# Designing a Multilateral Investment Court: Blueprints for a New Route in Investor-State Dispute Settlement

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Table of Contents



## A. Introduction

Certain discontent and scepticism towards Investor-State Dispute Settlement (ISDS) have been predominant in the last years,[1] putting the existing system of investment

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1 *Hsu*, TDM 2014/1, p. 3; *Potestà*, in: Klausegger et al. (eds.), p. 157.

arbitration in the crosshairs of the European Union (EU). Currently, the United Nations Commission on International Trade Law (UNCITRAL) works as a forum to identify the problems of investment arbitration as well as possible solutions. Arguably, the criticisms to ISDS can be tackled with reforms within the system rather than drifting away from it,[2] in order to 'avoid throwing the baby out with the bathwater'.[3] Nevertheless, a proposal for a Multilateral Investment Court (MIC), taking over the jurisdiction of investment disputes, is gaining momentum and its establishment should be carefully analysed.

Against this background, this contribution strives to sketch some of the features of an MIC that could address the criticisms to investment arbitration. Having this purpose in mind, firstly, the discussions regarding the establishment of an MIC in the EU as well as at UNCITRAL are explained (section B). Afterwards, a structure of permanent adjudicators at an MIC is confronted to the prevailing practice of international arbitration (section C), and the inclusion of an appeal mechanism is discussed (section D). Subsequently, the transparency of the proceedings (section E) and the right to regulate (section F) are addressed. Finally, the conclusions reached are presented (section G).

## B. State of Play: Towards a Multilateral Investment Court

The EU, as the fiercest proponent of an investment court, has already laid the groundwork through its recent investment agreements, with the ultimate goal of setting up an MIC.[4] In the meantime, UNCITRAL Working Group III has been entrusted with the analysis of possible reforms to ISDS,[5] which may include the establishment of an MIC.

### I. EU Approach: Bilateral Courts and a Multilateral Court

Already in some of its new investment treaties, the EU has introduced provisions aiming for the establishment of standing courts to settle investment disputes. This EU approach is twofold: The first step consists of the establishment of bilateral investment courts or Investment Court Systems (ICSs); the second step, and the ultimate goal of the EU, is the creation of an MIC taking over the jurisdiction of the ICSs and replacing the current system of investment arbitration. Nevertheless, such an approach presents certain drawbacks, which will be analysed below.

2 *González García*, TDM 2014/1, pp. 7 ff.; *Bernardini*, ICSID Review 2017/1, p. 55.
3 *Titi*, TDM 2017/1, p. 4.
4 *European Commission*, Multilateral Reform of Investment Dispute Resolution *accompanying the document* Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes, (Impact Assessment) SWD (2017) 302 final, p. 6.
5 *UNCITRAL Working Group III*, Possible Reform of Investor-State Dispute Settlement (ISDS), A/CN.9/WG.III/WP.142, 18 September 2017, para. 3.

## 1. First Step: Bilateral Investment Courts

The EU has proposed a court system to replace investment arbitration in the framework of several new International Investment Agreements (IIAs). Particularly, the EU-Vietnam Investment Protection Agreement (IPA),[6] the EU-Singapore IPA[7] and the Comprehensive Economic and Trade Agreement (CETA) with Canada design a new system for solving international investment disputes. The EU-Vietnam and EU-Singapore agreements still require to undergo a ratification process in each EU Member State, whereas CETA Chapter 8 Section F (Resolution of Investment Disputes between Investors and States), after Belgium's request to the Court of Justice of the European Union (CJEU) for an opinion, was declared compatible with EU law on 30 April 2019.[8] More recently, the EU-Mexico Agreement also includes a chapter on Resolution of Investment Disputes with reference to an investment court system.[9]

The bilateral court systems proposed in CETA, EU-Vietnam IPA and EU-Singapore IPA outline provisions for the establishment of a standing court for each IIA in a quite similar manner.[10] For instance, each one has a first instance tribunal and an appeal tribunal.[11] Furthermore, the adjudicators are selected by a joint committee: one-third nationals of EU Member States, one-third nationals of the other party and one-third nationals of third states.[12] These adjudicators would have a fixed term in office, which can be renewed once,[13] and in principle, they will get a retainer fee, which could become a regular salary.[14] Arbitration rules would be used for the conduct of the proceedings.[15] The grounds for appeal will be those provided for in Art. 52 ICSID Convention, but also errors of law and manifest errors of facts.[16] Furthermore, for the purpose of enforcement of decisions, there is recourse to the ICSID Convention and the NYC.[17]

6 EU-Vietnam IPA, Chapter 3 (Dispute Settlement) Section B (Resolutions of Disputes between Investors and Parties) (Text as of August 2018).
7 EU-Singapore IPA, Chapter 3 (Dispute Settlement) Section A (Resolutions of Disputes between Investors and Parties) (Text as of April 2018).
8 CJEU, *Opinion 1/17*, Request for an opinion submitted by the Kingdom of Belgium, ECLI:EU:C:2019:341.
9 The agreement in principle is undergoing review on technical issues, available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833 (16/05/2019).
10 *Reinisch*, Journal of International Economic Law 2016/4, p. 763.
11 CETA Art. 8.27-8.28; EU-Vietnam IPA Art. 3.38-3.39; EU-Singapore IPA Art. 3.9-3.10.
12 Nevertheless, the contracting states in each respective treaty may appoint judges from other nationalities, which will be considered of the nationality of the party that proposed them. See CETA Art. 8.27(2); EU-Vietnam IPA Art. 3.38(2); EU-Singapore IPA Art. 3.9(2).
13 CETA Art. 8.27(5); EU-Vietnam IPA Art. 3.38(5); EU-Singapore IPA Art. 3.9(5).
14 CETA Art. 8.27(15); EU-Vietnam IPA Art. 3.38(17); EU-Singapore IPA Art. 3.9(12-15).
15 CETA Art. 8.23(2); EU-Vietnam IPA Art. 3.33(2); EU-Singapore IPA Art. 3.6(1).
16 CETA Art. 8.28(2); EU-Vietnam IPA Art. 3.54(1); EU-Singapore IPA Art. 3.19(1).
17 CETA Art. 8.41. On the other hand, EU-Vietnam IPA Art. 3.57(3 and 8) and EU-Singapore IPA Art. 3.22(5-6) provide recourse to ICSID Convention and New York Convention, however, those are the default rules since EU-Vietnam IPA Art. 3.57(1-2) and EU-Singapore IPA Art. 3.22(1-2) respectively aim to establish an autonomous enforcement system.

