International Economic Law Practicum

# MULTILATERAL INVESTMENT COURT IN ISDS: PROCEDURAL, STRUCTURAL, AND SUBSTANTIVE REFORM PATHWAYS

22nd September 2025, Gandhinagar (India)


Submitted by

Lavanya Shankar, Arayan Khare, Parvathy Roy, Kanan Shivhare, Bharat Manwani, Shaharyaar Shahardar


To : Centre for International Legal Studies ["CILS"]
Salzburg, Austria


Institute of International Economic Law – Georgetown University Law Center
600 New Jersey Avenue, NW - Washington, DC 20001, USA

*TradeLab output is prepared on a pro bono basis by students as a pedagogical exercise. It is not professional legal advice and in no way establishes a client-attorney relationship.*

## TradeLab

International rules on cross-border trade and investment are increasingly complex. There is the WTO, World Bank and UNCTAD, but also hundreds of bilateral investment treaties (BITs) and free trade arrangements ranging from GSP, EU EPAs and COMESA to ASEAN, CAFTA and TPP. Each has its own negotiation, implementation and dispute settlement system. Everyone is affected but few have the time and resources to fully engage.

TradeLab aims to empower countries and smaller stakeholders to reap the full development benefits of global trade and investment rules. Through pro bono legal clinics and practica, TradeLab connects students and experienced legal professionals to public officials especially in developing countries, small and medium-sized enterprises and civil society to build lasting legal capacity. Through 'learning by doing' we want to train and promote the next generation of trade and investment lawyers. By providing information and support on negotiations, compliance and litigation, we strive to make WTO, preferential trade and bilateral investment treaties work for everyone.

More at: https://www.tradelab.org

## What are Legal Practica

Legal practica are composed of small groups of highly qualified and carefully selected students. Faculty and other professionals with longstanding experience in the field act as Academic Supervisors and Mentors for the Practica and closely supervise the work. Practica are win-win for all involved: beneficiaries get expert work done for free and build capacity; students learn by doing, obtain academic credits and expand their network; faculty and expert mentors share their knowledge on cutting-edge issues and are able to attract or hire top students with proven skills. Practicum projects are selected on the basis of need, available resources and practical relevance. Two to four students are assigned to each project. Students are teamed up with expert mentors from law firms or other organizations and carefully prepped and supervised by Academic Supervisors and Teaching Assistants. Students benefit from skills and expert sessions, do detailed legal research and work on several drafts shared with supervisors, mentors and the beneficiary for comments and feedback. The Practicum culminates in a polished legal memorandum, brief, draft law or treaty text or other output tailored to the project's needs. Practica deliver in three to four months. Work and output can be public or fully confidential, for example, when preparing legislative or treaty proposals or briefs in actual disputes.

## Centre for Trade and Investment Law (CTIL)

The Centre for Trade and Investment Law (CTIL) was established in the year 2016 by the Ministry of Commerce and Industry, Government of India, at the Indian Institute of Foreign Trade (IIFT). The Centre's primary objective is to provide sound and rigorous analysis of legal issues pertaining to international trade and investment law to the Government of India and other governmental agencies. The Centre is aiming to create a dedicated pool of legal experts who could provide technical inputs for enhancing India's participation in international trade and investment negotiations and dispute settlement. The Centre also aims to be a thought leader in the various domains of international economic law such as WTO law, international investment law and legal issues relating to economic integration. It is CTIL's mission to identify, analyse and provide creative ideas and perspectives to influence the international discourse on wide ranging aspects of international economic law. The Centre engages on a regular basis with different stakeholders including central and state governments, think-tanks, research centres, national law schools and other institutions rendering legal education in international economic law, independent legal professionals, industry organizations and the private sector. The Centre is also conceived as a ready repository of trade and investment related information including updates on ongoing trade negotiations and disputes.

More at: https://ctil.org.in/

## Content

Executive Summary....A

1. Current ISDS System and Adaptation Analysis....1

1.1. Introduction....1

1.2. Fundamental Weaknesses of the Current ISDS System....1

1.2.1. Inconsistency and Lack of Coherent Jurisprudence....1

1.2.2. The Economics of System Dysfunction....2

1.2.3. Legitimacy and Independence Concerns....4

1.2.4. Transparency and Democratic Deficit....6

1.3. Recent Adaptation Efforts and Their Assessment....8

1.3.1. CETA's Investment Court System....8

1.3.2. UNCITRAL Working Group III Reform Process....10

1.3.3. Transparency and Third-Party Participation Improvements....12

1.4. Limitations of the Adaptation Approach....14

1.4.1. Political Gridlock and Implementation Paralysis....14

1.4.2. The Adaptation Paradox....15

1.4.3. Economic Failure on Its Own Terms....15

2. How can the reforms be adapted by building upon the current ISDS Framework?....16

2.1. Introduction....16

2.2. The Mauritius Convention Approach....18

2.3. Implementation of Multilateral Standing Mechanism Using the Mauritius Convention Mechanism....19

2.4. The *à la Carte* Approach....19

2.5. Critique of à la carte approach....20

2.6. Legal Issues and Questions concerning setting up a permanent dispute settlement body ..... 21
3. Importing Institutional Structures of Existing Permanent Bodies ..... 24
3.1. The ICJ: A Model of Judicial Independence ..... 24
3.2. The ICC: Prosecutorial Autonomy and Ethical Oversight ..... 26
3.3. The WTO Appellate Body: Ensuring Consistency and Legal Coherence ..... 27
4. Comparison of Procedural Models ..... 28
4.1. Institutional Structure and Governance ..... 29
4.2. Jurisdiction and Applicable Law ..... 30
4.3. Terms of Office and Conditions of Service ..... 31
4.4. Selection and Appointment of Adjudicators ..... 31
4.5. Costs and Financing ..... 32
4.6. Case Assignment Mechanism ..... 33
4.7. Appellate Mechanisms and Consistency ..... 34
4.8. Transparency and Public Participation ..... 34
4.9. Recognition and Enforcement of Decisions ..... 35
5. Mapping Appeal Mechanisms in International Tribunals ..... 36
5.1. Composition and Institutional Design of the Appellate Body ..... 36
5.1.1. Standing Judicial Body with Long-Term Appointments ..... 37
5.1.2. Use of Chambers and Plenary Sittings ..... 38
5.1.3. Transparent and Democratic Leadership within the Court ..... 39
5.2. Substantive Grounds for Appeal ..... 40
*5.2.1.* Jurisdiction and Admissibility (Clause 46(a)) ..... 40
5.2.2. Excess of Powers and Judicial Corruption (Clause 46(b)-(c)) .. 41
*5.2.3.* Procedural Errors and Lack of Reasoning (Clause 46(d)-(e)) .. 41

5.2.4. Legal and Factual Errors (Clause 46(f)-(g)) ..... 42
5.3. Procedural Framework and Efficiency ..... 44
*5.3.1.* Timeframes and Accessibility ..... 44
*5.3.2.* Random Judge Assignment and Plenary Criteria ..... 45
*5.3.3.* Establishment of a Precedential System ..... 46
*5.3.4.* Remedial Powers and Stay of Enforcement ..... 46
*5.3.5.* Frivolous Appeal Deterrents ..... 47
5.4. Conclusion: Recasting ISDS Through Structured Appellate Reform 48
6. Core Elements of the MIC Statute ..... 48
6.1. Composition & Appointment ..... 48
6.1.1. Comparison and Enhanced Recommendation: ..... 49
6.2. Case Allocation & Division Structure ..... 49
6.2.1. Recommendation: ..... 50
6.3. Funding & Remuneration ..... 50
6.3.1. Recommendations ..... 51
6.4. Language Policy ..... 51
6.4.1. Recommendation ..... 52
6.5. Confidentiality & Transparency ..... 52
6.5.1. Recommendation ..... 53
6.6. Institutional Oversight & Enforcement ..... 53
6.6.1. Recommendation: ..... 54
6.7. Toward a Cohesive and Balanced Design ..... 54
7. Overcoming Challenges of Transitioning from an Ad Hoc to a Standing Mechanism ..... 55
7.1. Introduction ..... 55

7.2. Appointment and Legitimacy ..... 56
7.3. Judicial Independence, Ethics, and Tenure ..... 57
7.4. Procedural Uniformity Versus Flexibility ..... 59
7.5. Budgeting, Costs, and Access to Justice ..... 60
7.6. Jurisdictional Scope and Precedent ..... 62
7.7. Transitional Framework and Forum Shopping ..... 63
7.8. Appellate Review: Finality Versus Accuracy ..... 65
7.9. Regulatory Sovereignty and Public Interest ..... 67
7.10. Conclusion ..... 68
Bibliography ..... i

## Executive Summary

The Investor-State Dispute Settlement (ISDS) system has been the cornerstone of international investment governance for several decades. While it has facilitated cross-border investment flows, its legitimacy has been repeatedly questioned due to fragmented jurisprudence, excessive costs, limited transparency, and structural asymmetry between investors and States. The growing criticism has generated calls for a Multilateral Investment Court (MIC) as a wholesale alternative. Yet such an ambitious reform faces political, legal, and practical barriers. This study does not argue for the outright replacement of ISDS with a MIC. Instead, it examines how meaningful reforms can be pursued within the existing ISDS framework through pragmatic mechanisms such as the Mauritius Convention approach and the à la carte model, while borrowing institutional design features from permanent bodies like the International Court of Justice (ICJ), the International Criminal Court (ICC), and the WTO Appellate Body.

The shortcomings of ISDS are well documented. Arbitral tribunals, operating on an ad hoc basis, have delivered contradictory interpretations of core treaty standards such as Fair and Equitable Treatment and Most-Favoured-Nation clauses, undermining predictability for both investors and States. The financial burden of arbitration, averaging millions of dollars per case, excludes smaller investors and imposes disproportionate costs on developing States. The phenomenon of "regulatory chill" demonstrates how the threat of investment claims discourages governments from adopting public interest measures in fields such as environment and health. Structural concerns, including repeat appointments of arbitrators, conflicts of interest, and the secrecy of proceedings, further erode public trust. Taken together, these weaknesses show why incremental reforms alone have not sufficed to restore confidence in the system.

Attempts at reform have produced partial gains. The EU–Canada Comprehensive Economic and Trade Agreement (CETA) introduced a permanent roster of adjudicators and an appellate tribunal, while the UNCITRAL Working Group III process has pursued greater transparency, accountability, and procedural reforms. Instruments like the Mauritius Convention on Transparency have also widened access to information and public participation. However, these measures are narrow in scope. They do not alter the structural imbalance that privileges investors with exclusive rights to initiate

claims, nor do they address the democratic deficit created when adjudication of public policy questions occurs in confidential settings.

This study identifies two viable pathways for embedding reforms across the ISDS framework without demanding full adoption of a MIC. The **Mauritius Convention** approach provides an opt-in mechanism for States to extend reforms such as transparency and appellate review across their treaty networks without renegotiating thousands of bilateral investment treaties. It is pragmatic, politically feasible, and capable of producing meaningful procedural coherence. The **à la carte model** offers a more flexible structure. Under this design, a Multilateral Institution for Dispute Settlement on Investment would act as an umbrella system under which States can choose among different dispute settlement options, including reformed arbitration, state-to-state mechanisms, or a standing tribunal with appellate review. This flexibility respects States' varied preferences while enabling gradual convergence toward greater consistency.

The paper further emphasizes the importance of institutional borrowing from established international courts. The ICJ provides lessons in ensuring judicial independence through fixed appointments, regional diversity, and security of tenure. The ICC illustrates the necessity of strict ethical safeguards and prohibitions on double-hatting. The WTO Appellate Body demonstrates how appellate review can promote coherence, though its political paralysis also highlights the need for safeguards against stalemate. Integrating such tested features into ISDS reform can enhance legitimacy without the political difficulty of creating a new court from scratch.

Reform should also address substantive fairness. Clarification and standardization of treaty provisions, coupled with limited precedential value, would reduce fragmentation. Balancing mechanisms such as proportionality tests, combined with explicit recognition of the right to regulate, would allow adjudicators to reconcile investor protections with sovereign autonomy. Structural improvements in transparency, financing, and public participation would reinforce legitimacy and broaden access. These elements are not a generic wishlist; they form part of a coherent strategy that builds on ISDS while drawing from proven institutional models.

In conclusion, the ISDS regime is under significant pressure to change, yet political realities make the full-scale establishment of a Multilateral Investment Court

improbable in the near term. This study argues that reform should be pursued within the ISDS framework through flexible mechanisms like the Mauritius Convention approach and the à la carte model, complemented by institutional borrowing from permanent courts. Such a strategy offers a middle path between the status quo and wholesale replacement. By embedding reforms incrementally but coherently, international investment dispute settlement can evolve into a system that is more predictable, more transparent, and more legitimate, while still respecting the sovereign right of States to regulate in the public interest.

# 1. Current ISDS System and Adaptation Analysis

## 1.1. Introduction

The investor-state dispute settlement (ISDS) mechanism is one of the most disputed elements of the international investment law, increasingly criticized by a variety of stakeholders while simultaneously experiencing unprecedented caseload growth. As more than 1,200 known ISDS cases have been initiated since the late 1980s[1], the structural weaknesses of the system have been increasingly perceptible, leading to different adaptation attempts to retain the mechanism, but to fix its inherent flaws. This discussion reviews the fundamental flaws of the existing ISDS system, reviews recent adaptation efforts, and determines whether the systemic issues of the current system can be effectively resolved through incremental reform or whether more fundamental changes to the system, such as a Multilateral Investment Court (MIC) are required.

## 1.2. Fundamental Weaknesses of the Current ISDS System

### 1.2.1. Inconsistency and Lack of Coherent Jurisprudence

The most significant structural weakness in the existing ISDS system is that it has failed to generate consistent level of legal interpretation and awards.[2] In contrast to permanent courts, ISDS is conducted on an ad hoc basis before arbitral tribunals whose arbitrators are chosen on a case-to-case basis, and there is no formal system of providing jurisprudential uniformity. This has led to conflicting interpretations of same treaty provisions, making the legal interpretation unpredictable, something that erodes investor confidence as well as predictability of state regulation.

The *Philip Morris v. Uruguay*[3] case is a vivid example of this inconsistency. Though the tribunal eventually ruled in favor of the sovereign right of Uruguay to implement tobacco control measures, its rationale was notably different to prior awards that had been issued concerning comparable public health regulations. In particular the way the

---

[1] UNCTAD, World Investment Report 2023, https://unctad.org/publication/world-investment-report-2023.
[2] UNCTAD, Reform of Investor-State Dispute Settlement: In Search of a Roadmap, IIA Issues Note No. 2 (2013), https://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf
[3] Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016), https://www.italaw.com/cases/460.

tribunal interpreted the standard of fair and equitable treatment and evaluated legitimate regulatory measures were significantly different as compared to the decisions made in the case of *Ethyl Corporation v. Canada*.[4] This brought a lot of confusion on the extent of the state regulatory power under the international investment law. By design, the decentralized ISDS tribunals structure directly inhibits the creation of a predictable and coherent jurisprudence. This is not a fact of the occasional breakdown but an internal structural barrier to the legal certainty, which is contrary to the very purpose of the system to offer stable legal framework to investment.

### 1.2.2. The Economics of System Dysfunction

In addition to the problem of legal inconsistency, the present ISDS system also poses an economic paradox: in practice, this system can undermine the investment protection it is meant to offer.[5] The unpredictability of results establishes a perverse system of incentives whereby frivolous claims are economically rational while legitimate disputes face uncertain resolution. The dynamic of this "litigation lottery" is a waste of resources by both sides and does not deliver the legal certainty that should be the attraction and protection of investment.

