages and harm suffered as a result of a state measure while the dispute settlement process is running, such is certainly not the case for ISDS.⁶³⁷ In this regard, reforms under the MIC should take into account the general distinctions between international trade and investment disputes.

The MIC should depart from a short and strict time frame as that runs counterproductive to quality of decisions. The timeframe of proceedings should be flexible enough to ensure that decisions rendered will be of the highest quality, and that neither the judges nor the parties are put under undue pressure. The MIC may explore setting flexible timeframes for different stages of proceedings, from the initiation of a dispute to the delivery of a judgment, and empowering judges to ensure adequate control of proceedings and penalize unjustifiable delays on the side

⁶³² *Australia – Tobacco Plain Packaging* [2020] WTO WT/DS435/AB/R; WT/DS441/AB/R, ABR; Bossche and Zdouc (n 15) 268.

⁶³³ Van den Bossche (n 15) s 4.4.

⁶³⁴ The WTO DSS time limits, and time limit for appellate review in particular, have attracted much criticism for being excessively short and demanding for both disputing parties and the adjudicators at the Panel and Appellate level. see Bossche and Zdouc (n 15) 269.

⁶³⁵ *ibid.*

⁶³⁶ *ibid.*

⁶³⁷ See 4.2.8 (Enforcement)

of the parties. If at all definitive timeframes would be provided, such should take into account the average timeframe of ISDS proceedings. In no regard, however, should it be so strict as to prevent an extension when the peculiarities of a case and the workload of the court justify it. This approach may not make ISDS cheaper; however, it would ensure that only the best possible decisions are delivered.

CHAPTER 6: CONCLUSIONS

ISDS has been a long-standing concern for states. In recent years, its problems have become increasingly evident and attracted a heavy public backlash. While some of these problems are legitimate, others are unfounded or overblown. This has led to a generally negative perception of the entire system. Such “perception”, coupled with the disappointments and challenges experienced by different sections of developing countries, which accepted a strong and enforceable ISDS regime to attract foreign direct investments, and the unforeseen role of developed countries as respondents in ISDS proceedings, have united states in seeking reforms of the dispute settlement mechanism.

One proposal for ISDS reform, particularly advocated by the EU, is the establishment of a permanent MIC. While an MIC, if established, may effectively resolve some of the ISDS concerns, it would also create new ones.

Currently, the investment regime is characterized by a myriad of IIAs, which contain standards that serve as substantive laws for ISDS. These IIAs are unique in their nature, and as such, the conceptualization of the standards and common intent of parties might differ from treaty to treaty. Consequently, different ISDS tribunals may deliver diverging opinions when faced with disputes under different treaties. This led to concerns about the lack of consistency of ISDS decisions. However, such inconsistency is not necessarily unjustifiable as it reflects the fragmentation of the investment regime and obligations incumbent on arbitral tribunals to respect the laws applicable to each dispute. An MIC may be able to achieve consistency and coherence within its system; however, such consistency would not be based on a single uniform model, such as in the case of national treatment standard under the WTO, respecting the textual and structural differences in treaties. This if implemented would lead to even greater fragmentation of the system and not remedy the concerns as ad-hoc arbitral tribunals would co-exist with the MIC and continue to issue their separate rulings. While it is true that arbitral

tribunals often cite decisions of permanent international courts, there exist legal autonomy and little to no coordination between them when adjudicating “even” disputes arising from the same measures over the same substantive standards. In this regard, it should not be expected that arbitral tribunals would simply rely on MIC decisions, and neither should there be an expectation that this lack of coordination would necessarily be any different.

Other alleged benefits of the MIC and reform options under it are equally problematic. The benefit of the waiver of administrative costs for adjudicating disputes under a permanent court may be negated by the cost of maintaining such an institution. In ISDS, tribunal costs usually account for less than 10% of the total costs. This, taking into account the average number of ISDS cases per year, is about three times less than the cost of maintaining a “modest” institution such as the WTO in terms of budget, while disregarding party costs that usually constitute more than 90% of the cost of dispute settlement.⁶³⁸ Such significant costs may serve as a financial constraint to MIC Members, and would only be compounded if the MIC explored establishing an ACIIL. Equally, adopting a strict and short timeframe of proceedings that have been proven unrealistic in the case of the WTO should not be expected to yield any different results in ISDS, where disputes are characterized by their technical nature and typically take longer to resolve. While the primary concern for states is safeguarding their right to regulate and addressing the regulatory chill concerns, it does not appear that the mere recognition of such ‘right to regulate’ under the MIC Statute would achieve such an objective; neither would a multilateral solution under a “permanent international court” cause less regulatory chill than ad-hoc arbitral tribunals, which cannot invoke institutional authority in their judgements. For investors, the enforcement mechanism under the MIC would not provide any greater advantages in terms of enforcement of ISDS awards than the one that currently exists under the ICSID convention. These, amongst others, serve as impediments to the perceived benefits of an MIC within an institutional framework.

Further, the establishment of an MIC may largely depend on its political feasibility. Multilateralism, as well as the obligations incumbent on states subject to the jurisdiction of a permanent international court, are accompanied by complexities that may not give states the incentive to pursue this cause. Issues of state sovereignty and the policy space to pursue

⁶³⁸ See 4.2.2 (Two-instance Permanent Court)

legitimate policy objectives still remain of practical significance to states. While the EU has been a staunch supporter of an MIC, starting with the conclusion of bilateral agreements with ICS clauses that envisage transition into a full-blown MIC, with countries like Canada, the EU has, for its part, failed to make these agreements come into force due to individual Member's failure to ratify them. Moreover, none of these countries with whom the EU has signed such agreements has clearly supported its cause for the establishment of an MIC at the UNCITRAL setting, except for Canada. Chile, as one of them, is even in a position with such countries as US, Russia and Japan, which are firm advocates of bilateral reforms of ISDS as opposed to a multilateral one. In this regard, a significant number of states do not share the same enthusiasm for establishing a broader MIC as the EU; thus, the prospects for its establishment remain bleak.

However, if eventually established, valuable lessons could be learned from WTO experience, especially since the MIC is modelled after the WTO DSS. To secure a sustainable DSS, the MIC must address the issues that have attracted so much criticism to the WTO DSS and eventually rendered its Appellate Body inoperative. This pertains to the short term of office of adjudicators, consensus decision-making mechanism, precedential value of previous decisions, and short and strict timeframe of proceedings. Implementing the researcher's recommendations on these subjects, while ideal, may require certain compromises from states which makes it even more complicated. Still, the establishment of an MIC may technically be feasible under the proposals of the Draft Statute. However, the practical relevance of such a court established under these proposals as a solution for ISDS and its sustainability are highly questionable.

Consequently, it does not appear that an MIC as currently envisaged, would be better a solution for the settlement of investor-state disputes than the current ISDS regime. While certain benefits may be obtained by its establishment, these benefits may be negated by the new problems it would generate. In that regard, the MIC, much like any such projects to multilateralize the investment regime in the past, has very little prospect of leaving the drawing board.

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