Such a system of standing courts strives to solve some of the main concerns of investment arbitration. For instance, harmonising the decisions rendered in the framework of investor-state disputes, not only through the permanent character of a court but also introducing an appeal mechanism.[18] In the same line, the proposed ICSs are expected to reduce concerns about impartiality and independence of arbitrators, since the concept of a party-appointed arbitrator is eliminated and replaced with adjudicators selected before the disputes arise.[19]

### 2. Second Step: Multilateral Investment Court

The second step of the envisaged solution proposed by the EU to reform the current system for solving disputes between foreign investors and states is the establishment of an MIC. It is argued that legal certainty would be enhanced if a multilateral court takes over jurisdiction to decide investment disputes across several IIAs, thus, reducing the risk of inconsistent decisions.[20] As the ultimate goal, an MIC is expected to overcome not only the legitimacy crisis of investment arbitration but also the foreseen flaws of the ICSs.

In this sense, the CETA, EU-Vietnam IPA and EU-Singapore IPA already contemplate the possibility of an MIC, which, once created, will replace the bilateral investment courts.[21] Pursuant to CETA, chapter 8, section F, Art. 8.29,[22] EU-Vietnam IPA, chapter 3, section b, Art. 3.41,[23] and EU-Singapore IPA, chapter 3, section a, Art. 3.12,[24] the respective contracting parties 'shall' pursue, or enter into negotiations for, the establishment of a multilateral investment tribunal.

18 *Bedoya/Ramírez*, Revista del Club Español del Arbitraje 2016/1, p. 40; *Schwieder*, Columbia Journal of Transnational Law 2016/1, p. 202; *Wuschka*, ZEuS 2016/2, p. 158.
19 *Schwieder*, Columbia Journal of Transnational Law 2016/1, pp. 196-197.
20 *Puig/Shaffer*, American Journal of International Law 2018/3, p. 399.
21 *Happ/Wuschka*, Indian Journal of Arbitration Law 2017/1, p. 114.
22 CETA, chapter 8, section F, Art. 8.29: "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" (emphasis added).
23 EU-Vietnam IPA, chapter 3, section b, Art. 3.41: "The Parties shall enter into negotiations for an international agreement providing for a multilateral investment tribunal in combination with, or separate from, a multilateral appellate mechanism applicable to disputes under this Agreement. The Parties may consequently agree on the non-application of relevant parts of this Section. The Committee may adopt a decision specifying any necessary transitional arrangements" (emphasis added).
24 EU-Singapore IPA, chapter 3, section a, Art. 3.12: "The Parties shall pursue with each other and other interested trading partners, the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of international investment disputes. Upon establishment of such a multilateral mechanism, the Committee shall consider adopting a decision to provide that investment disputes under this Section will be resolved pursuant to that multilateral mechanism, and to make appropriate transitional arrangements" (emphasis added).

According to the EU, once the ICSs are set up, they could work as 'stepping stones' for the ultimate goal of an MIC,[25] bearing in mind the innumerable burdens of creating a multilateral court from scratch. Afterwards, the MIC would undertake jurisdiction displacing those bilateral investment courts.

### 3. Drawbacks of the EU Approach

This two-step approach seems to embody serious flaws, which could jeopardise the successful establishment of an MIC.

First, the bilateral court systems laid down in the CETA, EU-Vietnam IPA and EU-Singapore IPA keep some highly criticised features of investment arbitration,[26] thereby gaining the ironic name of 'ISDS plus'.[27] An example is that this bilateral approach does not confront the risk of inconsistent decisions; although a bilateral court could provide a certain degree of consistency within the IIA it is based upon, the systematic problem of diverging decisions will remain because each bilateral court would be based on different treaties.[28] Each bilateral court could construe and decide differently, even if they use treaty provisions with identical wording since there is no hierarchical relation or harmonising mechanism among the envisaged bilateral courts.[29]

Second, the EU foresees already the complexity of having in place one bilateral investment court per each new IIA: 'The more ICSs are included in EU agreements, the more complex the management will be for the Commission services, which will have to bear the administrative burden in terms of time, workforce and financial resources'.[30] From a budgetary point of view alone, the bilateral court system would be more expensive than the MIC in the long run. A functioning MIC is expected to cost approximately EUR 10 million per year regardless of the number of cases, whereas a

25 *European Commission*, Concept Paper: Investment in TTIP and beyond—the path for reform (5 May 2015), available at: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (16/05/2019), pp. 11-12.

26 *Van Harten*, Key flaws in the European Commission's proposals for foreign investor protection in TTIP, Osgoode Legal Studies Research Paper No. 16 2016/4, p. 1, available at: http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1139&context=olsrps (16/05/2019).

27 *Butler/Subedi*, Netherlands International Law Review 2017/1, p. 55: "Despite the inclusion of the word 'court' in the name, many commentators have come to the conclusion that the ICS mechanism is largely an 'ISDS plus' mechanism, which at its core retains many of the features of investment arbitration that critics of ISDS wishes to see removed".

28 *Schill*, Das TTIP-Gericht: Keimzelle oder Stolperstein für echte Multilateralisierung des internationalen Investitionsrechts?, Verfassungsblog, 25 November 2015, pp. 2-3, available at: https://pure.uva.nl/ws/files/2676024/168554_495440.pdf (16/05/2019); *Wuschka*, ZEuS 2016/2, p. 162; *Lee*, Northwestern Journal of International Law & Business 2018/1, p. 24.

29 *McRae*, Journal of International Dispute Settlement 2010/2, p. 384; *Titi*, Procedural Multilateralism and Multilateral Investment Court: Discussion in Light of Increased Institutionalism in Transatlantic Relations, in: Fahey (ed.), p. 159.

30 *European Commission*, Multilateral Reform ISDS-Impact Assessment, (fn. 4), p. 17. Similarly, *Titi*, AJIL Unbound 2018/1, p. 234.

single bilateral investment court is expected to cost around EUR 2 million per year with only one case at first instance and one case at appeal.[31] Needless to say, the more bilateral courts in place and cases submitted, the more expensive the bilateral system will be.[32]

Third, if the establishment of well-functioning ICSs is achieved, it would have an impact on the later attempts of creating an MIC. Once an ICS is successfully established, it is more difficult to replace it.[33] Therefore, the proposed bilateral investment courts would be a 'stumbling block to future multilateralism'.[34]

Consequently, the establishment of the MIC should be pursued directly, without creating bilateral investment courts,[35] because ICSs do not address the inconsistency of the decisions, they are more expensive in the long run and they could be a stumbling block to the aimed multilateralization of investment law. Nevertheless, considering that the CJEU has given the green light to the bilateral investment court in CETA, the EU may be tempted to keep pushing for more ICSs in new IIAs.