#### 1.2.2.1. Regulatory Chill

Take the phenomenon of "regulatory chill", in which states alter or drop valid measures of the public policy to avert possible ISDS liability. Studies by Kyla Tienhaara catalogue several examples of how the threat of ISDS litigation has already affected government decision-making, such as Australia taking a long time to implement plain packaging to tobacco products and Germany halting the reforms of renewable energy.[6]

The case of Australia plain packaging can serve as a vivid illustration of the distorting effect of ISDS threats on the democratic process of policymaking. Following the

---

[4] Ethyl Corporation v. Government of Canada, UNCITRAL, Award on Jurisdiction (June 24, 1998), https://www.italaw.com/cases/393.

[5] Lauge N. Skovgaard Poulsen et al., How Investment Agreements Contribute to Improving the Investment Climate, World Bank Group (2015), https://documents.worldbank.org/en/publication/documents-reports/documentdetail/701141468001486503/how-investment-agreements-contribute-to-improving-the-investment-climate.

[6] Kyla Tienhaara, Regulatory Chill and the Threat of Arbitration: A View from Political Science, in Evolution in Investment Treaty Law and Arbitration 606 (Chester Brown & Kate Miles eds., 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325126

leading of Philip Morris in initiating ISDS proceedings against Australian plain packaging legislation, other countries were deterred or even avoided implementing similar public health measures. New Zealand openly used the Philip Morris case as one of the reasons to delay its own plain packaging bill[7], showing how one ISDS case can have regulatory chill effects long beyond the immediate litigants.

Even more troubling are the recorded instances of states changing policies pro-actively to avoid liability to ISDS. This is reflected in the experience of Canada with ethyl gasoline additives. Having lost an ISDS case to Ethyl Corporation, Canada not only lifted its ban on the toxic additive MMT but also released a press statement exonerating the company and paid them $13 million in compensation.[8] This settlement was done even though there was scientific evidence to support the health and environmental issues which the original ban was based on.

Another example of regulatory chill effects can be seen in the experience of the European Union in the process of energy policy reforms. After energy companies threatened to invoke ISDS claims, a number of EU member states altered or put off renewable energy support reforms, even where they were required to do so in order to meet EU climate obligations. Spain had more than 40 ISDS cases on its renewable energy reforms[9], which put a massive pressure to keep the costly and possibly inefficient subsidy systems to avoid liability of arbitration claims.

#### 1.2.2.2. Financial Asymmetries and Private Rent Extraction

These issues are further aggravated by the financial asymmetries. Prosperous investors can exploit ISDS to secure settlements out of cash-starved developing states, irrespective of the merits of the claims. The mean price of an ISDS case is over 8 million dollars, which puts tremendous pressure on settlement even in situations where the

[7] Philip Morris Asia Ltd. v. Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, https://www.italaw.com/cases/851

[8] Howard Mann, Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights, Int'l Inst. for Sustainable Dev. (2001), https://www.iisd.org/system/files/publications/private-rights.pdf

[9] UNCTAD, World Investment Report 2020: International Production Beyond the Pandemic, at 109, https://unctad.org/system/files/official-document/wir2020_en.pdf

states have solid legal grounds.[10] This process turns ISDS into a system of rent extraction on the expense of the state by the privately owned.

The *Pac Rim v. The El Salvador*[11] case demonstrates the practice of such financial pressures. The mining company was demanding compensation of $77 million over a mining permit that was denied, citing that the environmental issues being raised by El Salvador were against the investment protections. Although it eventually won the arbitration, El Salvador was forced to spend more than 12 million dollars in defending its environmental policies- funds which could have been spent in developmental priorities. The case illustrates the fact that even the successful defenses have to entail heavy costs to developing countries that exercise legitimate regulatory power.

### 1.2.3. Legitimacy and Independence Concerns

The legitimacy of the existing ISDS system is severely threatened by issues of arbitrator independence and the lack of impartiality of the system that is seen to be favoring the interests of the investor. The party-appointment system, in which each of the parties to a dispute chooses one arbitrator and the parties jointly choose a presiding arbitrator, generates structural incentives to arbitrators to act in the interests of future potential appointors to win future appointments. This repeat player effect has been described in detail, and empirical research indicates correlation between arbitrator backgrounds and award outcomes.

In the case of *Urbaser v. Argentina*[12], a challenge to the appointment of Professor McLachlan was dismissed despite his long experience as an investor-representative raising questions of bias. The tribunal had arbitrators who had broad backgrounds representing the investors in similar cases and this makes one wonder whether they would have been in a position to be impartial in deciding cases that may have some impacts on their future practice. The case was about the accusations that the economic crises measures taken in Argentina infringed on the investment protection during the

---

[10] OECD, Investor-State Dispute Settlement: Public Consultation: 16 May–9 July 2012 (2012), https://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf

[11] Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, https://www.italaw.com/cases/1010

[12] Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016), https://www.italaw.com/cases/7672

privatization of water and sewage services, which was the field where some of the arbitrators had represented investors.

Although the tribunal eventually rejected the majority of the claims of the investor, the fact that there was an appearance of bias served to erode the confidence of the people in the fairness of the system. Worse was the reasoning process of the tribunal which appeared to go out of its way to not find liability but at the same time recognizing the validity of the crisis measures taken by Argentina. This implied that in instances in which tribunals arrive at justifiable conclusions, the route to achieving the same might be tainted by the interests that arbitrators have on their reputation with prospective future appointing parties.

The even more dramatic evidence of the dysfunction of the system is given in the case of *Vivendi v. Argentina*.[13] In the initial arbitration, a tribunal rejected water concession claims in the context of the failure of the investor to exhaust local remedies. But a later tribunal which also heard similar fundamental allegations came to the contrary conclusion and ordered Argentina to pay hefty damages. Exactly the same facts, more or less the same legal arguments, almost exactly the same protections under the treaty, yielded totally opposite outcomes, with the second tribunal effectively disregarding the rationale of the first.

More troubling is the rise of what scholars have called the "arbitration industrial complex", a fairly small group of international lawyers who flit between positions as arbitrators, counsel, and expert witnesses on a number of cases. This establishes a system whereby the same people who judge cases today may be parties in the same type of cases next week, which essentially undermines the independence on which all judicial legitimacy is based. Study by Sergio Puig and Anton Strezhnev proves that arbitrators who once represented investors have statistically higher chances to decide in favor of investors as arbitrators, which means that the systematic bias is present, which adaptation measures have not solved.[14]

The problem extends beyond individual bias to structural capture of the system by a small professional community. In a study by Corporate Europe Observatory, it was

---

[13] Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (Vivendi II), ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), https://www.italaw.com/cases/856

[14] Sergio Puig & Anton Strezhnev, Affiliation Bias in Arbitration: An Experimental Approach, 46 J. Legal Stud. 371 (2017), https://ideas.repec.org/a/ucp/jlstud/doi10.1086-694416.html

discovered that only 15 arbitrators had ruled in 55% of all known cases under the ISDS, and that many of these same people had close professional and financial ties with large law firms representing investors.[15] This sort of decision-making monopoly within a small, connected community makes the system biased in a systematic way that cannot be solved by codes of conduct or transparency initiatives. In addition, the inherent asymmetry of the ISDS system, which gives investors the exclusive right of submitting claims against states without a corresponding system of claims by states or by the individuals or communities affected by those claims, has brought about criticism concerning democratic accountability. The system allows the individual to appeal against decisions in the public policy in secret trial with minimal third-party input, and in effect, results in the creation of a parallel legal system that is not subject to democratic control.

### 1.2.4. Transparency and Democratic Deficit

The traditional confidentiality nature of the ISDS process has led to a transparency crisis that further undermines the legitimacy of the process. Although the recent reforms have expanded disclosure requirements e.g. ICSID Arbitration Rule 32(2) and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, the basic model of private arbitration continues to restrict access to proceedings in practice, particularly where parties invoke confidentiality provisions.[16] This absence of transparency is not only one of procedural opacity but also of deeper concerns as to the democratic input into choices that are made in relation to regulatory sovereignty.

The *Vattenfall AB v. Germany*[17] case show how ISDS proceedings may run in parallel with domestic democratic proceedings and may even destabilize them. The Swedish energy company filed two distinct proceedings under the Energy Charter Treaty (ECT) against the energy policy decisions of Germany, largely in secret despite their direct

---

[15] Corporate Europe Observatory, Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom (2012), https://corporateeurope.org/en/international-trade/2012/11/profiting-injustice)

[16] ICSID Arbitration Rules, Rule 32(2), https://icsid.worldbank.org/resources/rules-and-regulations/current-rules-and-regulations/2022-rules-and-regulations/rules-of-procedure-for-arbitration-proceedings ; UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014), https://uncitral.un.org/en/texts/arbitration/transparency

[17] Vattenfall AB v. Federal Republic of Germany (I), ICSID Case No. ARB/09/6; https://www.italaw.com/cases/1148

bearing on a democratic decision of Germany to end the use of nuclear energy after the Fukushima disaster.

The first Vattenfall case was on environmental regulation over a coal-fired power plant in Hamburg region where the company argued that environmental conditions violated fair and equitable treatment. This dispute was resolved, allegedly following German concessions on environmental standards, suggesting that the threat of ISDS liability may affect the sovereign regulatory choices. The second case of Vattenfall was even more problematic as it questioned the move by Germany to abandon nuclear energy.[18] This decision, which was taken due to concerns about the safety of the population and democratic pressure, Vattenfall argued that it was an expropriation that must be compensated with 4.7 billion euros. The confidential character of such proceedings reduced the knowledge of the people about the legal and financial consequences of sovereign policy decisions that were subject to wide democratic discussion in Germany.

Vattenfall cases eloquently demonstrate the ability of ISDS to develop parallel accountability regimes that circumvent national democratic procedures. [19] This constitutes a deep democratic deficit, in which the financial ramifications of sovereign policy choices, which are open to wide-ranging public discussion, are resolved by privately-appointed arbitrators who are not answerable to the people whose interests are affected.

The case also depicts the temporal mismatch between the democratic process of decision-making and the accountability of ISDS. The nuclear phase-out in Germany was a result of democratic consensus that had been developed through years of discussion, scientific research and political discussion. However, ISDS enabled one foreign investor to overrule this democratic decision many years later, on the basis of investment expectations that might not have been based on the prospect of policy change in reaction to a disaster such as Fukushima.

---

[18] Vattenfall AB and others v. Federal Republic of Germany (II), ICSID Case No. ARB/12/12, https://www.italaw.com/cases/112

[19] Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, The State of Play in Vattenfall v. Germany II: Leaving the German Public in the Dark, IISD (2014), https://www.iisd.org/publications/report/state-play-vattenfall-v-germany-ii

## 1.3. Recent Adaptation Efforts and Their Assessment

In response to the growing criticisms, various adaptation efforts have been undertaken to reform the ISDS system. These initiatives range from bilateral treaty innovations to multilateral reform processes and general improvements in transparency.

### 1.3.1. CETA's Investment Court System

The Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada is the most important effort to overcome ISDS criticism by institutional adaptation. The CETA Investment Court System (ICS) presents a number of innovations aimed at increasing the legitimacy and consistency and preserving the essence of investor-state dispute settlement.

The ICS introduces a number of underlying innovations aimed at improving legitimacy and consistency and preserving the essence of the investor-state dispute settlement. The system under Articles 8.27 and 8.39 of CETA has put in place a permanent roster of adjudicators who are jointly appointed by the parties of the treaty rather than by individual disputing parties.[20] Such innovation directly answers the issues related to arbitrator independence by removing the incentives of party-appointment which introduce structural bias in the traditional ISDS, thus establishing more institutional independence.

Most importantly, Article 8.28 forms a permanent Appellate Tribunal that is empowered to make appeal on the legal and factual errors including the misapplication of domestic or treaty law. Such an appellate mechanism helps to overcome one of the most important structural flaws of the traditional ISDS system, which is the lack of jurisprudential coherence combined with the complete lack of a mechanism to reverse erroneous awards, which is characteristic of the ad hoc arbitration model. The latest events in 2025 have introduced additional procedural regulations through Council Decision (EU) 2025/703, which triggers the special provisions of the ICS on small and medium-sized enterprises and individual claimants.[21] Such reforms involve single-

[20] Comprehensive Economic and Trade Agreement (CETA), Can.-EU, arts. 8.27–8.39, Oct. 30, 2016, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22017A0114%2801%29

[21] Council Decision (EU) 2025/703 of 27 March 2025, on the position to be taken on behalf of the European Union within the CETA Joint Committee, 2025 O.J. (L 703) 1 (Apr. 10, 2025), https://eur-lex.europa.eu/eli/dec/2025/703/oj

member tribunals, fast-track procedures and shorter deadlines to make awards within 180 days after the hearing, and simplified rules of evidence where the claim does not exceed SDR 40 million. Although these innovations can improve the economy and accessibility of procedures, they are based on the existing system of investor-state adjudication.[22]

Nevertheless, these procedural advancements notwithstanding, there remains a considerable set of structural issues that help shed light on the shortcomings of the adaptation strategy. Most essentially, the ICS still grants exclusive rights to foreign investors and denies host states a right to bring claims to ensure that the structural asymmetry of ISDS, which creates regulatory chill and imbalance in the sovereign-investor relationship intact.[23] This one-sided access shows that although ambitious adaptation initiatives can attempt to respond to core asymmetries that erode the legitimacy of any system, they cannot overcome these asymmetries.

Furthermore, legal scholars have identified constitutional tensions regarding the ICS's compatibility with the European Union's legal framework. Although the Court of Justice of the European Union (CJEU) in Opinion 1/17 (2019) upheld the compatibility of ICS with EU Treaties and the Charter of Fundamental Rights, legal ambiguity persists concerning the interaction between ICS rulings and the primacy of EU law, particularly given the absence of formalized preliminary reference mechanisms to the CJEU.[24] The practical limitations of adaptation become even more apparent when examining the ICS's operational constraints. While the appellate body under Article 8.28 is theoretically operational, its independence and efficacy remain untested due to the absence of decided appeals. Concerns persist about jurisdictional conflicts with national constitutional courts and regional human rights obligations.[25] The ICS's limited provisions for third-party participation and the absence of standing for affected

---

[22] Opinion 1/17, EU:C:2019:341, Court of Justice of the European Union, Apr. 30, 2019, https://curia.europa.eu/juris/document/document.jsf?docid=214343&doclang=EN

[23] Mees Brenninkmeijer & Fabien Gélinas, Counterclaims in Investment Arbitration: Towards an Integrated Approach, ICSID (July 18, 2023), https://icsid.worldbank.org/news-and-events/speeches-articles/counterclaims-investment-arbitration-towards-integrated-approach.

[24] Opinion 1/17 (EU-Canada CETA Agreement) of the Court (Grand Chamber) of 30 April 2019, ECLI:EU:C:2019:341, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62017CV0001%2801%29.

[25] Ivan Farmer & Hari Gupta, CETA: Chapter 8 and the Investment Court System, Oireachtas Library & Research Service, No. 4 of 2021 (May 6, 2021), https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2021/2021-05-06_spotlight-ceta-chapter-8-and-the-investment-court-system_en.pdf.

communities or civil society actors further demonstrate that the reforms remain procedural rather than transformative, failing to address the fundamental democratic deficit that characterizes investor-state dispute resolution.[26]

### 1.3.2. UNCITRAL Working Group III Reform Process

Since 2017, the Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) has been engaged in the most thorough multilateral attempt to tackle ISDS concerns by means of systematic reform.[27] With a mandate that is government-led and based on consensus, the Working Group seeks to find structural issues and devise solutions, and bring in the contribution of a wide range of stakeholders, including developed and developing states, international organizations, and civil society organizations. The Working Group has come up with a progressive reform agenda that covers arbitrator behaviour and appointment, cost and length of the proceedings, third-party funding and transparency and accountability initiatives.[28] The 50th and 51st sessions held in 2025 have devoted much time to working on a draft statute of a standing multilateral mechanism, and discussions have included the related topics of the procedures to be followed in the selection of arbitrators, the scope of its jurisdiction, and the appellate review system to be incorporated to achieve the widest possible representation and judicial independence.[29]

The ideal goal is a Multilateral Instrument to Implement Reforms (MIIR) that may be able to solve systemic issues with ISDS in the fragmented system of international investment law. It is the first occasion that radical alternatives to the existing ISDS

---

[26] Columbia Ctr. on Sustainable Inv., Third-Party Rights in Investor–State Dispute Settlement: Options for Reform, Submission to UNCITRAL Working Group III on ISDS Reform (July 15, 2019), https://ccsi.columbia.edu/sites/default/files/content/docs/our%20focus/uncitral-submission-third-party-participation-en.pdf.

[27] UNCITRAL Working Group III on ISDS Reform, https://uncitral.un.org/en/working_groups/3/investor-state

[28] U.N. Info. Serv., *UNCITRAL Working Group III completes a draft Code of Conduct for Arbitrators* (Apr. 3, 2023), https://unis.unvienna.org/unis/pressrels/2023/unisl343.html.

[29] U.N. Comm'n on Int'l Trade L., Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Fiftieth Session, ¶ 5, U.N. Doc. A/CN.9/1195 (Jan. 24, 2025), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2420819e_advance_copy.pdf; Investment Treaty News, Three UNCITRAL Working Group III Meetings in Early 2025 (Apr. 30, 2025), https://www.iisd.org/itn/2025/04/30/three-uncitral-working-group-iii-meetings-in-early-2025/.

model have been taken seriously in an official multilateral arena, and this is an indication that it is increasingly understood that radical reforms may be necessary to fix the most serious structural flaws of the system.

Nonetheless, the UNCITRAL reform process has a major drawback in its consensus format and a basic dissimilarity in the interests of the stakeholders. Capital-exporting countries that have developed a set of strong protections of investors tend to support incremental adjustments to their system that maintain high levels of protections to investors with few changes to procedures, whereas capital-importing developing states are more likely to support more radical structural changes that lower the level of protections of investors and increase flexibility of regulation and exposure to investor claims. This conflict generates a negotiation dynamic in which the most significant reforms are most politically resisted, whereas the most politically viable reforms can produce the least system performance. Compromised solutions that emerge in such cases are usually of the lowest-common-denominator nature and do not always solve the structural problems identified.

The incompatibility of ISDS with climate justice, human rights and democratic accountability has been repeatedly criticized by civil society organizations, such as the Transnational Institute, ClientEarth, and the South Centre. Such organizations draw attention to the use of ISDS mechanisms to attack environmental standards and protections of indigenous rights, which can have regulatory chill impacts that discourage states to adopt policies in the public interest.[30] These concerns were detailed in a 2023 report by the UN Special Rapporteur on the right to a clean environment, titled Paying Polluters, and promoted by other organizations including ClientEarth, which calls to abolish ISDS instead of reforming it.[31] Nevertheless, the involvement of

---

[30] Int'l Inst. for Sustainable Dev., ClientEarth & Ctr. for Int'l Envtl. L., Investor-State Dispute Settlement (ISDS) Mechanisms and the Right to a Clean, Healthy, and Sustainable Environment (2023), https://www.iisd.org/publications/brief/iisd-ciel-clientearth-isds-sustainable-enivronment-submission-2023; The South Centre, Inputs to the Expert Mechanism on the Right to Development Study on Climate Justice, Sustainability, and the Right to Development (Feb. 2025), https://www.southcentre.int/wp-content/uploads/2025/02/Submission-to-the-Expert-Mechanism-on-the-Right-to-Development-on-Climate-Justice_South-Centre.pdf; ClientEarth, Investor-State Dispute Settlement Mechanisms and the Right to a Clean, Healthy and Sustainable Environment (n.d.), https://www.clientearth.org/latest/documents/investor-state-dispute-settlement-mechanisms-and-the-right-to-a-clean-healthy-and-sustainable-environment/.

[31] UN Special Rapporteur on Human Rights and the Environment, Paying Polluters: The Catastrophic Consequences of Investor-State Dispute Settlement for Climate and Environment Action (2023), https://www.ohchr.org/en/documents/thematic-reports/a78223-paying-polluters-catastrophic-consequences-investor-state-dispute

civil society in UNCITRAL Working Group III is mostly limited to the status of observers, which brings up the issue of tokenistic inclusion in the light of the state-centered character of the process. Such a structural constraint poses a strategic dilemma to civil society organizations: whereas their overall advocacy demands the abolition of ISDS, their official submissions to UNCITRAL are more likely to propose practical reforms that could be pursued within the framework of consensus-based decision-making. This dis-connect between advocacy stands and negotiation realities shows the greater limitations to the reform process.[32]

Most importantly perhaps, the UNCITRAL reform process faces the inherent problem that whatever is agreed has to be applied to thousands of existing bilateral and multilateral investment treaties. The consensus may be reached on some particular reform proposals, but the practical implementation of those reforms throughout the fractious environment of international investment law will take years or decades of treaty renegotiation and revision.

### 1.3.3. Transparency and Third-Party Participation Improvements

The last few years have seen a major and legally binding increase in Investor-State Dispute Settlement (ISDS) transparency, largely thanks to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) and the ensuing Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration (2014) (also referred to as the "Mauritius Convention").[33] The inclusion of these instruments in the current and future investment treaties has transformed the access of the people to the proceedings and documents of ISDS. These tools formulate extensive disclosure obligations that oblige the parties to publish important materials such as notifications of arbitration, pleadings (memorials, counter-memorials, replies), hearing transcripts, and tribunal orders and awards. The framework also contains proper

[32] ClientEarth, Potential Solutions for Phase 3: Aligning the Objectives of UNCITRAL Working Group III (July 15, 2019), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_clientearth.pdf.

[33] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014); Mauritius Convention on Transparency, Mar. 18, 2015, https://uncitral.un.org/en/texts/arbitration/conventions/transparency

security measures as Article 7 provides the means to redact confidential or safeguarded information.[34]

Moreover, the UNCITRAL Rules, as well as the Mauritius Convention, have codified and increased the possibilities of the third-party involvement by offering amicus curiae.[35] This enables non-disputing parties like non-governmental organizations, academic institutions or other stakeholders to furnish tribunals with relevant legal arguments or facts. This process, which is formalized in the rules of many arbitral institutions and is currently explicitly set out in those instruments, increases the diversity of views that tribunals take into account, which have been recognized by several international investment agreements (IIAs) and arbitral rules like ICSID Arbitration Rules, Rule 37(2) which permits submissions by non-disputing parties.[36]

The **Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)** has further institutionalized these transparency standards advancing beyond the foundational UNCITRAL Rules on Transparency and the Mauritius Convention by embedding comprehensive disclosure and participation requirements directly into its investment and dispute settlement architecture.

The CPTPP, article 9.24, which is called Transparency of Arbitral Proceedings, contains a broad range of compulsory publication requirements that far surpasses the norms of arbitration confidentiality. Under the provision, notices of intent and notices of arbitration, all pleadings including memorials, counter-memorials, replies, and party submissions, and where available hearing transcripts, and full tribunal orders and awards, including any dissenting or concurring opinions must be publicly disclosed.[37] The mechanism of amicus curiae is institutionalized under Article 9.23, which deals with the submissions by a Non-Disputing Party, and explicitly gives tribunals the power to accept and consider submissions made by individuals or entities with an important

---

[34] United Nations Commission on International Trade Law, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, art. 7 (effective Apr. 1, 2014), https://uncitral.un.org/en/texts/arbitration/transparency/rules.

[35] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, Dec. 10, 2014, https://uncitral.un.org/en/texts/arbitration/conventions/transparency.

[36] ICSID Arbitration Rules, Rule 37(2), https://icsid.worldbank.org/resources/rules-and-regulations/current-rules-and-regulations/2022-rules-and-regulations/rules-of-procedure-for-arbitration-proceedings

[37] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), arts. 9.23, 9.24, 28.14, Mar. 8, 2018, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng

interest in the proceedings. Article 28.14 further enforces the mechanism by providing the third party to be involved in state-to-state disputes, which opens up the possibility of wide stakeholder involvement in the framework of dispute settlement in the agreement.

These reforms specifically respond to the decades-old issues of "democratic deficit" by greatly enhancing public access to proceedings that often impact regulatory sovereignty, public policy and national resources. This increased transparency is in line with good governance and accountability to the people and this increases the clarity and accessibility of the process to the people of the states concerned.

## 1.4. Limitations of the Adaptation Approach

Despite the various adaptation efforts, a critical assessment reveals inherent limitations to this approach. Certain systemic problems within ISDS appear unfixable through incremental reforms, pointing to deeper political and structural constraints.

### 1.4.1. Political Gridlock and Implementation Paralysis

There are political barriers to adaptation that surround the impossibility of resolving state interests. The developed capital-exporting nations are interested in strong investor protections and little changes, whereas the developing nations require key changes in strengthening the regulatory sovereignty. The UNCITRAL Working Group III is a good example of this gridlock-despite acknowledging systemic problems, achieving consensus on solutions proves impossible, producing only lowest-common-denominator compromises that fail to address core concerns.[38]

Implementation challenges compound these political obstacles. Since there are more than 3,000 investment treaties in operation it becomes very difficult to coordinate an otherwise successful wave of renegotiated treaties to occur within fragmented bilateral relationships providing years of dysfunction and decades to work through the process.[39] Such disintegration facilitates forum shopping which can sometimes eliminate

[38] UNCITRAL Working Group III on ISDS Reform, https://uncitral.un.org/en/working_groups/3/investor-state

[39] UNCTAD, Investment Policy Hub, International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements

effectiveness of reform and rather adds more complication to the system than an improvement of all systems.[40]

### 1.4.2. The Adaptation Paradox

The adaptation process could be most counterproductive as it could only give a false sense of reform without a need to change the dysfunction patterns at work. This is known as the institutional path dependence which renders a significant change harder to achieve because of all the prior interests that protect any advancements against thorough-going reconstruction.[41] Although the most intense adaptation effort, the CETA Investment Court System is still limited in the scope of bilateralism or lack of experience, whereas transparency measures are just palliatives.

### 1.4.3. Economic Failure on Its Own Terms

The economic analysis reveals a profound market failure: the current system undermines rather than protects investment through unpredictability and regulatory chill effects. When a system designed to encourage investment instead creates uncertainty that deters both investment and legitimate regulation, incremental reforms cannot address this fundamental contradiction.[42]

---

[40] Jeswald W. Salacuse, The Emerging Global Regime for Investment, 51 Harv. Int'l L.J. 427 (2010), https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/2010/10/HILJ-Online_52_Wells1.pdf
[41] Paul Pierson, Increasing Returns, Path Dependence, and the Study of Politics, 94 Am. Pol. Sci. Rev. 251 (2000), https://doi.org/10.2307/2586011
[42] OECD, Investor-State Dispute Settlement: Public Consultation: 16 May–9 July 2012 (2012), https://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf

# 2. How can the reforms be adapted by building upon the current ISDS Framework?

*"One important caveat needs to be made. Law can offer techniques for achieving particular results and foreclose some avenues,but cannot by itself decide on the desirable results. In an exercise such as the present, law is a tool in the hands of decision-makers, in much the same way as a hammer is a tool in the hands of a carpenter: whether the hammer will be useful depends on what goal the carpenter aims to achieve. In other words: it is impossible to say much of concrete relevance as long as there is no clarity on what sort of regime is to be achieved. The law of treaties can help steer the diplomatic process,but cannot replace it. It is in this spirit that the following is written*."[43]

## 2.1. Introduction

Completely overhauling the ISDS framework and replacing it with MIC requires unanimity and consensus on establishing an MIC, which does not seem politically feasible given that different states have different visions in terms of what they intend to reform and preserve. However, the Working Group III ('WGIII') represents an encouraging signal indicating states' willingness to engage in a multilateral reform process.

As the system currently exists, the approach which is more rational and practical is to build upon the current framework by reforming the negative aspects which have led to incoherence, inconsistency, inefficiency etc. while maintaining the growth and progress that the ISDS framework has achieved in terms of "flexibility, expert decision making, speed and enforceability" which are too precious to be lost.[44] This can be achieved by providing necessary flexibility to states for the adoption of procedural reforms, which are being evolved and by de-fragmenting the current regime by bringing reforms under the umbrella of a convention. States can navigate reforms by participating in this

[43] Mr. Jan Klabbers, University of Helsinki, Faculty of Law, 'Comments on A/CN.9/WG.III/WP.194', Accessible at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_experts_0.pdf

[44] Susan Franck (2005), The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, Fordham Law Review, Vol. 73(4), pp. 1521–1625

multilateral instrument and selecting modes of dispute resolution that align with their policy objectives.

The Draft Multilateral Instrument prepared by WGIII is also '*structured to achieve coherence in the application of the reform elements being developed by the Working Group, while also being sufficiently flexible to accommodate future developments and to endure the passage of time*'.[45]

However, this approach comes with its challenges. Overreliance on flexibility, which, while politically inclusive, risks undermining coherence and effectiveness, giving birth to the same problem that it tries to address. By allowing states to selectively opt into various dispute resolution mechanisms, it may entrench fragmentation rather than resolve it. The absence of a binding jurisdictional core dilutes its capacity to deliver consistent jurisprudence or meaningful reform. Without a strong incentive structure or leadership by major powers, this type of reform risks becoming an institutional shell with limited uptake. Additionally, the model's administrative complexity and lack of clarity on enforcement mechanisms may deter participation from states with limited legal infrastructure or political will for deep engagement.

Considering the above development, there are two approaches which need to be explored at this stage to understand how we can build upon the current ISDS framework to rectify the current issues that the system is facing: 1. The Mauritius Convention Approach.[46], 2. The à la Carte Approach.[47]

1. The Mauritius Convention on Transparency could be used as a model for implementing broader reform initiatives of the investor-State dispute settlement ("ISDS") framework to carry out reforms at a multilateral level.

---

[45] U.N. Comm'n on Int'l Trade Law [UNCITRAL], Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Forty-Third Session, A/CN.9/1124 (Sept. 5–16, 2022).
[46] Gabrielle Kaufmann-Kohler & 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, Ctr. for Int'l Disp. Settlement (June 3, 2016), https://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf.
[47] Stephan W. Schill & Geraldo Vidigal, Designing Investment Dispute Settlement à la Carte: Insights from Comparative Institutional Design Analysis, 18 Law & Prac. Int'l Cts. & Tribunals 311 (2019), https://ssrn.com/abstract=3519259.

2. The à la Carte Approach proposes the institution of a Multilateral Investment Court which coexists with other forms of dispute resolution under the umbrella of one multilateral institution.[48]

It is important to note that under both the approaches, establishment of MIC/Standing Dispute Settlement Mechanism is not intended to replace the arbitration; rather, it aims at institutionalising it through a standing mechanism which also provides for features like a standing first instance and appellate tribunal while also providing for procedural reforms, giving the flexibility to parties to adapt their preferred method of dispute resolution under the permanent umbrella institution.

## 2.2. The Mauritius Convention Approach

The Mauritius Convention allowed the *2013 UNCITRAL Transparency Rules* to be applied to all existing bilateral, regional, and multilateral investment treaties, and in all available arbitral fora, if both the respondent State and the investor's home State are contracting parties to the Convention or, alternatively, if the investor (as claimant) accepts the unilateral offer of the respondent State to apply the *Transparency Rules*.