## II. Discussions at UNCITRAL

The criticisms to investment arbitration did not go unnoticed by UNCITRAL, and it started multilateral discussions for possible reforms already in 2017.[36] The Working Group III was entrusted with the task of continuing the deliberations regarding ISDS, specifically, first, identifying the concerns regarding ISDS, second, assessing whether reform is necessary, and third, developing pertinent solutions.[37] So far, different alternatives to tackle the criticisms to investment arbitration have been displayed. Reforms within the existing ISDS, such as an alternative method for appointing arbitrators, establishing a system of preliminary rulings, introducing a doctrine of precedent or the creation of an appellate body, among others, have been discussed.[38] A reform

31 *European Commission*, Multilateral Reform ISDS-Impact Assessment, (fn. 4), annex 4 Explanation of Costs Analysis, pp. 85-120.

32 When compared with the estimated costs of an average investment arbitration procedure (USD 8.000.000), an MIC and an ICS still prove themselves to be less expensive. Cf. *UNCITRAL*, Report of Working Group III (Investor-State Settlement Reform) on the Work of its Thirty-Fourth Session (Vienna, 27 November-1 December 2017), A/CN.9/930/Rev. 1, 20 April 2017, para. 36.

33 *Schill*, p. 2-3.

34 *Titi*, TDM 2017/1, p. 28. In similar sense, see *Voon*, World Trade Review 2017/1, p. 62.

35 To this point, it has been proposed the suspension of the ICSs (since some treaties foreseeing ICSs are already in ratification process) in order to redirect resources to an MIC, see *Lee*, Northwestern Journal of International Law & Business 2018/1, p. 32.

36 *UNCITRAL*, Possible future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS), A/CN.9/917, 20 April 2017, para. 2.

37 *UNCITRAL Working Group III*, Possible Reform of Investor-State Dispute Settlement (ISDS), A/CN.9/WG.III/WP.142, 18 September 2017, para. 3.

38 *UNCITRAL Working Group III*, Possible Reform of Investor-State Dispute Settlement (ISDS), A/CN.9/WG.III/WP.142, 18 September 2017, para. 51, in conjunction with *UNCITRAL Working Group III*, Possible Reform of Investor-State Dispute Settlement (ISDS), A/CN.9/WG.III/WP.149, 5 September 2018, paras 26 ff.

outside the existing ISDS mechanism, *i.e.* the establishment of an international investment court, is also considered.[39]

The UNCITRAL Working Group III completed its 37th session in April 2019 with submissions from ICSID and the Permanent Court of Arbitration (PCA),[40] from the EU,[41] as well as from several governments.[42] Given that the establishment of an MIC is not the only option analysed at UNCITRAL, there are no templates pertaining to the possibilities and design of such a court from the multilateral discussions.

Although being still in an early stage of the discussions about the possible establishment of an MIC, some states have already shown their disapproval to such an alternative.[43] Similarly, some authors doubt the benefits of including an international court for solving investment disputes.[44] In this context, it is unrealistic to assume that all states would immediately embrace the jurisdiction of the MIC.[45] Therefore, an opt-in convention, whereby no universal consensus would be required to enter into force, seems more feasible.[46] The MIC set forth in an opt-in convention may start as a 'plurilateral' initiative,[47] and afterwards, more states would be able to join.

By establishing the MIC through an opt-in convention, it would be possible to extend the jurisdiction of the MIC to solve investment disputes arising from existing IIAs, while at the same time, for future IIAs, a reference to the opt-in convention as

39 *UNCITRAL*, Possible future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS), A/CN.9/917, 20 April 2017, paras 29 ff.; *UNCITRAL Working Group III*, Possible Reform of Investor-State Dispute Settlement (ISDS), A/CN.9/WG.III/WP.142, 18 September 2017, para. 52.

40 *UNCITRAL Working Group III*, Possible Reform of Investor-State Dispute Settlement (ISDS): Submissions from International Intergovernmental Organizations, A/CN.9/WG.III/WP.143, 13 October 2017; *UNCITRAL Working Group III*, Possible Reform of Investor-State Dispute Settlement (ISDS): Submissions from International Intergovernmental Organizations and additional Information: Appointment of Arbitrators, A/CN.9/WG.III/WP.146, 19 February 2018.

41 *UNCITRAL Working Group III*, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union, A/CN.9/WG.III/WP.145, 12 December 2017.

42 For instance, Costa Rica, Chile, Indonesia, Israel, Japan, among others, have presented submissions to UNCITRAL Working Group III.

43 For instance, Chile, Japan and Russia have made a stand on keeping investor-state arbitration, see *Roberts*, The American Journal of International Law 2018/3, p. 410.

44 Arguments against the establishment of an international investment court, see *Brower/Ahmad*, Fordham International Law Journal 2018/4, pp. 814 ff.; *Alvarez Zarate*, Boston College Law Review 2018/1.

45 *Titi*, AJIL Unbound 2018/1, p. 232.

46 *Kaufmann-Kohler/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?, 3 June 2016, p. 32, available at: http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf (16/05/2019). See also *Bungenberg/Reinisch*, paras 577-592.

47 *García-Bolivar*, TDM 2014/1, p. 5.

the mechanism to solve investment disputes will suffice.[48] An opt-in convention would have the character of an international treaty with the aim of replacing investment disputes settlement mechanisms; therefore, a clear conflict clause must be designed to give priority to the MIC jurisdiction. If such clauses are not contemplated in the opt-in convention, recourse to the residual rules of the Vienna Convention on the Law of Treaties (VCLT) may be possible.[49] In this sense, assuming that the home state of the investor and the host state have an IIA with an investment disputes' settlement mechanism in place, two scenarios might be foreseen:

The *first scenario* would be when the host state and the home state of the investor, which are parties to an IIA, are also parties to the opt-in convention. If there is a provision where it is expressly stated that the MIC will prevail over existing ISDS mechanisms between the contracting states, such agreement will solve the conflict. If there is no provision dealing with the conflict between treaties, Art. 30(3) VCLT may apply, which embodies the principle *lex posterior derogat legi priori,*[50] leading to the same result: MIC jurisdiction would prevail.[51]

The *second scenario* consists of only one state (or none) being party to the opt-in convention establishing the MIC. The potential conflict clause in the opt-in convention would be irrelevant in this situation since only one state party (or none) is bound by it. Either by means of the principle *pacta tertiis nec nocent nec prosunt*,[52] with respect to the opt-in convention, or by means of the principle of *pacta sunt servanda*[53] with respect to the existing IIA, the investment disputes' settlement mechanism in the IIA would remain applicable.

Consequently, one can deduce that only if the opt-in convention setting up the MIC and the existing IIA have the same state parties, then the MIC jurisdiction would prevail.[54]

Additionally, it must be taken into consideration that the MIC would not be an abrupt and sudden replacement of the existing mechanisms for ISDS, namely, investment arbitration. Therefore, it is assumed they would compete as fora to solve investor states' disputes. Although one may foresee that, at the beginning of the MIC, investment arbitration will still be the favourite choice, as time passes by and the dispute settlement under the MIC becomes more popular, the latter may be chosen more frequently.[55]

48 *Kaufmann-Kohler/Potestà*, Can the Mauritius Convention serve as a Model, (fn. 46), p. 75; *Happ/Wuschka*, Indian Journal of Arbitration Law 2017/1, pp. 129-130; *Bungenberg/Reinisch*, paras 577-579. Similarly, *Fach Gómez*, Revista Española de Derecho Internacional 2017/1, p. 302; *Howse*, Yearbook of European Law 2017/1, p. 219.

49 In this regard, see *Kolb*, p. 186; *López Martín*, Anuario Colombiano de Derecho Internacional 2017/1, p. 69.

50 *Kolb*, p. 189; *López Martín*, Anuario Colombiano de Derecho Internacional 2017/1, p. 73.

51 In this sense, see *Bungenberg/Reinisch*, paras 581-582.

52 *Fitzmaurice*, in: Evans (ed.), p. 182; *Stein/Buttlar*, p. 36; *Shaw*, pp. 703-704; *Wuschka*, ZEuS 2016/2, p. 170.

53 Art. 26 VCLT.

54 Considering the possibility of granting jurisdiction to the MIC, for instance, by means of *ad hoc* compromis, see *Bungenberg/Reinisch*, paras 585-591.

55 *García-Bolivar*, TDM 2014/1, p. 4.

## C. Permanent Adjudicators and Arbitrators: Changing the Paradigm

### I. Existing Criticisms: Overreaction?

The impartiality and independence of arbitrators have been placed under scrutiny in investment arbitration because arbitrators are perceived to unduly favour private interests.[56] Often, critics raise the concern of the supposed partiality of arbitrators, asserting that they tend to favour investors in order to create future opportunities of work[57] and that this problem goes beyond the reach of the existing duties of disclosure and guidelines about conflict of interest of arbitrators.[58]

Furthermore, situations may arise, where a person can be an appointed arbitrator of one of the parties in one case and the counsel of the same party in another case, also known as double hatting.[59] This practice of double hatting may raise questions of perceived bias and conflicts of interest.[60] Consequently, it is argued that the roles of arbitrator and counsel are interchangeable.[61]

Conversely, some authors argue that the partiality of arbitrators is at least overstated.[62] In the same sense, the users of ISDS do not seem to consider that arbitrators are partial or that they unduly favour the appointing party.[63] Besides, no tendency to favour claimant-investors can be deduced from the outcome of the proceedings in investment arbitration.[64] According to the information provided by the United Nations Conference on Trade and Development (UNCTAD), respondent-states have won more cases (35.7 %) than claimant-investors (28.7 %).[65] Although these numbers do not necessarily mean that investment arbitration is not tilted towards investors, they do water down criticisms regarding the partiality of arbitrators.[66] Moreover, the practice of double hatting is rather limited and focused on prominent individuals.[67]

56 *Van Harten*, in: Waibel et al. (eds.), p. 436; *Miles*, p. 377; *Behn*, Georgetown Journal of International Law 2015/1, p. 380. In similar way, concerns regarding impartiality and independence of arbitrators are discussed at *UNCITRAL Working Group III*, Possible Reform of Investor-State Dispute Settlement (ISDS), A/CN.9/WG.III/WP.149, 5 September 2018, paras 11 ff.

57 *Van Harten*, in: Waibel et al. (eds.), p. 441; *Butler/Subedi*, Netherlands International Law Review 2017/1, p. 47.

58 *Baetens*, Legal Issues of Economic Integration 2016/4, p. 370. Nevertheless, when analysing the decisions of party-appointed arbitrators, it has been advanced that they may appear to favour the side that appointed them, regardless whether it was the investor or not, see *Puig/Strezhnev*, Journal of Legal Studies 2017/1, pp. 382 ff.

59 *Langford/Behn/Lie*, Journal of International Economic Law 2017/2, p. 321.

60 For instance, discussion about Emmanuel Gaillard as claimant-appointed arbitrator in *Telekom Malaysia v. Ghana* while being claimant's counsel in *RFCC v. Morocco*, see *Langford/Behn/Lie*, Journal of International Economic Law 2017/2, p. 323.

61 *González García,* TDM 2014/1, p. 7; *Bedoya/Ramírez*, Revista del Club Español del Arbitraje 2016/26, p. 48; *Butler/Subedi*, Netherlands International Law Review 2017/1, p. 47.

62 *Zuleta*, TDM 2014/1, p. 7; *Franck/Wylie*, Duke Law Journal 2015/1, p. 491.

63 *Bedoya/Ramírez*, Revista del Club Español del Arbitraje 2016/26, p. 52.

64 *Van Harten*, in: Waibel et al. (eds.), p. 446; *Franck/Wylie*, Duke Law Journal 2015/1, p. 489.

65 https://investmentpolicyhubold.unctad.org/ISDS (16/05/2019).

66 A similar analysis in *Alvarez*, pp. 390-391.

67 *Langford/Behn/Lie*, Journal of International Economic Law 2017/2, pp. 325 ff.

## II. Selection of Adjudicators at an MIC

In this context, one of the features to consider at an MIC pertains to permanent adjudicators. This arises from the idea that one of the requirements across all jurisdictions to ensure the impartiality and independence of judges, or adjudicators in general, is the security of tenure.[68] The selection of adjudicators in an MIC plays a fundamental role because the method for selection chosen will have a direct impact on the perceived legitimacy of the MIC.[69]

It has been held that the selection or even the nomination of adjudicators by contracting states may undermine the trust investors have in the neutrality of the system, producing certain reluctance to the jurisdiction of an MIC.[70] Nevertheless, the experience of other international courts such as the Inter-American Court of Human Rights or the European Court of Human Rights is illustrative.[71] Despite the fact that states nominate the judges in those courts, they are not perceived as biased towards the interests of their respective states.[72] Furthermore, states must be mindful that they may be hosting the investment, but they might also be the home state of investors. [73]

A middle ground solution could be that states nominate their candidates and an organ of the MIC will be in charge of the selection; nevertheless, the latter should design clear guidelines on how each state would select its candidates.[74] A transparent process for the nomination and selection of adjudicators at the MIC must be carefully determined in order to avoid that politicised decisions put the functioning of the MIC at risk, which currently occurs at the World Trade Organization (WTO) Appellate Body.[75]