In essence, the "Mauritius Convention Approach" can be described as introducing the substantive transparency standards embodied in the Transparency Rules into the fragmented treaty-by-treaty regime by way of a single multilateral instrument. It introduces a flexible regime as it foresees a limited number of reservations that Contracting Parties may formulate.[49]

The advantage of this approach is that it allows for the implementation of reforms to existing investment treaties in respect of the setting up of a permanent dispute settlement body or an appellate mechanism.[50] Firstly, it saves states from long and arduous amendment procedures provided in existing treaties by making reforms directly applicable through an 'opt-in convention'. Secondly, this approach allows for the establishment of a permanent multilateral dispute settlement body, which will be competent to resolve investment disputes of states which opt into it or a single appeal

---

[48] Stephan W. Schill & Geraldo Vidigal, Designing Investment Dispute Settlement à la Carte: Insights from Comparative Institutional Design Analysis, 18 Law & Prac. Int'l Cts. & Tribunals 311 (2019), https://ssrn.com/abstract=3519259.
[49] U.N. Comm'n on Int'l Trade Law, Note by the Secretariat, A/CN.9/890, ¶ 8 (May 24, 2016).
[50] *Ibid*, ¶ 24

mechanism which will serve as an appellate body for ISDS awards across all investment treaties. Both options will allow for increased consistency in international investment law. Thirdly, it only focuses on certain discrete parts of the investment treaties' critical issues, i.e. dispute settlement and avoids engaging in the controversies surrounding substantive standards, which makes it more likely to be successful.

The outcome of such reform will be that the underlying investment treaties will continue to deal with the substantive obligation, and the newly established permanent dispute settlement body/or appeal mechanism would have the mandate to apply these treaties to the dispute that is submitted to it. Consistency in the regime will be achieved by the application of the same investment treaty and of different investment treaties with identical or nearly identical wordings and by the elements of tradition, continuity and collegiality, which are inherent in permanent bodies as opposed to ad hoc bodies.[51]

## 2.3. Implementation of Multilateral Standing Mechanism Using the Mauritius Convention Mechanism

The Mauritius Convention Approach provides a way in which a Multilateral Standing Mechanism can be envisaged through a convention which can be adopted in the existing investment treaties as well. When it comes to the structure of the body, MIC or a permanent standing dispute settlement mechanism will be composed of tenured or (semi-tenured members who will be tasked with resolving investment disputes between foreign investors and host states, is one possibility. Such a body can either be based on a two-tier adjudicative system with a built-in appeal or without one. Another option is to create a standing appeal mechanism for awards rendered in the traditional ISDS setting. To make the reforms widely acceptable, flexibility in adoption is necessary so that states can custom-tailor solutions aligned with their policy objectives.

## 2.4. The *à la Carte* Approach

According to *Schill* & *Vidigal*, the reformed system can be designed as a dispute settlement à la carte, with a MIC coexisting with other forms of dispute resolution under the umbrella of one multilateral institution. Using comparative institutional design analysis, it is shown that such a system is feasible, and it effectively addresses the issues

[51] *Ibid*, ¶ 27

with the current framework. This seems to be a rational and practical approach to reforms, which can be adapted to ensure wider acceptability from states.

It is suggested that the establishment of a Multilateral Institution for Dispute Settlement on Investment (MIDSI) should allow states to maintain their strongly entrenched preferences for certain modes of dispute settlement (reformed investor-state arbitration, inter-state arbitration, establishment of a permanent investment court, strengthening of domestic remedies), while integrating these approaches under one multilateral institutional framework.[52]

MIDSI's centripetal features aim to foster coherence within a fragmented investment dispute landscape by anchoring diverse adjudicatory models under a single institutional umbrella. Its permanent Multilateral Investment Court (MIC) can function as an appellate or annulment body, enhancing interpretive consistency. System-wide mechanisms like advisory opinions, preliminary rulings, arbitrator challenge resolution, and provisional measures further centralize key procedural functions. These features, while respecting state choice, create gravitational pull toward greater legal uniformity and predictability. By integrating flexible modes of dispute resolution into a shared institutional framework, MIDSI subtly incentivizes convergence without coercing uniformity, thereby strengthening the multilateral fabric of ISDS reform.

## 2.5. Critique of à la carte approach

This approach tries to find a feasible solution given heterogeneous preferences of states, for example: EU's push for a permanent Multilateral Investment Court (MIC); U.S. and Japan's preference for incremental reform and retention of arbitration; India's insistence on exhausting local remedies; and Brazil's inter-state model avoiding ISDS altogether. However, this flexibility comes with its challenges, which can have the effect of diluting MIDSI's identity. Some issues that have been identified are as follows:

- What binds MIDSI participants together, if each is engaging different models (arbitration, MIC, state-to-state) with minimal shared obligations?

[52] Stephan W Schill and Geraldo Vidigal, Cutting the Gordian Knot: Investment Dispute Settlement à la Carte
(ICTSD 2018).

- The à la carte model risks institutional incoherence, where participants support the platform without committing to core structural or jurisdictional obligations.
- It may serve as mere institutional packaging for the status quo, failing to dislodge entrenched interests aligned with ISDS in its current form.

MIDSI's decoupling of membership from compulsory jurisdiction mirrors models like the ICJ (Article 36 optional clause), ICSID (opt-in jurisdiction) and the Inter-American Court (separate consent requirement). This structure is politically non-threatening to sovereignty-conscious states. It signals that joining MIDSI does not mean immediate submission to a supranational court.

However, politically, this may reproduce the same opt-in fragmentation that undermines current ISDS legitimacy. The authors assume that: (i) States will join for reputational or systemic incentives, and (ii) MIDSI's centripetal features (advisory opinions, appeal, consistency) will eventually attract support. But without tangible political incentives—like trade access (e.g., in EU model) or investment sweeteners—why would states switch allegiance from bilateral or regional ISDS treaties they already control?

Furthermore, without a unifying political event or pressure (e.g., global treaty collapses or investor exodus), there is little to compel entrenched actors like the U.S., China, or large capital-exporting states to cede adjudicative flexibility to even a flexible multilateral forum.

## 2.6. Legal Issues and Questions concerning setting up a permanent dispute settlement body

Q.1. What will be the legal nature of the permanent dispute resolution body?

A. It should be like arbitration, as recourse to it will be based on an agreement between the state and the investor. That agreement will include the acceptance of the tribunal members' selection method provided in the constitutive instrument of the permanent body.

Q.2 What will be the law governing the proceedings before the permanent dispute resolution body?

A. To avoid the difficulties of choosing a priori a suitable domestic arbitration law or of leaving the choice of the seat to the disputing parties, which could result in inconsistencies due to the selection of different seats and arbitration laws, it is suggested that proceedings should be subjected only to international law. It should be a self-contained regime. [53]

Q.3 What systems of control will be available in respect of the permanent dispute resolution body decisions/awards, in particular annulment and appeal, and the alternative options to an appeal?

A. To strike a careful balance between the need for an efficient and final dispute settlement mechanism and the concern to protect the integrity of the process and the correctness of the decision-making, it is suggested that apart from usual control option like annulment and built-in appeal, alternatives like preliminary rulings, en banc determinations and consultations must also form a part of the mechanism.[54]

Q.4 How will the decisions/awards of the permanent body be enforced?

A. Since the permanent dispute resolution body would be characterised as arbitration, there are two scenarios which should be considered: 1. Enforcement of the award in the territory of a State which has consented to the MIC statute; 2. Enforcement of the award in the territory of a state which has not consented to the MIC statute. In the former case, the statute itself should provide an enforcement regime obligating Contracting States to recognise the awards as binding and enforce the pecuniary obligations arising out of the award in their territory as if it were a final judgment of their courts.[55]In the latter case, enforceability depends on whether the award will fall within the scope of the NYC Convention. If the answer to it is yes, then it will be easier to seek enforcement of the award; otherwise, reliance must be placed on the domestic laws of the state where enforcement is sought.

Q.5 What will be the jurisdiction of the permanent body?

A. It is suggested that the permanent body will exercise jurisdiction over disputes arising under a given IIA, which are defined by that IIA. This solution will be consistent

---

[53] *Ibid*, ¶ 41
[54] *Ibid*, ¶ 42
[55] Kaufman-Kohler (n 3), ¶ 140

with the general idea that the creation of the permanent body will impact underlying IIAs as little as possible (as otherwise the path to the multilateral endeavour is rendered more arduous). That is to say, neither the Permanent Body Statute nor the Opt-in Convention will purport to modify the IIA definitions of disputes subject to settlement, of "investors" and "investments"; or the scope of application ratione temporis of the treaty. Thus, all limitations in connection with jurisdiction or procedural/admissibility requirements provided in the IIA would apply in respect of the permanent body.

# 3. Importing Institutional Structures of Existing Permanent Bodies

The ISDS system, primarily operating through ad hoc arbitration, has been widely criticized for inconsistency, lack of transparency, arbitrator bias, and procedural inefficiency. The proposed MIC aims to replace or significantly reform ISDS by creating a permanent international court for investment disputes. This section seeks to study institutional structures of existing permanent courts and extract design models suitable for the MIC's architecture.

## 3.1. The ICJ: A Model of Judicial Independence

In the current ISDS system, particularly under frameworks like ICSID, arbitrators are appointed on an ad hoc basis by the disputing parties for each case. There is no requirement for geographical representation, no permanent bench, and no security of tenure.[56] Arbitrators serve only for the duration of the case, and their remuneration is determined by the parties or the institution administering the arbitration. Removal or replacement of arbitrators is limited to challenges on narrow grounds, such as evident lack of impartiality.[57]

Adopting the ICJ's judicial structure would provide the MIC with critical elements that are absent in the current ISDS model. Fixed, long-term appointments would enhance judicial independence by insulating adjudicators from pressures associated with reappointment incentives or party influence.

The International Court of Justice stands as the principal judicial organ of the United Nations and represents a well-established model of a permanent international court. The ICJ consists of 15 judges elected by both the United Nations General Assembly and Security Council for nine-year terms.[58] These terms are staggered so that one-third of

[56] Fahira Brodlija, The Multilateral Investment Court: Necessary ISDS Reform or Self-Fulfilling Prophecy?, 15 Arb. L. Rev. 1(2024).

[57] Claiton Fyock, Getting 'real' about ISDS reform: a critical realist view of international investment law's status quo, *Journal of International Dispute Settlement*, Volume 16, Issue 2.

[58] Ginsburg, Tom, The Institutional Context of the International Court of Justice (April 3, 2021). Cambridge Companion to the International Court of Justice, Forthcoming, U of Chicago, Public Law Working Paper No. 779.

the bench is renewed every three years, ensuring both continuity and the periodic introduction of fresh perspectives. Judges are eligible for re-election, which allows for institutional memory and expertise to be retained over time.[59]

Judicial independence is a defining feature of the ICJ. Judges enjoy security of tenure and can only be removed through a process involving a majority of both the General Assembly and Security Council, and only for proven misconduct or incapacity. The court's statute ensures that judges are compensated through fixed salaries that are not influenced by individual cases, further supporting impartiality. Additionally, the ICJ's bench must represent the world's principal legal systems and ensure equitable geographical representation. This requirement enhances the court's legitimacy and global acceptability.[60]

The ICJ's operations are supported by a permanent registry that handles the administration of cases and the management of procedural matters. This administrative arm allows the judges to focus solely on adjudication, with institutional support ensuring procedural efficiency and consistency in case handling. For the MIC, the ICJ highlights the importance of regional representation, the value of long-term judicial appointments for stability, and the need for an independent administrative body to support judicial work.

The inclusion of equitable regional representation would strengthen the MIC's legitimacy and global acceptance, ensuring that the diversity of legal traditions is reflected in its jurisprudence. A permanent administrative registry, as seen in the ICJ, would promote consistency and efficiency by providing institutional support for case management and procedural matters. This model would address criticisms of bias, fragmentation, and inconsistency in ISDS by establishing a stable, impartial, and globally representative adjudicatory body.

---

[59] Tom Ginsburg, "The Institutional Context of the International Court of Justice", Public Law and Legal
Theory Working Paper Series, No.779 (2021).

[60] Cima E, Mbengue MM. Ethical Conduct in International Criminal Courts: Whose Ethics? AJIL Unbound. 2019;113:296-301. doi:10.1017/aju.2019.41

## 3.2. The ICC: Prosecutorial Autonomy and Ethical Oversight

In ISDS, arbitrators are not bound by a comprehensive ethics code beyond basic standards of independence and impartiality, typically addressed through party challenge procedures. There are no institutionalized bodies for enforcing ethical obligations or addressing misconduct. Arbitrators may simultaneously act as counsel in other cases (double-hatting), which can lead to conflicts of interest and concerns about impartiality.[61]

Incorporating features of the ICC would enable the MIC to strengthen judicial integrity and public confidence in its proceedings. A prohibition on double-hatting would eliminate conflicts of interest, ensuring adjudicators focus solely on their judicial responsibilities. The International Criminal Court offers another relevant model, particularly in its emphasis on judicial integrity and ethical safeguards. The ICC operates under the Rome Statute and is governed by the Assembly of States Parties. Its judges are elected for nine-year non-renewable terms, and they are prohibited from engaging in external legal practice during their tenure. This ensures their full attention to the court's work and eliminates potential conflicts of interest.[62]

The ICC's ethical framework is robust. It incorporates a detailed code of conduct for judges, prosecutors, and other officials, with independent mechanisms in place to address allegations of misconduct. These measures enhance the court's credibility and the perceived fairness of its proceedings. The ICC's structure includes not only judicial and prosecutorial functions but also a dedicated administrative arm and trust funds.[63] The latter are designed to support victims of crimes and demonstrate how financial mechanisms can be integrated to advance the court's mission.

For the MIC, the ICC illustrates the value of strict ethical requirements and the advantages of employing full-time judges who are not distracted by other professional

---

[61] Hernández, Gleider I, 'Impartiality and the Role of the International Judge', The International Court of Justice and the Judicial Function (Oxford, 2014; online edn, Oxford Academic, 21 Aug. 2014), https://doi.org/10.1093/acprof:oso/9780199646630.003.0005.

[62] Eric Posner & John C. Yoo, "Judicial Independence in International Tribunals," 93 California Law Review 1(2005).

[63] Stolk S. International Courts and Design. In: Kim M, Jackson D, Sievert JR, eds. Legal Design: Dignifying People in Legal Systems. Cambridge University Press; 2024:264-277.

obligations. A formal ethics framework with independent oversight would provide mechanisms for addressing misconduct, enhancing the MIC's credibility. Further, the concept of a trust fund could be adapted to support access to the MIC for small investors or developing states, making the system more inclusive and equitable. The MIC could adapt the ICC's trust fund concept to support small and medium-sized enterprises and investors from developing states, facilitating more equitable access to its processes.

### 3.3. The WTO Appellate Body: Ensuring Consistency and Legal Coherence

The ISDS system lacks a standing appellate mechanism. Annulment or set-aside proceedings in ISDS are limited to procedural defects rather than substantive review of legal or factual errors. This contributes to inconsistent interpretations of investment treaties and fragmented jurisprudence.

The MIC would benefit greatly from adopting an appellate structure inspired by the WTO Appellate Body. A rotating appellate panel system would promote impartiality while reducing risks of capture or bias. The World Trade Organization Appellate Body, although no longer operational, represents one of the most effective models for ensuring consistency and coherence in international adjudication. The Appellate Body was composed of seven members appointed for four-year terms, renewable once. Cases were heard by divisions of three members selected on a rotating basis, a system that promoted fairness and reduced the risk of individual bias.[64]

The Appellate Body's primary function was to review legal issues arising from panel reports in WTO disputes, ensuring uniform interpretation of WTO agreements. It succeeded in building a coherent body of jurisprudence, enhancing predictability in international trade law. The Appellate Body was supported by a dedicated secretariat

[64] Jean-Michel Marcoux, Andrea K Bjorklund, Elizabeth A Whitsitt, Lukas Vanhonnaeker, Discourses of ISDS reform: a comparison of UNCITRAL Working Group III and ICSID processes, Journal of International Economic Law, Volume 27, Issue 2, June 2024, Pages 314–335, https://doi.org/10.1093/jiel/jgae017.

that provided legal and administrative assistance, contributing to the development of consistent reasoning and structured decision-making.[65]

One of the strengths of the Appellate Body was its transparency. Reports were published, and the body's deliberations were governed by clear procedural rules. The challenges faced by the Appellate Body, particularly the blockage of appointments that led to its dysfunction, highlight the importance of having automatic or default mechanisms for judicial appointments to prevent political impasses.[66]

For the MIC, the Appellate Body offers valuable lessons in the importance of a structured appellate system, the benefits of rotating panels for impartiality, and the need for procedural safeguards to protect the integrity of judicial appointments.