For deciding on cases, different divisions/chambers could be organised within the MIC with an odd number of judges and the cases could be assigned to those divisions/chambers, for example, by the president of the MIC.[76] For the instance of appeals, the example envisaged in this regard for the bilateral investment courts in CETA, EU-Vietnam IPA and EU-Singapore IPA could be followed.[77] The adjudicators in charge

68 *Van Harten*, in: Waibel et al. (eds.), p. 440; *Miles*, p. 376; *Howard*, Fordham International Law Journal 2017/1, p. 26.
69 *Bungenberg/Reinisch*, para. 87.
70 *Zuleta*, TDM 2014/1, p. 9. Similarly, *Bernardini*, ICSID Review 2017/1, p. 48; *Reinisch*, Journal of International Economic Law 2016/4, p. 777; *Kho et. al*., ICSID Review 2017/2, p. 344.
71 Pursuant to Art. 7 Statute of Inter-American Court of Human Rights and Art. 22 European Convention on Human Rights, judges are nominated by the respective contracting states.
72 *Titi*, TDM 2017/1, pp. 6-7.
73 *UNCITRAL*, Possible future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS), A/CN.9/917, 20 April 2017, para. 36.
74 *Bungenberg/Reinisch*, paras 89-90.
75 The current crisis at the WTO Appellate Body, whereby new appointments for WTO Appellate Body members have not been achieved, is feared to be replicated in an investment court, see *Puig/Shaffer*, American Journal of International Law 2018/3, p. 400.
76 *Bungenberg/Reinisch*, paras 167-169.
77 CETA Art. 8.28(5); EU-Vietnam IPA Art. 3.39(8-9); EU-Singapore IPA Art. 3.10(7-8).

of appeals would form a roster, from which they would be randomly assigned, in groups of three, for the decision of specific cases.

Another aspect in this regard refers to the number of adjudicators that the MIC should have. In this sense, there are two methods to define it: either a fixed number[78] or a variable number. The latter option was adopted by the International Criminal Court, whereby the number of judges is determined according to the workload.[79] This approach appears to be the most appropriate and flexible one.[80]

Additionally, the diversity of different legal backgrounds can strengthen the perceived legitimacy of a dispute settlement system.[81] In this respect, the adjudicators of an MIC are suggested to represent all legal traditions and jurisdictions,[82] which can be achieved through provisions similar to those for the International Court of Justice (ICJ),[83] the International Tribunal for the Law of the Sea (ITLOS)[84] or the WTO Appellate Body.[85]

## III. Expertise and Qualifications of Adjudicators at an MIC

Clear guidelines regarding the expertise and qualifications of the adjudicators must be drawn, in order to guarantee that the users of this mechanism can place their trust in it. Hence, two ways to define the qualifications required to become an adjudicator at

78 A fixed number may be defined either irrespectively of the contracting states, such as the ICJ, or directly proportional to the number of contracting states, such as the ECHR.

79 Rome Statute of the International Criminal Court, Art. 36(2).

80 *European Commission*, Multilateral Reform ISDS-Impact Assessment, (fn. 4), p. 40; *UNCITRAL*, Possible future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS), A/CN.9/917, 20 April 2017, para. 35.

81 *Kaufmann-Kohler/Potestà*, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards: CIDS Supplement Report, 15th November 2017, p. 31, available at: http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf (16/05/2019); *UNCITRAL Working Group III*, Possible Reform of Investor-State Dispute Settlement (ISDS) – Arbitrators and decision-makers: Appointment mechanisms and related issues, A/CN.9/WG.III/WP.152, 30 August 2018, p. 6; *European Union*, Submission of the European Union and its Member States to UNCITRAL Working Group III: Establishing a standing Mechanism for the Settlement of International Investment Disputes, 18 January 2019, para. 50; *Howse*, Yearbook of European Law 2017/1, p. 224.

82 *Bungenberg/Reinisch*, paras 96-104.

83 Statute of the International Court of Justice, Art. 9: 'At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the **representation of the main forms of civilization and of the principal legal systems of the world should be assured**' (emphasis added).

84 Statute of the International Tribunal for the Law of the Sea, Art. 2(2): 'In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured' (emphasis added).

85 DSU, Art. 17(3): '(…) The Appellate Body membership shall be broadly representative of membership in the WTO (…)'.

the MIC are envisaged, namely in broader terms, similar to the ICJ,[86] or considering the expertise in specific fields of law such as public international law and investment law. Both approaches are equally acceptable and do not present any problem for the functioning of an MIC.[87]

Nevertheless, it is contended that the most suitable candidates to be designated as adjudicators at an MIC might not be interested in taking a permanent position because neither a permanent and exclusive job nor the remuneration offered would be sufficiently attractive for them.[88] Should that situation occur, although it probably would not affect the predictability and consistency of the decisions, it would affect the reliability of the system, and the prospective users may be reluctant to submit their investment disputes to the MIC.

However, the legitimacy of the adjudicators hinges on a broader variety of factors such as appointment rules, institutional framework, remuneration, the possibility of appeals, among others.[89] Thus, arguing that the lack of disposition of experienced arbitrators to a permanent position at the MIC undermines the reliability of the system seems rather simplistic.

Be that as it may, in the context of an MIC, a body of permanent adjudicators would eliminate the phenomenon of double hatting, and would also dissipate doubts about favouring the appointing party, thereby, tackling some of the criticisms to investment arbitration.

## D. Appeal Mechanism: Addressing the Inconsistency of Awards in Investment Arbitration

### I. Existing Criticisms

Consistency is one of the pillars of any system of dispute resolution.[90] It requires that adjudicators compare the case at hand to previous decisions, where similar circumstances occurred and similar treaty provisions were raised, thereby, an informed decision is reached.[91] Investment arbitration is criticised because it has produced incon-

86 Statute of the ICJ, Art. 2: "The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law".

87 Suggestions of requiring specific knowledge in public law, *i.e.* national administrative and constitutional law, have been advanced by *Bungenberg/Reinisch*, para. 125.

88 *Kaufmann-Kohler/Potestà*, Can the Mauritius Convention serve as a Model, (fn. 46), p. 19. In a similar way, *Brower/Ahmad*, Fordham International Law Journal 2018/4, p. 795.

89 *Pauwelyn*, The American Journal of International Law 2015/4, pp. 799 ff.

90 *Karton*, TDM 2014/1, p. 6.