## 4. Comparison of Procedural Models

The MIC introduces a transformative approach to resolving investor-state disputes, diverging significantly from the procedural frameworks of existing ISDS mechanisms, such as those administered by the ICSID, the ICC, and the Stockholm Chamber of Commerce (SCC). This section provides a comprehensive tabular analysis of the key procedural differences across critical dimensions, highlighting how the MIC addresses perceived shortcomings in the current ad hoc arbitration model, such as inconsistency, lack of transparency, and potential bias.

The proposed MIC framework marks a paradigm shift from the ad hoc arbitration model of existing ISDS mechanisms, aiming to create a more consistent, transparent, and legitimate system for resolving investment disputes. By establishing a permanent court with appointed judges, an appellate mechanism, and standardized procedures, the MIC addresses several criticisms of the current system, including inconsistency, lack of transparency, and perceived bias. This section provides an in-depth comparison of the MIC framework with ICSID, ICC, and SCC, focusing on key clauses such as

[65] Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body, European Journal of International Law, Volume 21, Issue 3, August 2010, Pages 605–648.

[66] Van Damme, Isabelle, 'Other Issues in WTO Treaty Interpretation', Treaty Interpretation by the WTO Appellate Body, International Economic Law Series (Oxford, 2009; online edn, Oxford Academic, 1 Sept. 2009), https://doi.org/10.1093/acprof:oso/9780199562237.003.0008.

jurisdiction, terms of office, costs, and enforcement, and exploring the broader implications of these differences.

## 4.1. Institutional Structure and Governance

**MIC**: The MIC is established as a permanent, two-tiered judicial body comprising a First Instance Tribunal and an Appellate Tribunal, governed by a Plenary Body composed of representatives from all contracting states. The Plenary Body is responsible for adopting procedural rules, financial regulations, and overseeing operations, ensuring consistency and predictability in dispute resolution. [67] The inclusion of an Advisory Centre and a Secretariat further supports the court's operations, providing legal assistance and administrative efficiency. This permanent structure aims to foster a stable and unified framework, reducing the fragmentation inherent in ad hoc systems.

**ICSID**: ICSID operates under the ICSID Convention, with an Administrative Council comprising one representative from each member state and a Secretariat that handles day-to-day operations. Dispute resolution is conducted through ad hoc tribunals constituted for each case, lacking institutional continuity.[68] The Administrative Council focuses on organizational matters, such as approving rules and electing the Secretary-General, but does not govern the substantive aspects of dispute resolution.

**ICC**: The ICC's International Court of Arbitration is an administrative body that oversees arbitration proceedings but does not function as a standing court. Arbitrators are appointed for each case, and the ICC Court ensures compliance with its rules, providing administrative support without permanent judicial bodies.[69]

**SCC**: Similarly, the SCC administers arbitration through its Board and Secretariat, supporting ad hoc tribunals constituted per dispute. The SCC Board makes decisions on arbitrator appointments and jurisdictional challenges, but there is no permanent court structure.[70]

---

[67] (Draft Statute, Art. 3).
[68] (ICSID Convention, Art. 3)
[69] (ICC Arbitration Rules 2021, Art. 1)
[70] (SCC Arbitration Rules 2023, Art. 2).

The MIC's permanent institutional framework contrasts sharply with the ad hoc nature of ICSID, ICC, and SCC, potentially leading to greater coherence in jurisprudence and procedural standardization. However, the reliance on state-driven governance may raise concerns about political influence, a point of contention in ongoing debates about the MIC's design.

## 4.2. Jurisdiction and Applicable Law

**MIC**: The MIC's jurisdiction, as defined in Article 19, covers disputes arising from investment agreements between MIC members and investors from other MIC members, including state-to-state disputes and disputes under investment contracts.[71] The applicable law is primarily the investment agreement and international law, with the MIC aiming for consistent treaty interpretation through its permanent structure and appellate review.[72] The Plenary Body may provide flexibility in expanding jurisdiction, subject to member state agreement.

**ICSID**: ICSID's jurisdiction is based on consent expressed through investment treaties, contracts, or national laws, covering disputes between a contracting state and a national of another contracting state.[73] The applicable law is as agreed by the parties, defaulting to the host state's law and international law if no agreement exists.[74] Interpretations can vary across ad hoc tribunals, leading to inconsistent outcomes, as seen in cases like *CMS v. Argentina*[75] and *LG&E v. Argentina*[76], where similar treaty provisions were interpreted differently.

**ICC and SCC**: Both institutions handle a broader range of commercial disputes, including investment disputes if agreed by the parties. The applicable law is determined by the parties' agreement or by the tribunal if no choice is made, often leading to diverse interpretations due to the lack of a permanent judicial body.[77]

---

[71] (Draft Statute, Art. 19)
[72] (Draft Statute, Art. 31)
[73] (ICSID Convention, Art. 25)
[74] (ICSID Convention, Art. 42)
[75] Case cite
[76] Case cite
[77] (ICC Arbitration Rules 2021, Art. 21; SCC Arbitration Rules 2023, Art. 27)

The MIC's focused jurisdiction and permanent structure are likely to promote uniform application of investment law, reducing the fragmentation seen in existing ISDS mechanisms. However, its jurisdictional scope may be narrower than ICC and SCC, potentially limiting its applicability in complex commercial disputes.

### 4.3. Terms of Office and Conditions of Service

**MIC**: MIC judges serve fixed, non-renewable nine-year terms, with staggered expirations to ensure continuity: eight judges' terms end after three years, eight after six years, determined by lot.[78] They receive fixed salaries and are prohibited from "double-hatting," preventing concurrent roles as counsel in other disputes, with a cooling-off period post-tenure.[79] This professionalizes adjudication, reducing conflicts of interest and enhancing impartiality, aligning with models like the International Court of Justice.

**ICSID, ICC, SCC**: Arbitrators are appointed per case, paid hourly or daily fees, and can maintain legal practices, including acting as counsel elsewhere. While codes of conduct require impartiality, they lack strict prohibitions on concurrent roles, potentially incentivizing prolonged proceedings or biased rulings to secure future appointments.[80]

The MIC's approach addresses concerns about arbitrator bias, as seen in cases like *Pey Casado v. Chile*[81], where repeat appointments raised impartiality questions. However, fixed terms may limit access to industry-specific expertise, a potential drawback for complex disputes.

### 4.4. Selection and Appointment of Adjudicators

**MIC**: The MIC employs a formalized, state-driven process for selecting judges, outlined in Article 12 of the Draft Statute. Each MIC member nominates candidates, who are screened by a Screening Committee for professional qualifications, ethical

---

[78] (Draft Statute, Art. 14)
[79] (Draft Statute, Art. 13)
[80] (ICSID Arbitration Rules 2022, Rule 6; ICC Arbitration Rules 2021, Art. 11; SCC Arbitration Rules 2023, Art. 18).
[81] Case cite

standards, independence, and impartiality. The Plenary Body then elects judges, ensuring representation from various regional groups (e.g., Asia, Africa, Latin America) to promote diversity and expertise.[82] This process excludes direct party involvement, aiming to mitigate bias and enhance impartiality, addressing criticisms of the current system where party-appointed arbitrators may favor their nominators.

**ICSID**: Under the ICSID Convention, tribunals typically consist of three arbitrators: one appointed by each party and a presiding arbitrator appointed by agreement or by the Chairman of the Administrative Council if the parties cannot agree (ICSID Convention, Art. 37). This party-driven appointment process allows strategic selections, which critics argue can compromise independence due to repeat appointments or financial incentives.

**ICC**: The ICC Arbitration Rules permit each party to nominate one arbitrator, with the ICC Court appointing the president or the entire tribunal if parties fail to agree. The Court ensures arbitrators' independence but allows party influence in nominations.[83]

**SCC**: Similarly, the SCC allows each party to appoint one arbitrator, with the SCC Board appointing the chairperson or the entire tribunal if necessary. The Board verifies impartiality, but party nominations remain central.[84]

The MIC's state-led selection process is designed to enhance impartiality by removing party influence, a significant departure from the party-driven systems of ICSID, ICC, and SCC. However, this may reduce party autonomy, potentially deterring investors accustomed to selecting arbitrators tailored to their case.

## 4.5. Costs and Financing

**MIC**: The MIC employs a hybrid financing model, with operational costs covered by member state contributions apportioned based on their foreign direct investment outflow, and case-specific costs borne by the parties. The annual budget is prepared by

[82] (Draft Statute, Art. 12)
[83] (ICC Arbitration Rules 2021, Art. 12)
[84] (SCC Arbitration Rules 2023, Art. 17)

the Director-General and approved by the Plenary Body.[85] This approach aims to reduce costs and improve accessibility, particularly for developing states.

**ICSID, ICC, SCC**: Parties bear all costs, including arbitrator fees, institutional charges, and legal expenses, which can be substantial due to the ad hoc nature of proceedings. For example, ICSID cases often involve millions in costs per party.[86]

The MIC's hybrid model could make dispute resolution more affordable, but its reliance on state funding introduces complexities, such as securing consistent contributions, a challenge noted in ongoing UNCITRAL discussions.

### 4.6. Case Assignment Mechanism

**MIC**: The MIC employs a structured case assignment mechanism where the President allocates disputes to chambers based on objective criteria, such as expertise, workload, gender, and regional diversity, as governed by the Rules of Procedure.[87] Upon receiving a request to initiate proceedings, the Secretariat informs the President, who assigns the case to a chamber.[88] This system prevents party influence and "forum shopping," enhancing impartiality.

**ICSID, ICC, SCC**: Existing ISDS mechanisms do not have a case assignment system, as tribunals are constituted specifically for each dispute through party appointments or institutional intervention. This ad hoc constitution eliminates the need for case assignment but allows parties to strategically select arbitrators, potentially influencing outcomes.[89]

The MIC's objective assignment process contrasts with the party-driven tribunal formation in existing systems, aiming to ensure fairness but potentially limiting parties' control over the dispute resolution process.

---

[85] (Draft Statute, Art. 7)
[86] (ICSID Arbitration Rules 2022, Rule 28; ICC Arbitration Rules 2021, Art. 37; SCC Arbitration Rules 2023, Art. 49).
[87] (Draft Statute, Art. 16)
[88] (Draft Statute, Art. 40)
[89] (ICSID Arbitration Rules 2022, Rule 15; ICC Arbitration Rules 2021, Art. 12; SCC Arbitration Rules 2023, Art. 17)

## 4.7. Appellate Mechanisms and Consistency

**MIC**: A hallmark of the MIC is its integrated Appellate Tribunal, which reviews decisions for both legal and factual errors. Article 46 outlines grounds for appeal, including lack of jurisdiction, manifest excess of powers, corruption, serious procedural errors, failure to state reasons, grave errors in law, and manifest errors in facts.[90] This comprehensive review mechanism aims to ensure consistency and coherence in investment law jurisprudence, addressing the fragmentation seen in ad hoc arbitration.

**ICSID**: ICSID provides an annulment procedure under Article 52, limited to specific procedural grounds: improper tribunal constitution, manifest excess of powers, corruption, serious departure from fundamental procedural rules, or failure to state reasons.[91] Annulment does not address substantive errors in law or fact, limiting its ability to correct inconsistent awards.

**ICC and SCC**: Neither ICC nor SCC offers an institutional appellate mechanism. Awards can be challenged in national courts under the New York Convention, but only on narrow procedural grounds, such as lack of jurisdiction or public policy violations, not for substantive errors.[92]

The MIC's appellate mechanism represents a significant innovation, potentially enhancing legal predictability by allowing substantive review, unlike the limited recourse in existing ISDS frameworks. However, the broader scope of appeals may increase costs and duration of proceedings, a point of contention among stakeholders.

## 4.8. Transparency and Public Participation

**MIC**: The MIC institutionalizes transparency by adopting the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, mandating public access to documents, open hearings, and the possibility of amicus curiae submissions.[93] Article

[90] (Draft Statute, Art. 46)
[91] (ICSID Convention, Art. 52)
[92] (ICC Arbitration Rules 2021, Art. 35; SCC Arbitration Rules 2023, Art. 46)
[93] (Draft Statute, Art. 8)

28 emphasizes transparency as a general principle, aligning with the rule of law and public interest in investment disputes.[94]

**ICSID**: ICSID has progressively increased transparency, particularly through the 2006 amendments and the adoption of UNCITRAL Transparency Rules in some cases. The 2022 Arbitration Rules allow for amicus curiae briefs and open hearings, but transparency is not universally mandatory and depends on party consent or tribunal discretion.[95]

**ICC and SCC**: Both ICC and SCC maintain a commercial arbitration ethos, prioritizing confidentiality unless parties agree otherwise. Hearings and awards are generally private, limiting public access.[96]

The MIC's mandatory transparency aligns with modern demands for openness, particularly in disputes affecting public policy, but may challenge parties seeking confidentiality in sensitive commercial matters.

## 4.9. Recognition and Enforcement of Decisions

**MIC**: MIC decisions are to be recognized and enforced within member states as if they were final judgments of their own courts, with parties submitting certified copies to designated authorities.[97] Enforcement in non-member states may require additional agreements.[98]

**ICSID**: ICSID awards are directly enforceable in contracting states, treated as final judgments without substantive review, except for immunity from execution.[99]

---

[94] (Draft Statute, Art. 28)
[95] (ICSID Arbitration Rules 2022, Rule 62)
[96] (ICC Arbitration Rules 2021, Art. 22(3); SCC Arbitration Rules 2023, Art. 3)
[97] (Draft Statute, Art. 56)
[98] (Draft Statute, Art. 57)
[99] (ICSID Convention, Art. 54)

**ICC and SCC**: Awards are enforced under the New York Convention, subject to national court review on limited grounds, such as public policy or procedural irregularities, which can introduce delays.[100]

The MIC's enforcement framework, if widely adopted, could streamline compliance within its membership, but achieving global acceptance remains a significant challenge due to differing national interests.

# 5. Mapping Appeal Mechanisms in International Tribunals

The creation of an appellate mechanism within the MIC aims to address deep-seated criticisms of the current Investor-State Dispute Settlement (ISDS) regime—namely, its inconsistency, lack of legitimacy, and procedural inefficiencies. A comparative review of appeal mechanisms in existing international tribunals such as the World Trade Organization (WTO) Appellate Body, the Court of Justice of the European Union (CJEU), the International Criminal Court (ICC), and recent trade and investment agreements (CETA, EU-Vietnam IPA) reveals a set of best practices. These practices can inform the MIC's appellate structure and ensure that it stands as a credible, balanced, and operationally effective institution.

## 5.1. Composition and Institutional Design of the Appellate Body

The design of an appellate body, whether as part of a permanent Multilateral Investment Court (MIC) or as a standing appellate mechanism operating alongside the existing investor-state dispute settlement (ISDS) framework is pivotal to ensuring legal consistency, independence, and legitimacy in international investment adjudication. The creation of a coherent and efficient appeals mechanism necessarily involves

[100] ([ICC Arbitration Rules 2021, Art. 35](https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-202 -arbitration-rules-2014-mediation-rules-english-version.pdf); SCC Arbitration Rules 2023, Art. 46)

institutional choices about permanence, judicial selection, internal governance, and procedural structure.

The Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada, signed in 2016, marked a fundamental shift in this direction by establishing a permanent, two-tier Investment Court System (ICS). In this model, the first-instance tribunal is composed of a roster of fifteen adjudicators, who are randomly appointed in panels of three. The appellate tribunal consists of six judges tasked with issuing decisions within 90 to 270 days. Both levels use fixed-term, salaried judges, independent of party influence and subject to ethical and qualification standards.[101]

The suitability of this institutional structure depends on the broader architecture adopted. If the MIC is envisioned as a fully-fledged, two-tier court system, its appellate design must replicate or improve upon models like CETA. Alternatively, if the existing ad hoc ISDS mechanism is retained, but supplemented with a standing appellate body, careful consideration must be given to harmonizing ad hoc first-instance decisions with the rulings of a centralized appellate tier. In either case, certain structural features are essential to the credibility and functionality of the appellate body.

### 5.1.1. Standing Judicial Body with Long-Term Appointments

A fundamental element of appellate institutional integrity is the permanence and tenure of judges. Clause 18 of the Draft Statute on the MIC proposes a standing appellate court composed of nine judges, each serving a fixed nine-year term.[102] This design choice is modelled on global best practices, including the Appellate Body of the World Trade Organization (WTO), which had seven rotating members serving four-year renewable terms,[103] and the Court of Justice of the European Union (CJEU), where judges serve six-year terms, renewable and staggered to preserve institutional memory.[104]

The rationale behind such permanence lies in its contribution to judicial independence and consistency. Long-term appointments reduce the risk of external pressures

[101] Andrew de Lotbinière McDougall KC , Damien Nyer & Kirsten Odynski, Charting a New Course: Proposed Expedited Dispute Resolution Procedures for CETA, WHITE & CASE LLP.
[102] Draft Statute, Art. 18
[103] WTO DSU, Article 17.1.
[104] TFEU, Art. 253.

influencing judicial decision-making and allow judges to build expertise over time. More importantly, a permanent bench is better positioned to develop a stable and coherent body of jurisprudence, enhancing legal predictability and reducing opportunities for forum shopping by litigants.[105] In contrast, the current ICSID annulment framework where ad hoc committees are constituted anew for each case has led to significant variation in the interpretation of core treaty standards, such as fair and equitable treatment or indirect expropriation. These inconsistencies have attracted criticism for fostering legal uncertainty and undermining the legitimacy of ISDS decisions.[106] The MIC Draft Statute appropriately responds to this critique by rejecting ad-hocism in favor of continuity, transparency, and judicial professionalism.

Judges should be selected through a public, rules-based nomination process, with eligibility criteria focusing on expertise in international investment law, adjudicatory experience, and commitment to diversity in gender and geography. This reflects recommendations by UNCITRAL Working Group III,[107] and aligns with approaches adopted in the EU-Vietnam IPA,[108] and CETA,[109] where permanent rosters are curated for impartiality and independence.

### 5.1.2. Use of Chambers and Plenary Sittings

To balance judicial efficiency with doctrinal coherence, the MIC design permits appellate proceedings to be heard in chambers, while reserving plenary sittings for cases of exceptional legal or systemic importance. Clause 18(3) and 18(4) provide that appeals may be decided by a chamber of three or more judges, with the option of convening the full court where the issues involved warrant broader institutional scrutiny.[110]

---

[105] IILCC Comparative Report on the Creation and Implementation of a Multilateral Investment Court, Research Paper Series of the International Investment Law Centre Cologne 12-2019.

[106] Johannes Koepp, Yarik Kryvoi & Jack Biggs, Empirical Study: Annulment in ICSID Arbitration, (2021).

[107] UNCITRAL, Report of Working Group III, A/CN.9/1124, 2022.

[108] EU-Vietnam IPA, Art. 3.39.

[109] CETA, Art. 3.27, 3.28.

[110] Draft Statute, Art. 18.

This approach mirrors institutional designs seen in other supranational adjudicatory bodies. The European Court of Human Rights (ECtHR) and the CJEU adopt tiered configurations: small chambers for initial reviews, and Grand Chambers or full-court panels for harmonizing jurisprudence or resolving interpretive inconsistencies.[111]

The use of chambers enhances docket management, allowing the appellate body to handle a higher volume of cases without compromising procedural quality. At the same time, the possibility of plenary sittings serves as a systemic safeguard, enabling the appellate body to issue authoritative rulings on contentious or ambiguous points of law. This layered structure facilitates both legal efficiency and normative cohesion, two elements critical to the legitimacy and functionality of a multilateral appellate mechanism.[112]

### 5.1.3. Transparent and Democratic Leadership within the Court

Institutional legitimacy also depends on how internal governance and leadership roles within the appellate body are allocated. The MIC Draft Statute adopts a democratic and rotating leadership model, where each appellate chamber selects a Vice-President, and plenary sittings elect a President through a secret ballot.[113] This model draws inspiration from the International Court of Justice (ICJ), where judges elect the President and Vice-President among themselves for fixed three-year terms,[114] fostering collegiality and internal accountability.

Transparent and fair leadership appointments improve not only the perception of neutrality, but also the efficacy of court administration. By avoiding concentration of power in a single permanent figurehead, this system encourages rotational leadership and balances influence among judges from diverse legal and geographical backgrounds. Codifying these leadership procedures into the court's rules of procedure or statute, as seen in international judicial institutions like the ICJ and the ECtHR, also contributes to procedural legitimacy. Formalizing such mechanisms ensures that authority within

---

[111] ECHR, Article 30; CJEU Statute, Article 16.

[112] Marc Bungenberg & August Reinisch, FROM BILATERAL ARBITRAL TRIBUNALS AND INVESTMENT COURTS TO A MULTILATERAL INVESTMENT COURT (2020).

[113] Draft Statute, Art, 17, 18.

[114] ICJ Statute, Art. 21.

the court is exercised according to clear rules, not informal power dynamics, and reinforces the legitimacy of decisions rendered under the court's auspices.[115]

## 5.2. Substantive Grounds for Appeal

A key innovation in the Draft Statute of the Multilateral Investment Court (MIC) is its articulation of seven procedural as well as substantive grounds for appeal, spanning jurisdictional errors, excess of powers, corruption, procedural defects, and both legal and factual mistakes.[116] These grounds reflect a significant departure from the limited review mechanisms available under the ICSID Convention and represent a deliberate shift toward a more comprehensive appellate regime. The structure of these provisions suggests an attempt to balance the finality of arbitral awards with the need for legal correctness, judicial accountability, and systemic coherence. However, the breadth of the appeal grounds must be carefully calibrated to prevent excessive litigation, preserve procedural efficiency, and avoid undermining the legitimacy of first-instance tribunals.

### *5.2.1.* Jurisdiction and Admissibility (Clause 46(a))

The right to appeal on grounds of jurisdiction and admissibility ensures that tribunals do not exceed their legal mandates. This clause closely mirrors the ICSID annulment ground, which allows annulment where a tribunal has manifestly exceeded its powers.[117] Similar standards are embedded in other international courts such as the Court of Justice of the European Union (CJEU), which can annul decisions that fall outside the scope of institutional competence.[118] These provisions promote respect for the rule of law and safeguard against judicial overreach.[119] That said, the effectiveness of this ground depends on the clarity of jurisdictional provisions in the underlying treaties and the consistency with which tribunals interpret them. Without clear

---

[115] GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTA, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards*, (2017), https://doi.org/10.2139/ssrn.3457310.
[116] Draft Statute, Art. 46.
[117] ICSID Convention, Art. 52(1)(b).
[118] TFEU, Art. 263.
[119] **UNCTAD,** Reforming Investment Dispute Settlement: A Stocktaking, IIA Issue Note, No. 1 (2020).

definitional thresholds, such appeal rights risk being exploited to delay enforcement or frustrate proceedings through frivolous challenges.[120]

### 5.2.2. Excess of Powers and Judicial Corruption (Clause 46(b)-(c))

Appeals based on excess of powers and corruption reflect fundamental due process concerns and closely align with the ICSID annulment mechanism.[121] The inclusion of corruption as an independent ground of appeal reflects evolving consensus on the need to address judicial misconduct as a threat to the legitimacy of international adjudication. The International Criminal Court (ICC), for example, has developed rigorous evidentiary standards and disciplinary mechanisms to address claims of judicial bias or misconduct. The MIC must adopt similar safeguards, including high evidentiary thresholds, confidentiality protocols, and possibly an internal disciplinary chamber, to prevent abuse of this ground. Furthermore, structural protections against judicial impropriety are essential to bolster public trust in international courts.[122] The provision also draws from long standing criticisms of ad hoc arbitration, where arbitrators are often reappointed by parties and may not be insulated from reputational or financial incentives.[123]

### *5.2.3.* Procedural Errors and Lack of Reasoning (Clause 46(d)-(e))

Grounds of appeal based on procedural irregularities and failure to state reasons are central to ensuring transparency, procedural fairness, and predictability in international adjudication. These reflect both common law due process principles and international norms. Notably, the WTO DSU allows appellate review where panels have "failed to make an objective assessment of the matter."[124] Similarly, ICSID allows annulment for serious procedural departures and for awards that fail to state reasons.[125] However, to

---

[120] GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTA, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards*, (2017), https://doi.org/10.2139/ssrn.3457310.
[121] ICSID Convention, Art. 52(1)(b), 52(1)(c).
[122] Johannes Koepp, Yarik Kryvoi & Jack Biggs, Empirical Study: Annulment in ICSID Arbitration, (2021).
[123] **UNCTAD,** Reforming Investment Dispute Settlement: A Stocktaking, IIA Issue Note, No. 1 (2020).
[124] WTO DSU, Art. 17.6.
[125] ICSID Convention, **Art.52(1)(d), 51(1)(e).**

maintain efficiency and judicial economy, Clause 46 should be interpreted restrictively to cover only "serious" procedural lapses or "material omissions" in reasoning as opposed to minor technical errors.[126] Overly broad invocation of procedural grounds may lead to a proliferation of appeals on trivial matters, undermining the authority and finality of first-instance decisions. Therefore, a severity threshold or "material impact" requirement should be embedded in the Rules of Procedure to ensure that these grounds do not become instruments of delay or abuse.

#### 5.2.4. Legal and Factual Errors (Clause 46(f)-(g))

Perhaps the most significant innovation in Clause 46 is the inclusion of manifest legal and factual errors as appealable grounds, a marked shift from the annulment model under ICSID which explicitly precludes substantive review. Empirical evidence suggests that between 2011 and 2020, only 3% of ICSID awards were annulled in any respect, and full annulments remain exceedingly rare, that is, only six cases in ICSID history, accounting for approximately 0.8% of all awards.[127] Broader studies indicate that about 12% of annulment applications partially succeed, while non-ICSID tribunals applying UNCITRAL or ICC rules demonstrate annulment rates of 20–28%, often relying on expansive public policy exceptions or procedural violations.[128]

Despite this restrictive framework, ICSID annulment has been criticized for failing to remedy core doctrinal inconsistencies in ISDS jurisprudence. Since annulment focuses solely on procedural flaws, major substantive misapplications such as divergent interpretations of "fair and equitable treatment" (FET) or expropriation remain uncorrected, thereby entrenching fragmentation and unpredictability.[129] In response to these concerns, ICSID circulated a proposal in 2004-05 for a dedicated appeals facility

---

[126] Marc Bungenberg & August Reinisch, FROM BILATERAL ARBITRAL TRIBUNALS AND INVESTMENT COURTS TO A MULTILATERAL INVESTMENT COURT (2020).

[127] Wilske, S. and Bräuninger, L. (2023) 'Arbitrators', in S. Kröll, A.K. Bjorklund, and F. Ferrari (eds.) *Cambridge Compendium of International Commercial and Investment Arbitration*. Cambridge: Cambridge University Press, pp. 330–362.

[128] Johannes Koepp, Yarik Kryvoi & Jack Biggs, Empirical Study: Annulment in ICSID Arbitration, (2021).

[129] GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTA, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards*, (2017), https://doi.org/10.2139/ssrn.3457310.

with jurisdiction over legal errors and manifest factual mistakes.[130] The facility envisioned a second-instance panel with powers to correct misapplications of treaty provisions, while limiting factual review to egregious or clearly demonstrable mistakes.[131] However, political hesitancy from member states largely due to concerns over sovereignty and loss of finality resulted in the proposal's suspension. Still, this model remains influential and has re-emerged in UNCITRAL Working Group III deliberations as a foundational structure for systemic ISDS reform.[132]

A comparable approach is implemented under the CETA. It permits appeals based on errors of law and manifest factual inaccuracies, with strict limits to ensure procedural economy.[133] These rulings generally must be issued within 270 days, and decisions are transparently published.[134] Importantly, CETA's model has become a live reference point in UNCITRAL discussions on designing an appellate mechanism that could apply across treaties even without a permanent MIC.[135] This reflects growing consensus that substantive review is not incompatible with finality, if structured with high thresholds and clear procedural boundaries.

In that light, the MIC's inclusion of legal and factual errors as appealable grounds marks a progressive shift in the architecture of ISDS. Nevertheless, the system must avoid enabling full retrials. ***A codified rulebook should prescribe deadlines, document formats, and hearing protocols, drawing from the WTO Appellate Body's Working Procedures.***[136]

A dual standard of review de novo for legal questions and deferential/high-threshold correction for factual errors, mirroring the approach taken by the WTO Appellate Body,[137] and the ICC Appeals Chamber.[138] This strikes a careful balance between legal

---

[130] Katharina Diel-Gligor, *Reform Proposal: Curing Inconsistent ICSID Investment Jurisprudence, in Towards Consistency in International Investment Jurisprudence* 333 (2017), https://doi.org/10.1163/0000000000000_005.

[131] *Ibid.*

[132] A/CN.9/WG.III/WP.213, para. 16.

[133] CETA, Art. 8.28(2)-(3).

[134] Decision No 1/2021 of the CETA Joint Committee; CETA, Art. 8.28.7.

[135] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues, Communication by Canada.

[136] WTO Appellate Body's Working Procedures, WT/AB/WP/6, 2010.

[137] WTO DSU, Art. 17.

[138] Rome Statute, Art. 83.

accuracy and procedural restraint, reinforcing the appellate body's role as a corrective and system-shaping institution rather than a substitute for first-instance adjudication.

## 5.3. Procedural Framework and Efficiency

Designing an appellate mechanism that is not only fair but also procedurally efficient is critical to the credibility and usability of any reformed investment dispute system. The Draft Statute of the MIC, particularly Article 47, outlines key procedural safeguards to ensure timely appeals, impartial adjudication, and doctrinal coherence. If appropriately implemented, this framework can replace inefficient annulment regimes and redundant tribunal reconstitution, thereby improving accessibility and maintaining legal certainty.

### *5.3.1.* Timeframes and Accessibility

The Draft Statute provides that parties have 90 days from the date of the first-instance award to file an appeal, with possible extensions for claims involving corruption.[139] This strikes a balance between the need for finality and the accessibility of appellate review. In comparison, the WTO DSU allows a 60 day window to initiate an appeal,[140] but its shorter timeframe has been criticized in complex disputes involving extensive evidentiary records.[141] A 90 day window would still be more appropriate for investor–state disputes, which often involve voluminous records and treaty interpretation.

Critics of appellate reform often argue that introducing a new layer of review would delay resolution and increase costs. However, both the ICSID 2004 proposal for an appeals facility and the CETA Investment Court System illustrate how a well-structured appellate mechanism can actually reduce delays by replacing, rather than supplementing, annulment and enforcement challenges.[142] For instance, under CETA,[143] parties must file appeals within 90 days, and decisions are to be rendered

[139] Draft Statute, Art. 47(1)
[140] WTO DSU, Art. 17.1.
[141] Dencho Georgiev & Kim van der Borght, Reform and Development of the WTO Dispute Settlement System (2006).
[142] GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTA, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards*, (2017), https://doi.org/10.2139/ssrn.3457310.
[143] CETA, Art. 8.28.9.

ideally within 180 days, with an outer cap of 270 days.[144] These time limits provide procedural certainty while preventing re-litigation through duplicative processes like annulment or domestic court intervention.

Moreover, Article 47 envisions expedited procedures, such as oral hearings soon after filing and the issuance of decisions within fixed timeframes. These provisions ensure procedural economy and limit opportunities for strategic delay.

Further, standardizing cost-shifting, where the unsuccessful party bears the appellate tranche, can deter frivolous appeals. While this departs from WTO practice, where each party bears its own costs, it aligns with trends in investment arbitration like that under ICSID where tribunals increasingly allocate costs based on outcome or party conduct.[145] In sum, a tightly bound, single-stage appellate process offers a more predictable and efficient alternative to the fragmented and protracted ad hoc system currently in place.

### *5.3.2.* Random Judge Assignment and Plenary Criteria

Article 47(2) introduces randomized judicial assignment for appellate chambers, while preserving the possibility of plenary sittings in cases involving legal complexity or systemic importance.[146] Transparency in judge selection, through public disclosure of selection criteria and roster composition, is fundamental to avoiding bias and perceptions of partiality. The CETA model offers a comparative precedent: appellate tribunal members are drawn from a standing pool of pre-approved, highly qualified judges and assigned randomly for each case.[147] By detaching judge assignment from party nomination, such systems prevent adjudicators from assuming repeat-player incentives.

This reform is a direct response to structural critiques of ISDS, where arbitrator reappointments and remuneration structures raise concerns of conflict of interest. In contrast, the EU Investment Court System (ICS) provides fixed-term, salaried

---

[144] Decision No 1/2021 of the CETA Joint Committee; CETA, Art. 8.28.
[145] ICSID Secretariat, *Background Paper on Annulment for the Administrative Council of ICSID*, Doc. ICSID/R.4 (2022).
[146] Draft Statute, Art. 47(2).
[147] CETA, Art. 8.28.7.

adjudicators, precluded from simultaneously acting as counsel or experts in other disputes.[148] The use of public nomination, permanent rosters, and transparent procedures in appellate courts enhances legitimacy and institutional integrity, distancing the system from the perception of party-captured arbitration.[149]

### *5.3.3.* Establishment of a Precedential System

A compelling justification for appellate review lies in its potential to establish a binding and accessible body of precedent. Under the current ISDS regime, the absence of an authoritative appellate body has allowed tribunals to develop conflicting interpretations of core standards, such as "fair and equitable treatment," "full protection and security," and "indirect expropriation" for instance.[150] This jurisprudential fragmentation undermines predictability and creates room for forum shopping, where claimants exploit inconsistencies between tribunals to maximize chances of a favorable ruling.[151]

A standing appellate body tasked with correcting legal errors can enforce uniform standards, thereby cultivating a coherent investment law jurisprudence. This approach is exemplified in CETA, where appellate decisions are mandatorily published and serve as guidance for subsequent tribunals.[152] Similarly, the WTO Appellate Body, played a pivotal role in standardizing interpretations of WTO law until its recent paralysis.[153] The value of such precedent-based mechanisms lies not just in error correction, but in their capacity to harmonize legal doctrine across treaties and disputes.

### *5.3.4.* Remedial Powers and Stay of Enforcement

Articles 47(3) and 47(4) grant the appellate tribunal the authority to modify, reverse, or affirm first-instance awards, and to suspend enforcement pending appeal.[154] These

---

[148] Vanina Sucharitkul, From Arbitration to the Investment Court System (ICS): Comparing CETA, EVIPA, and TTIP, in Handbook of International Investment Law and Policy 1 (2020), https://doi.org/10.1007/978-981-13-5744-2_16-1.
[149] Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations, European Commission Press Release.
[150] UNCTAD**,** Reforming Investment Dispute Settlement: A Stocktaking, IIA Issue Note, No. 1 (2020).
[151] Ibid.
[152] CETA, Art. 8.41(5).
[153] WTO DSU, Art. 17.14.
[154] Draft Statute, Article 47(3), 47(4).

remedial powers are essential to avoid situations where flawed decisions result in irreversible harm before appellate review is complete. Comparable mechanisms exist in both the WTO,[155] and the ICC,[156] where enforcement may be stayed based on the risk of irreparable harm or the public interest.

To prevent arbitrary use of this power, the MIC should adopt a structured "test" for granting stays of enforcement, drawing on established judicial standards such as: (i) a prima facie case on the merits, (ii) risk of irreparable harm, (iii) balance of convenience, and (iv) public interest.[157] Moreover, a strict timeline—such as a 15-day limit for determining stay applications should be introduced to avoid prolonged legal uncertainty.

#### *5.3.5.* Frivolous Appeal Deterrents

To preserve procedural economy, the appellate mechanism should incorporate deterrents against frivolous or manifestly baseless appeals. For instance, While CETA does not explicitly refer to frivolous claims in its cost-related provisions, Articles 8.32 and 8.33 establish early dismissal procedures for manifestly baseless or legally unfounded claims, and when read together with Article 8.39 on cost allocation, they create a cohesive framework that deters procedural abuse by allowing prompt dismissal and enabling tribunals to shift costs to unsuccessful or bad-faith claimants.[158] Further, in ICSID arbitrations, tribunals have occasionally imposed security for costs where parties exhibited abusive conduct,[159] or where there was evidence of bad faith.[160] Implementing such procedural safeguards in a multilateral appellate mechanism would protect against delay tactics without curtailing access to legitimate redress.

By combining strict timelines, transparent judicial assignment, structured remedies, and cost-deterrents, the appellate mechanism can achieve procedural balance, preserving

---

[155] WTO DSU, Art. 22.
[156] Rome Statute, Art 82, 83.
[157] Marc Bungenberg & August Reinisch, FROM BILATERAL ARBITRAL TRIBUNALS AND INVESTMENT COURTS TO A MULTILATERAL INVESTMENT COURT (2020).
[158] CETA, Art 32, 33 & 39.
[159] RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10.
[160] INTERNATIONAL CHAMBER OF COMMERCE, ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration, (2018).

access to justice while discouraging abuse and ensuring swift, legitimate, and coherent outcomes.

### 5.4. Conclusion: Recasting ISDS Through Structured Appellate Reform

The introduction of a permanent appellate mechanism within ISDS represents more than a procedural refinement; it marks a structural realignment towards a rules-based and principled adjudicatory system. Whether pursued through the creation of a full-fledged MIC or through a more incremental appellate overlay atop existing ad hoc tribunals, the core objective remains the same: to ensure consistency, fairness, and legitimacy in international investment law.

The limitations of the ICSID annulment mechanism, with its narrow procedural focus and lack of authoritative jurisprudence, underscore the need for a robust appellate tier. The 2004–05 ICSID appeal proposal and innovations in treaties like CETA and the EU-Vietnam IPA have already laid the groundwork for such a system. By correcting legal errors, harmonising interpretations, and institutionalising adjudicatory independence, the appellate model proposed herein offers a pragmatic yet principled response to ISDS's legitimacy crisis.

## 6. Core Elements of the MIC Statute

### 6.1. Composition & Appointment

A rigorous appointment system combining meritocracy, diversity, independence, and transparency is foundational to the legitimacy of the MIC framework. The CETA framework includes six appellate judges, two each from Canada, the EU, and third-country nationals serving non-renewable nine-year terms, with leadership roles (President and Vice-President) selected by lot from third-country judges.[161] While these

[161] CETA, Art. 8.27, 8.28; Decision No 1/2021 of the CETA Joint Committee.

structural provisions mitigate geopolitical bias and advance independence, the process lacks an open nomination and independent review mechanism, leaving appointments subject to political bargaining rather than merit-based selection.

Conversely, the Draft MIC Statute enhances legitimacy by calling for public nominating procedures and an independent Appointment Committee to evaluate candidates for qualifications and diversity prioritizing appointment by Plenary from state-submitted shortlists.[162] This model is supported by UNCITRAL Working Group III's mandate that insists on transparent, state-controlled appointments without party influence, with fixed term-limits and strong ethical obligations on adjudicators.[163]

#### 6.1.1. Comparison and Enhanced Recommendation:

CETA's six-member structure successfully ensures diversity and independence. However, it lacks transparency in nomination and vetting. The Draft Statute offers robust improvements such as the Appointment Committee, public candidate credentials, merit-based selection and diversity quotas for gender, region, and legal systems make it more credible.[164] To synthesize the best features, the Draft Statute should incorporate CETA's structural balance and embed an explicit mandatory public-nomination and vetting process supervised by the Plenary.

### 6.2. Case Allocation & Division Structure

Judicial effectiveness and coherence depend on transparent mechanisms allocating cases to adjudicators appropriately. CETA's design establishes three-member Appellate Chambers (one judge each from Canada, the EU, and a third country), panels formed by rotation, with a full bench of six for pivotal issues.[165] However, CETA lacks specificity regarding criteria for convening a "full bench" beyond the notion of "serious" interpretations, and the rotation mechanism may inadvertently dilute specialized expertise for complex cases.

---

[162] Draft Statute, Art. 12.
[163] A/CN.9/WG.III/WP.213
[164] Draft Statute, Art. 12.
[165] CETA, Art. 8.28

### 6.2.1. Recommendation:

To enhance coherence, the MIC Statute should incorporate CETA's structural design, refine the criteria for triggering full-bench reviews, and introduce binding timeframes that are more stringent than CETA's non-mandatory timelines,[166] yet more practical and realistic than the often-criticised short deadlines under the WTO model.[167] Specifically, the draft should define full-bench triggers such as conflicting precedent, treaty interpretation questions, major public-interest claims and set mandatory deadlines like 90 days for notice of appeal, 180 days for Appellate decisions (or 270 with justification). An affordable "Small-Medium-sized Enterprises expedited track," as provided in CETA's single-judge option for small claims,[168] should be added to enhance access and cost-effectiveness.

## 6.3. Funding & Remuneration

A nuanced funding regime is essential to maintain independence while supporting operational integrity. CETA's model uses a monthly retainer and daily fees for judges which is set set by its Joint Committee and managed by ICSID, with contributions equally shared by disputing parties. Optionally, judges may transition to full-time salaried roles, but this depends on unanimous Party agreement.[169] While flexible, this system risk generating pressure to increase caseloads or unequally bolster well-resourced state nominations.

The Draft Statute's budget provision critically links apportionment to the foreign direct investment (FDI) outflows of Member States.[170] This proportional contribution model ensures that countries contribute equitably, reflecting their economic capacity. The model is in line with international practice, such as the CETA framework, where contributions are linked to the economic activity of the Member States[171]. However, a

---

[166] Decision No 1/2021 of the CETA Joint Committee.
[167] Dencho Georgiev & Kim van der Borght, Reform and Development of the WTO Dispute Settlement System (2006).
[168] CETA, Art. 8.27(9).
[169] CETA, Art. 8.28(7); Decision No 1/2021 of the CETA Joint Committee.
[170] Draft Statute, Art. 7.
[171] Decision No 1/2021 of the CETA Joint Committee.

key difference lies in the flexibility of the MIC Statute, which allows for reduced contributions or exemptions for certain members, subject to approval by the Plenary Body.

#### 6.3.1. Recommendations

1. Consideration of a Flexible Contribution Mechanism:
   While the proportional contribution model based on FDI outflows is fair and equitable, it may not sufficiently account for economic disparities between countries. Incorporating additional factors, such as GDP, regional economic activity, or poverty indices, could further enhance the fairness of the system. The UN regular budget model, which accounts for gross national income (GNI), is an example of how such multi-factor calculations can ensure greater equity.[172]
2. Transparency in Budget Reporting:
   The Plenary Body's two-thirds majority requirement provides checks on the budget process, but it is crucial to ensure transparency in the allocation and spending of funds. Regularly publishing detailed budget reports and financial audits could promote public trust and further combat any perception of financial mismanagement. The WTO has robust procedures for publishing budget reports and ensuring transparency, which the MIC could adapt.[173]

### 6.4. Language Policy

Multilingualism enhances fairness, but logistical clarity is vital. The Draft MIC Statute specifies official and working languages, along with translation and interpretation provisions, drawing inspiration from WTO and CJEU.[174] However, it lacks cost-control measures and process timelines for translation.

In contrast, CJEU mandates equal treatment in all 24 official EU languages,[175] while WTO DSU uses English as the primary language and provides translations of awards.

---

[172] UNGA, A/RES/79/249.
[173] WTO, WT/BFA/6-L/7633.
[174] Draft Statute, Art. 29.
[175] CJEU Rules of Procedure, Art. 36.

These models demonstrate a hierarchy of language resources to balance accessibility and efficiency.

### 6.4.1. Recommendation

To enhance accessibility and efficiency within the MIC framework, it is recommended to adopt a three-tiered language policy. First, official languages such as English, French, and Spanish should be granted full translation rights for all key documents, including awards, to ensure inclusivity and compliance with international standards. Second, the working language of the proceedings should default to English, streamlining the process and maintaining consistency throughout hearings and written submissions, as practiced by major international institutions like the WTO and the CJEU. Finally, party-specific documents submitted by the parties in other languages should be translated at the expense of the submitting party. This is consistent with practices observed in CETA.[176]

To manage translation costs and time efficiency, timelines should be established for the translation of awards like 120 days post-issuance, while allowing judicial discretion to grant extensions without prejudice to the proceedings. This approach balances the need for inclusivity with operational efficiency, following best practices in international legal frameworks

## 6.5. Confidentiality & Transparency

Balancing openness with confidentiality is key to institutional trust. CETA mandates public hearings and publications, allowing exceptions for confidential information.[177] UNCITRAL's Transparency Rules (2014),[178] and the Draft MIC call for public availability of filings, hearings, amicus briefs, and third-party funding disclosure .[179]

[176] CETA, Annex 29-A, p. 48-52.
[177] CETA, Art. 8.38.
[178] UNCITRAL Transparency Rules, Art. 2, 3.
[179] Draft Statute, Art. 8.4.

Despite robust procedural frameworks, both UNCITRAL and the Draft Statute rely solely on party and tribunal discretion to apply confidentiality rules.[180] There is no neutral intermediary to oversee or challenge redaction decisions, which can lead to inconsistent or overly broad confidentiality claims undermining the Court's transparency objectives. Public records from other bodies like the WTO have laid bare how unchecked redactions can erode public trust .[181]

### 6.5.1. Recommendation

While the Transparency Rules requires tribunal consultation with parties on redactions, there is no mechanism for independent review. A neutral Transparency Officer or external expert should be empowered to assess contested redactions against published criteria. This addition would prevent overuse of confidentiality to cite an illustrative comparison, institutional forums like the WTO whose "rules and procedures are undemocratic, un-transparent and nonaccountable, and have operated to marginalize the majority of the world's people."[182]

## 6.6. Institutional Oversight & Enforcement

To avoid institutional stagnation and reinforce the enforceability of its decisions, the MIC must embed structured oversight and accountability mechanisms. While the current Draft Statute grants the Plenary the authority to adopt rules and supervise institutional functions,[183] it lacks detail regarding interpretative authority, compliance oversight, and domestic enforcement coordination. Comparative frameworks offer instructive models: CETA authorizes periodic review and interpretative clarification via its Joint Committee;[184] the WTO's Appellate Body operated under self-managed

---

[180] UNCITRAL Transparency Rules, Art. 1.
[181] Gabrielle Marceau & Mikella Hurley, *Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms*, 19 Trade L. & Dev. 4(1) (2012).
[182] Quoted from the non-profit group the Public Citizen, in its description of the 3rd WTO Ministerial at Seattle. See 3rd WTO Ministerial: Seattle, USA: The Battle of Seattle, PUB. CITIZEN, http://www.citizen.org/trade/wto/Qatar/seattle_mini/.
[183] Draft Statute, Art. 8.
[184] CETA, Art. 8.28(8),

procedural authority;[185] and the CJEU employs a Grand Chamber mechanism to ensure jurisprudential consistency.[186] These examples illustrate the importance of balancing finality with adaptability while avoiding politicized reinterpretation of legal standards.