91 *Butler/Subedi*, Netherlands International Law Review 2017/1, p. 49.

sistent decisions, bringing confusion and lack of predictability.[92] Quite frequently, cases where similar, if not identical, facts gave rise to disputes and treaty provisions with the same wording were raised, arbitral tribunals have reached opposing decisions.[93] Certainly, the problem of inconsistent decisions stems from one of the main features of arbitration: *ad hoc* tribunals, which are not bound by previous decisions.[94] In this context, states as well as investors cannot foresee the possible outcome of an investment dispute and cannot rely on previous awards, since the case law is fragmented and isolated, affecting the credibility of the system.[95]

There are abundant examples of inconsistent decisions in investment arbitration, which give a glimpse of the implications on the perceived legitimacy of the system. In *CME v Czech Republic* and *Lauder v Czech Republic*, two tribunals reached opposite decisions based on the same facts but slightly different provisions: one concluded that expropriation had occurred, and the other concluded expropriation never took place.[96] Another example can be found in the famous cases of *CMS v Argentina* and *LG&E v Argentina*, where one of the tribunals allowed the exception of necessity and the other did not, both cases under the same circumstances and treaty provisions.[97]

However, the debate is not settled. Some authors stand up for the current system of investment arbitration as it is, arguing that in spite of the non-precedential value of previous arbitral awards, experienced arbitrators usually cite and analyse the decisions rendered by other tribunals in similar cases, in order to strengthen their reasoning on the new case.[98] Furthermore, it is held that cases where diametrically opposite decisions have been rendered are rather rare and only display different views on the application of the standards of protection.[99]

92 *Karton*, TDM 2014/1, p. 2; *Schill*, Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward, (2015) International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, p. 2, available at: http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf (16/05/2019); *Butler/Subedi*, Netherlands International Law Review 2017/1, p. 44; *Katz,* Harvard Negotiation Law Review 2016/1, pp. 174-175. In similar way, concerns pertaining consistency are identified by *UNCITRAL Working Group III*, Possible Reform of Investor-State Dispute Settlement (ISDS), A/CN.9/WG.III/WP.149, 5 September 2018, paras 9-10.

93 *García-Bolivar*, TDM 2014/1, p. 1; *González García,* TDM 2014/1, p. 2; *Butler/Subedi*, Netherlands International Law Review 2017/1, p. 48; *UNCITRAL Working Group III*, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, A/CN.9/WG.III/WP.150, 28 August 2018, para. 11.

94 *Schwieder*, Columbia Journal of Transnational Law 2016/1, p. 187.

95 *Calamita*, Journal of World Investment & Trade 2017/1, p. 587.

96 *CME Czech Republic BV v. The Czech Republic*, UNCITRAL Rules Final Award, 14 March 2003; *Ronald S Lauder v. The Czech Republic*, UNCITRAL Rules Final Award, 3 September 2001.

97 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award 12 May 2005; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic*, ICSID Case No. ARB/02/1, Award 25 July 2007.

98 *Franck*, University of California Davis Journal of International Law and Policy 2005/1, p. 57; *Zuleta*, TDM 2014/1, p. 14; *Bernardini*, ICSID Review 2017/1, p. 53.

99 *Schill*, Trade Law and Development 2010/2, p. 61.

Closely connected to the inconsistency of decisions is the lack of review on points of law or facts on the awards rendered. A substantive review or appeal refers to the substantive correctness of the decision, whereas annulment, setting aside and refusal of recognition and enforcement refer to the soundness of the process.[100] In investment arbitration a substantive review of awards has been excluded, considering that the finality of the decision is of paramount importance and it is deemed to be achieved through a one-instance judgement.[101]

The standard practice in investment arbitration is to allow only a few and strict remedies against the awards rendered,[102] which are related to the fundamental rules of procedure.[103] This strict limitation has given rise to situations, where even inaccurate assessments, either of applicable law or facts, cannot be corrected.[104] Different tribunals may have contrasting views on how to apply a specific treaty provision or how to weigh the circumstances before them,[105] and the parties of the dispute have their hands tied and cannot request the revision of the decision on its merits. This situation is exacerbated by the bilateral nature of IIAs and their ISDS mechanisms, where there is no hierarchy of the tribunals to guarantee the harmonised interpretation of the legal provisions in each case.[106]

## II. Sketching an Appeal Mechanism at an MIC

Considering the criticisms to investment arbitration detailed above, a 'fragmentation of international investment law' is feared.[107] In other words, international investment law dismembered case by case. Therefore, it is advanced that an appeal mechanism must be implemented in the framework of investment disputes, in order to guarantee the accuracy of the decisions taken,[108] as well as assuring predictability and consistency in international investment law.[109] Within an MIC, an appeal mechanism would allow

100 *Franck*, Fordham Law Review 2004/1, p. 1547; *Platt*, Journal of International Arbitration 2013/1, p. 532; *Pauwelyn*, ICSID Review 2014/2, p. 378; *Shin*, in: Kinnear et al. (eds.), p. 702.

101 *Shin*, in: Kinnear et al. (eds.), p. 699; *Wuschka*, ZEuS 2016/2, p. 160; *Chung*, Virginia Journal of International Law 2007/4, p. 967; *Dolzer/Schreuer,* p. 300.

102 Awards in investment arbitration can only be subjected to the following remedies: Annulment under Art. 52 ICSID Convention, setting aside in the place of arbitration according to its national legislation or refusal to enforce and recognize in the place of enforcement pursuant to the NYC.

103 *UNCITRAL Working Group III*, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, A/CN.9/WG.III/WP.150, 28 August 2018, paras 22 ff.

104 *Franck*, Fordham Law Review 2004/1, p. 1548; *European Commission*, Multilateral Reform ISDS-Impact Assessment, (fn. 4), p. 14.

105 *Schill*, Trade Law and Development 2010/2, p. 64.

106 *Lee*, Northwestern Journal of International Law & Business 2018/1, p. 22.

107 *Schill*, Trade Law and Development 2010/2, p. 65.

108 *Goldhaber*, TDM 2014/1, p. 3.

109 *Baetens*, Legal Issues of Economic Integration 2016/4, p. 381.

the review of manifest errors of facts and the errors of law, providing consistency throughout the whole system of international investment law.

The issues that might be subject to appeal must be limited in order to avoid groundless and obstructive appeals. A point of reference can be found in the WTO. As set forth in Art. 17(6) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the grounds for appeal are limited to issues of law dealt with in the first-instance decision,[110] which narrows the scope of review of the WTO Appellate Body since no factual findings are subjected to review in appeal.[111] Similarly, the MIC should set clear limits for the appeal following the example of the DSU. Otherwise, an open appeal, allowing any point of law or fact to be reviewed, even if not relevant for the final decision, could backfire on the efficiency of the procedure.[112]

As one would anticipate, some heated debates have arisen over the length of the procedure in an MIC, since it is considered that an appeal mechanism would delay the proceedings and the final outcome.[113] The possibility of appeals could have an adverse effect on judicial economy and celerity of proceedings at the MIC because, at least for internal accountability, the losing party would always file an appeal,[114] postponing the final decision.

Nevertheless, the appeal mechanism within an MIC is not always foreseen as a drawback in the length of the procedure. Filing appeals might become the standard practice of the losing parties at the beginning of an MIC, but afterwards, once its reputation has increased and the decisions start to be predictable and consistent, a decrease in the number of appeals may be expected.[115]

It is recommended to introduce strict but realistic time limits for the appeal procedure in an MIC, in order to guarantee effective access to justice.[116] In the same line, it is desired that the instance of appeals at an MIC would be entitled to modify the legal findings of the first instance by itself, without referring to the first instance division/chamber, in order to avoid any unnecessary delays.[117] This differs from the ICSs outlined in CETA, EU-Vietnam IPA and EU-Singapore IPA since those agreements contemplate the possibility of the appeal tribunal to refer the case back to the first instance.[118]

110 DSU, Art. 17(6): "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel".
111 *Merrills*, p. 224; *Van den Bossche/Zdouc*, p. 236.
112 For instance, an open appeal on any error of facts has been considered as a Pandora's box, entailing the risk that all the decisions would subject to appeal regardless the impact of the error on the decision, see *Bottini*, in: Kalicki/Joubin-Bret (eds.), p. 460.
113 *Bernardini*, ICSID Review 2017/1, p. 47.
114 *Kaufmann-Kohler/Potestà*, Can the Mauritius Convention serve as a Model, (fn. 46), p. 47.
115 *Baetens*, Legal Issues of Economic Integration 2016/4, p. 380.
116 *European Commission*, Multilateral Reform ISDS-Impact Assessment, (fn. 4), p. 48; *Bungenberg/Reinisch*, para. 354.
117 *Baetens*, Legal Issues of Economic Integration 2016/4, p. 381; *Bungenberg/Reinisch*, para. 350. For a different opinion, see *Howse*, Yearbook of European Law 2017/1, p. 234.
118 CETA Art. 8.28(7)(b); EU-Vietnam IPA Art. 3.54(4); EU-Singapore IPA Art. 3.19(3).

In general, the MIC procedure, including appeal, should proceed efficiently to meet the time limits set forth. This would allow the MIC to become a more attractive mechanism to solve investment disputes, compared with the average length of an investment arbitration procedure which is estimated around 3.75 years for ICSID proceedings and 3.95 years for UNCITRAL *ad hoc* proceedings only from registration to award.[119]

An additional element to analyse in the appeal instance at the MIC comes from the WTO. The WTO Appellate Body has a unique internal procedure called 'exchange of views', which is highly regarded.[120] The WTO Appellate Body has seven members, but they decide the cases before them in configurations of three members.[121] Nonetheless, all the other members may express their views on a particular issue dealt with in a particular case through the 'exchange of views'.[122] It does not mean that the whole WTO Appellate Body decides an appeal since the specific division remains in charge and can drift away from the position of the other members.[123] However, it allows all members of the WTO Appellate Body to be aware of the positions of the others in a particular issue, hence, reducing the risk of inconsistency and incoherence of the decisions rendered.[124] In this sense, the 'exchange of views' arises as an invaluable input of the other members of the WTO Appellate Body, thereby, buttressing the institutional image of the WTO and providing one voice as regards the legal position and interpretation of the WTO instruments.

Naturally, the internal costs of the 'exchange of views' could be considered quite high, however, in comparison with *en banc* decisions, whereby the whole WTO Appellate Body would have to decide every case, the internal costs of the 'exchange of views' are rather low.[125] Comparatively, the MIC at the appeals instance could adopt a similar working feature to the 'exchange of views', which would provide consistency, even if different divisions of adjudicators are deciding a case, and would entail lower costs than *en banc* decisions.

It has been questioned whether the appeal mechanism in the MIC would guarantee consistency and predictability of the decisions, taking into consideration that there is no single treaty setting out the substantive standards of investment protection.[126] In spite of the existing different IIAs with diverse substantive standards, the elements of a permanent court could provide uniformity in a greater degree than investment arbitration.[127] Moreover, by means of appeal, the second instance could not only correct the decisions of the first instance when necessary, but also harmonise the interpreta-

119 *UNCITRAL Working Group III*, Possible Reform of Investor-State Dispute Settlement (ISDS): Cost and Duration, A/CN.9/WG.III/WP.153, 31 August 2018, para. 56.
120 *Kaufmann-Kohler/Potestà*, Can the Mauritius Convention serve as a Model, (fn. 46), p. 64.
121 *Mavrodis/Wu*, p. 995.
122 *Van den Bossche/Zdouc*, p. 234.
123 *Alvarez-Jimenez*, Journal of International Economic Law 2009/2, p. 309; *McRae*, Journal of International Dispute Settlement 2010/2, p. 375; *Mavrodis/Wu*, p. 995; *Merrills*, p. 225.
124 *Ehlermann*, Texas International Law Journal 2003/1, p. 478; *Merrills*, p. 225.
125 *Alvarez-Jimenez*, Journal of International Economic Law 2009/2, p. 304.
126 Cf. *McRae*, Journal of International Dispute Settlement 2010/2, p. 384.
127 *Howse*, Yearbook of European Law 2017/1, p. 20.

tions among the different IIAs. Notwithstanding, a WTO-like consistency cannot be expected.

### E. Transparency of the Proceedings

An often-raised criticism against investment arbitration lies on its characterisation of 'justice behind closed doors'.[128] This lack of transparency has created certain distrust of the system of ISDS, especially if arbitral tribunals are considered to perform a public function.[129] Transparency may cover different aspects of the arbitral proceedings, for instance, the publication of documents, with the redaction of confidential information; public access to hearings; participation of non-disputing parties, either contracting parties to the underlying IIA or other non-state parties by means of *amicus curiae* submissions.[130]

In this regard, investment arbitration has already introduced substantial reforms reflected in the UNCITRAL Rules on Transparency[131] and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention). The Mauritius Convention has been signed by 23 states and ratified by five states. It only entered into force on 18 October 2017.[132] Such developments on transparency for investment arbitration may be used as a template when drafting the procedure at an MIC. Arguably, that would legitimise the proceedings at the MIC, and it would increase the perceived accountability of the different actors in investment disputes.

### F. The Right to Regulate: Beyond Procedural Reforms?

#### I. Existing Criticisms

Keeping in mind that arbitral tribunals in investment arbitration may judge the regulatory activities of a state, some authors consider that these tribunals displace not only domestic courts but also legislators, affecting the public policy of the states and having a direct impact on their societies.[133] Therefore, it has been argued that the state's right to regulate is affected by investment arbitration.[134]

128 *UNCITRAL Working Group III*, Possible Reform of Investor-State Dispute Settlement (ISDS), A/CN.9/WG.III/WP.142, 18 September 2017, para. 26.
129 *Pauwelyn*, The American Journal of International Law 2015/4, p. 803.
130 *Fry/Repousis*, NYUJ International Law and Politics 2016/1, pp. 808-811.
131 Effective as of 1 April 2014.
132 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-3&chapter=22&lang=en (16/05/2019).
133 *Leader*, Journal of International Economic Law 2006/3, p. 684; *Kaushal*, Harvard International Law Journal 2009/2, p. 511; *Van Harten*, in: Waibel et al. (eds.), p. 449; *Alvarez*, pp. 56 ff.; *Katz,* Harvard Negotiation Law Review 2016/1, p. 173.
134 The right to regulate may be depicted as "the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate", *Titi*, p. 33.

Should states try to implement public policies to the detriment of foreign investors' interests, an ongoing threat of bringing claims to ISDS would soften their regulatory measures. Such a phenomenon has been called 'regulatory chill'.[135] Consequently, ISDS has been the target of critics, proclaiming that the existing ISDS undermines states' sovereignty, whereby the state's allegedly legal acts are subjected to the will of private corporations.[136]

Perhaps, concerns about the right to regulate may be overstated, since tribunals are not unfamiliar to this right.[137] For instance, in *Methanex v United States*, the tribunal found that 'non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, inter alia, a foreign investor or investment, is not deemed expropriatory.'[138] A further step was taken in *Saluka v Czech Republic*, where the arbitral tribunal expressly categorised as part of customary international law that states are not liable *vis-à-vis* investors, for damages caused by enacting regulatory powers in good faith.[139] However, other arbitral tribunals, such as *Tecmed v Mexico*,[140] have paid lip service to the right to regulate because, in spite of acknowledging this right, they have ruled against the host state in most of the cases.[141]

## II. Strengthening the Right to Regulate

At first sight, the right to regulate and the establishment of an MIC are not directly interrelated since the former touches upon rights of the state, whereas the latter refers to a mechanism for solving disputes. Nevertheless, given that the right to regulate delineates the scope of investment protection under IIAs, it may be of particular importance when reforming ISDS.[142]

135 It is raised that the possibility of facing investment arbitration influences the state decisions on public policy. See *Kaushal*, Harvard International Law Journal 2009/2, p. 516; *Butler/Subedi*, Netherlands International Law Review 2017/1, p. 58; *Puig/Shaffer*, American Journal of International Law 2018/3, p. 366; *Katz,* Harvard Negotiation Law Review 2016/1, p. 173.

136 *Waibel et al.*, in: Waibel et al. (eds.); *García-Bolivar*, TDM 2014/1, p. 1; *Behn*, Georgetown Journal of International Law 2015/1, pp. 366-367; *Schwieder*, Columbia Journal of Transnational Law 2016/1, p. 188.

137 *Bernardini*, ICSID Review 2017/1, pp. 51-52.

138 *Methanex Corporation v. United States of America*, UNCITRAL Rules Final Award on Jurisdiction and Merits, 3 August 2005, pt. IV ch. D para. 7.

139 *Saluka Investments BV v. Czech Republic*, UNCITRAL Rules Partial Award 17 March 2006, paras. 255 and 261.

140 *Técnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award 29 May 2003, para. 119: "The principle that the States' exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable".

141 *Titi*, p. 289.

142 For instance, when analysing the compatibility of the ICS in CETA with EU law, the CJEU highlights the right to regulate, CJEU, *Opinion 1/17*, Request for an opinion submitted by the Kingdom of Belgium, ECLI:EU:C:2019:341, paras 152 ff.

With different nuances, the right to regulate in investment law may be construed from the language of the standards of treatment, exceptions clauses, declaratory clauses, from the wording of the preamble or even from customary law.[143] It has an entrenched relation with substantive obligations of the IIAs, thus, an agreement on the right to regulate on a multilateral basis seems cumbersome.[144]

By means of the convention setting up the MIC, a specific provision stipulating states' right to regulate could be introduced,[145] which would then be considered a modification of the previous IIAs in that particular aspect. In principle, nothing prevents the modification of treaties pursuant to Art. 39 VCLT, however, given the importance of the principle of *pact sunt servanda*, such modification of the IIAs would require the agreement of the contracting states to the particular IIAs.[146]

Certainly, introducing a right to regulate clause into the treaty creating the MIC may be seen as a long shot, since states may be reluctant to include substantive reforms by this means. Nevertheless, it might be the easiest way to ensure a right to regulate without entering into renegotiations of IIAs.

## G. Conclusion

The backlash against investment arbitration calls for an urgent reform in ISDS. The efforts to achieve a multilateral response are noteworthy, nonetheless, it seems that a solution is still at an incipient stage. Several proposals for reforms have been discussed in different fora and, particularly, the establishment of an MIC taking over the jurisdiction of international investment disputes stands out. Such a proposal defies the predominant system of ISDS drawing the attention of practitioners, academics and international organisations.

Should the MIC proposal be selected as a new mechanism to solve investment disputes, careful attention must be given to its design, since, as a game changer, an MIC would shape a new route in international investment law. In this sense, some of the features of an MIC that might address the current criticisms to ISDS consist of a structure of permanent adjudicators and the introduction of an appeal mechanism. Furthermore, having transparent proceedings and an express right to regulate might complete the picture of a potential MIC that overcomes the perceived problems of investment arbitration.

143 In this regard, *Titi*.

144 As the experience of the negotiations on a Multilateral Agreement on Investment (MAI) has revealed, an agreement on substantive rights in investment law might be difficult to reach. In this regard, see *Leal-Arcas*, North Carolina Journal of International Law and Commercial Regulation 2009/1, pp. 67-68; *Loibl*, in: Evans (ed.), p. 745; *Rajput*, Indian Journal of International Law 2017/1, p. 444.

145 *Bungenberg/Reinisch*, paras 29.

146 Modification or amendment of bilateral treaties requires the agreement of all parties, whereas it is possible that the modification of multilateral treaties may be undertaken by some of the members, but it would be binding only on those agreeing on the modification, see *von der Decken*, in: Dörr/Schmalenbach (eds.), Art. 39 VCLT, para. 15.

Indisputably, the establishment of an MIC requires the engagement of representative states as well as considerable resources. However, the time has never been more appropriate to realise such an ambitious project.

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