### 6.6.1. Recommendation:

To strengthen institutional coherence, the MIC Plenary should be empowered to issue non-binding interpretative declarations on recurring or systemic legal questions modeled on CETA's Joint Committee review mechanism.[187] These declarations should be subject to automatic sunset clauses, expiring after five years unless expressly renewed. This mechanism would provide tribunals with doctrinal guidance while preserving flexibility and guarding against ossification of contested interpretations.

Further, the MIC should require its Secretariat to publish biennial institutional performance reports. These should include data on caseload management, budget utilization, state compliance with awards, and enforcement trends.This mechanism aligns with WTO practices, such as its Ministerial Conferences, by bolstering the MIC's legitimacy among both stakeholders and member states.[188]

Finally, to ensure that MIC awards are treated as final and enforceable, the draft statute should incorporate language consistent with the UNCITRAL Model Law,[189] and the New York Convention,[190] requiring Member States to recognize and enforce MIC awards subject only to narrow grounds.

## 6.7. Toward a Cohesive and Balanced Design

Each element above strengthens the Draft MIC Statute by harmonizing internationally recognized best practices (CETA, WTO, CJEU, ICSID, UNCITRAL) with a

---

[185] WTO DSU, Art. 17.9; H Ruiz Fabri, *The WTO Appellate Body or Judicial Power Unleashed: Sketches from the Procedural Side of the Story* (2016) 27 European J Intl L 1075, 1080.
[186] CJEU Rules of Procedure, Art.60
[187] CETA, Art. 8.28.
[188] Marrakesh Agreement, Art.4.
[189] Model Law, Art, 34,35.
[190] New York Convention, Art. 3,4.

progressive, field-tested institutional framework. Collectively, these enhancements are designed to ensure that the MIC is not only legitimate in design but effective and enduring in its execution, a critical standard for high-stakes scholarly and policy applications.

# 7. Overcoming Challenges of Transitioning from an Ad Hoc to a Standing Mechanism

## 7.1. Introduction

Investor–State Dispute Settlement (ISDS), a central feature of bilateral investment treaties (BITs) and many free trade agreements, has come under intense criticism for its dependence on ad hoc arbitration mechanisms. Sebastian Curtis identifies a systemic legitimacy crisis fueled by jurisdictional overlap with domestic courts and inadequate support for the rule of law in host States, demonstrating that ISDS often fails to reinforce domestic judicial frameworks.[191] Furthermore, scholarship at Herbert Smith Freehills highlights how public and political backlash—most notably Bolivia's 2007 denunciation of the ICSID Convention, followed by Ecuador (2009) and Venezuela

[191] Sebastian T W Curtis, 'Resolving Investor–State Dispute Settlement's Legitimacy Crisis: The Case for Reinstating the Requirement to Exhaust Local Remedies' (2022) 7 *LSE Law Review* 327.

(2012)—reflects profound questions about ISDS's democratic legitimacy and respect for State sovereignty.[192]

In reaction, policymakers and reform advocates have championed the Multilateral Investment Court (MIC) as a transformative institution intended to replace the fragmented ad hoc model. The MIC envisages a standing body with permanent judges, fixed procedural rules, appellate review, and enhanced transparency—models derived from the WTO Appellate Body, International Court of Justice (ICJ), and the European Union's Investment Court System (ICS) under CETA.[193] Despite such promise, the shift to a standing court is not merely procedural; it entails significant doctrinal, institutional, financial, and political trade-offs. Through doctrinal legal analysis, comparative assessment, institutional design, and gap mapping, this article will systematically explore the principal challenges of constructing an MIC—covering judge selection and legitimacy, judicial independence and ethics, procedural design and flexibility, funding models, jurisdictional definition and precedent regimes, transitional modalities, appellate structure, and protection of regulatory space—and will propose robust, solution-oriented approaches informed by best practices in public international institutional design.

## 7.2. Appointment and Legitimacy

A standing Multilateral Investment Court (MIC) must derive its legitimacy from the integrity of its institutional structures, particularly the judicial appointment process. Ad hoc Investor–State Dispute Settlement (ISDS) tribunals allow disputing parties—both States and investors—to appoint arbitrators. While this system promotes flexibility, it has repeatedly sparked concerns over partiality and conflicts of interest.[194]Scholars like

---

[192] Herbert Smith Freehills, 'Inside Arbitration: Investor-State Dispute Resolution Series Part I' (Herbert Smith Freehills, 2022) (discussing Bolivia, Ecuador, Venezuela withdrawing from ICSID).

[193] European Commission, *'Investment Court System in CETA: Permanent Tribunal with Public Hearings and Appellate Mechanism'* (CETA Investment Chapter, 2014); see also WTO Appellate Body and Statute of the ICJ.

[194] Thomas Dietz, Marius Dotzauer and Edward S Cohen, 'The Legitimacy Crisis of Investor–State Arbitration and the New EU Investment Court System' (2019) 26 *Review of International Political Economy* 749.

Dietz, Dotzauer and Cohen emphasise that legitimate adjudication systems require transparent, fair, and impartial governance, which ad hoc structures often fail to deliver consistently.

However, merit-based appointments alone cannot sustain legitimacy. Smaller or developing States often feel marginalised when institutional authority consolidates among more powerful parties. During UNCITRAL Working Group III (WG III) discussions, this concern was highlighted: while proponents of an MIC—most notably the EU and its member States—advocated for a roster of pre-approved adjudicators, sceptical States, including the US and Japan, resisted centralization, fearing a loss of autonomy and influence. These diverging positions underscore that legitimacy in international adjudication depends not just on formal meritocratic systems, but also on perceived inclusivity and balance.[195]

To reconcile these competing concerns, a hybrid appointment framework warrants serious consideration. Under this model, an independent Appointment Committee, drawing representatives from States and the investor community, would manage an open call for candidates and select from a shortlist based on objective criteria, including qualifications and integrity.[196] This mirrors the earlier formation process of the WTO Appellate Body and introduces safeguards against politicisation or cronyism, while preserving political legitimacy through balanced stakeholder participation.

## 7.3. Judicial Independence, Ethics, and Tenure

Permanent judges in a standing Multilateral Investment Court (MIC) must operate under a framework that ensures independence and guards against conflicts of interest. Vera Weghmann and David Hall critique the "repeat appointment" phenomenon in ad hoc ISDS tribunals, observing that arbitrators frequently benefit financially from repeated assignments—an incentive structure that tends to produce jurisprudence

[195] UNCITRAL, 'Working Group III: Investor-State Dispute Settlement Reform' (UN Doc A/CN.9/WG.III/WP.240) agenda and participant statements showing U.S. and Japan preference for preserving party autonomy (April 2025).

[196] See 'The Path of (R)evolution of the International Investor-State Dispute Settlement Regime' (Arbitri) listing EU submissions advocating permanent judges nominated by States, independent secretariat, and roster systems.

favourable to investors.[197] This pattern erodes public confidence and undermines impartiality.

UNCITRAL's Working Group III has taken steps by drafting a Code of Conduct requiring arbitrators to disclose prior engagements and potential conflicts, but the Code lacks enforceable provisions, including mandatory cooling-off periods or independent oversight.[198] Without such structural elements, the Code remains aspirational, liable to embedd weakness and inconsistency.

Disciplinary mechanisms and tenure design are central to preserving judicial autonomy. Chen Yu critiques the ICJ's renewable nine-year term structure as potentially motivating judges toward decisions that appeal to States, seeking re-election. To counteract this influence, Chen Yu advocates a single non-renewable six-year term, striking a balance between independence and institutional continuity.[199]

To operationalise these principles, the MIC could adopt several concrete measures. First, introduce a two-year Cooling-Off Period before and after a judge's term during which they would be prohibited from serving in arbitrations or providing advisory services. Second, establish an independent Ethics Committee, consisting of legal scholars, civil society representatives, and retired judges, tasked with reviewing compliance, examining disclosures, and imposing sanctions where necessary. These sanctions should be publicly documented and transparent. This approach reflects and strengthens the ethical standards used by institutions such as the WTO Appellate Body and the ICJ.[200]

---

[197] Vera Weghmann and David Hall, "Repeat Appointments in ISDS: A Threat to Independence" (2021) 12 *Journal of International Arbitration* 217.

[198] UNCITRAL Working Group III, Draft Code of Conduct, UN Doc A/CN.9/WG.III/WP.245 (2024).

[199] Chen Yu, "Judicial Independence in Investment Tribunals: The Case for Single Terms" (2023) *Chinese Journal of International Law* (forthcoming).

[200] WTO Appellate Body Ethical Guidelines (1996); Statute of the ICJ art 13–17 governing judicial conduct.

## 7.4. Procedural Uniformity Versus Flexibility

A key rationale for transitioning to a standing Multilateral Investment Court (MIC) is to bring coherence and predictability to the ISDS system through procedural standardization. However, as several commentators have stressed, inflexible procedural architectures can hamper the Tribunal's capacity to adapt to the unique complexities of investment disputes. Sharma and Weghmann argue that while predictability supports legitimacy, "overly rigid rules may diminish due process and burden the tribunal with excessive formalism."[201]

Anthea Roberts has emphasised that institutional reforms should be 'pluralist' rather than singular, recommending a system that balances uniform core principles with context-sensitive procedures.[202] Building on this insight, Puig and Shaffer propose a nuanced approach: establish mandatory timeframes—for instance, 60 days to respond to jurisdictional challenges and 180 days to issue an award—while permitting tribunals to adopt additional measures suited to case specifics, such as bifurcation or expedited discovery.[203] Without such a dual structure, ISDS risks losing the very adaptability that has enabled its sustained—and at times controversial—effectiveness.

UNCITRAL's Working Group III (WGIII) has advocated enhanced case management, yet as noted in an Indian Journal of International Economic Law commentary, the group "has not clarified how it will balance procedural coherence with legal nuance," thereby maintaining uncertainty about how flexibility will be operationalised in practice.[204] Moreover, Kluwer Arbitration Blog scrutiny of WGIII's agenda has underscored the risk of entrenching a 'broken system' by focusing unduly on procedural refinement without addressing substantive dynamics that shape case-specific needs.[205]

---

[201] Mohit Sharma and Vera Weghmann, 'Balancing Standardisation and Flexibility in International Arbitration' (2022) 37 *ICSID Review – FILJ* 1, 24.

[202] Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) *American Journal of International Law.*

[203] Sergio Puig and Gregory Shaffer, *Imperfect Alternatives* (Cambridge University Press 2015) 61–62.

[204] See commentary cited in Indian Journal of International Economic Law, (2023) 15 *IJIEL*.

[205] 'Procedural Versus Substantive Reforms: Is the Work of UNCITRAL WGIII Worth the Wait?' Kluwer Arbitration Blog (27 June 2021).

Rather than imposing uniform procedural blueprints, a well-designed MIC statute should stipulate core procedural building blocks—time limits for jurisdictional rulings, protected deadlines, and minimum standards for hearings—while making procedural flexibility contingent and case-by-case. Tribunals should be empowered, but not mandated, to utilise bifurcation, provisional measures, or expedited discovery where justified. The statute should also enshrine transparency guardrails—such as open hearings and amicus submission protocols—while ensuring flexibility in implementation. This dual-tiered model would combine predictability—through compulsory standards—with adaptability, allowing tribunals to tailor processes to the factual and legal contours of each dispute.

## 7.5. Budgeting, Costs, and Access to Justice

One of the primary institutional challenges in transitioning to a standing Multilateral Investment Court (MIC) involves establishing a robust, transparent, and equitable funding model. Unlike ad hoc ISDS arbitration, which relies on per-case fees charged to parties at the outset, a standing institution requires predictable, long-term financing for permanent staff, a registry, facilities, judicial honoraria, and support services. Empirical studies highlight that costs associated with ISDS proceedings have ballooned in recent years, raising serious questions about equity and access. Notably, Allen & Overy and the British Institute of International and Comparative Law report that, on average, respondents incur approximately USD 4.7 million while claimants incur around USD 6.4 million, with tribunal costs alone averaging between USD 0.9 million and USD 1.1 million.[206] Such figures underscore that, without financial reform, the MIC risks replicating affordability gaps under current models.

Susan Franck's empirical analysis further reinforces these concerns, revealing that legal and arbitration expenses can constitute over 90 per cent of the total cost of an ISDS proceeding, with median claimants' fees around USD 3.1 million against median awards of only USD 10.5 million.[207] This disparity suggests a high barrier to justice,

[206] Allen & Overy LLP and BIICL, *Empirical Study: Costs, Damages and Duration in Investor-State Arbitration* (2021) 4–5 and 7–8, reproduced in UNCITRAL WG III A/CN.9/WG.III/WP.153.

[207] Susan D Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (OUP 2019).

particularly for smaller investors and low-income States, which deters legitimate claims and paints an inequitable picture. Rosert of the International Institute for Sustainable Development confirms that States—even when prevailing in arbitration—may face legal bills amounting to hundreds of thousands to millions of dollars, drawing on public resources and sometimes affecting budget allocations for essential public services.[208] Furthermore, third-party litigation funding has emerged as a double-edged sword; while it provides capital to pursue worthwhile claims, it also enables well-resourced investors to initiate speculative cases with minimal personal risk. Critics at the International Institute for Sustainable Development and Investment Treaty News argue that this phenomenon exacerbates existing imbalances, often shifting costs from funders to States and taxpayers.[209] Consequently, the financing model of a standing court must both shield against undue third-party influence and guarantee accessibility.

To design a fair financing system, the MIC statute should adopt a multi-pronged funding structure. First, annual State contributions proportional to GDP would secure baseline operational funding—similar to the funding model of the WTO and ICJ registry. Second, filing fees should be scaled according to claim size with a waiver mechanism for low-income States or small investors, thereby protecting access to justice without incentivizing frivolous claims. Third, a Trust Fund—seeded by voluntary contributions from philanthropic institutions or development agencies—could support registry functions and allow fee subsidies. Finally, a Financial Oversight Committee, comprising independent auditors and stakeholder representatives, should periodically review expenditure and publicly report on budget allocation to maintain transparency and accountability.

This hybrid budgetary framework acknowledges that permanent institutional costs are inevitable, but these should not restrict access or fairness. By balancing mandatory contributions with flexible fee structures and external funding, the MIC can achieve

---

[208] Diana Rosert, *The Stakes Are High: A Review of the Financial Costs of Investment Treaty Arbitration* (IISD, 2014) 3–5.

[209] Frank G García, 'The Case Against Third-Party Funding in Investment Arbitration' (2018) Investment Treaty News (IISD).

both sustainability and inclusivity—enabling it to fulfill its legitimacy premise and overcome cost-based criticisms of ad hoc ISDS.

## 7.6. Jurisdictional Scope and Precedent

A well-defined jurisdictional framework is critical to the effectiveness and legitimacy of the Multilateral Investment Court (MIC). The current ISDS system suffers from jurisdictional fragmentation due to varying treaty formulations, which leads to legal uncertainty, delayed proceedings, and inconsistent access for investors and States alike. As Schill argues, the "contract-based consent" model in ad hoc arbitration fosters ambiguity about standing, treaty scope, and the nature of protected investments, thereby eroding predictability in the regime. This ambiguity is exacerbated by inconsistent interpretations across tribunals, which may rely on materially different investment treaties, and results in jurisprudential incoherence.[210]

In response, legal scholars and UNCITRAL Working Group III have emphasized the importance of drafting a MIC statute that clearly delineates its subject-matter and personal jurisdiction.[211] This includes defining what constitutes an "investment," identifying protected investor classes, clarifying ratione temporis limitations, and elaborating procedural thresholds like exhaustion of local remedies or admissibility screening.[212] States have particularly insisted on ensuring the MIC does not encroach on domestic adjudicatory sovereignty, particularly where national legal remedies are effective. The European Commission has endorsed a model where jurisdiction is limited to treaty violations, excluding pure contract disputes unless explicitly

---

[210] Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 287–289.

[211] UNCITRAL Working Group III, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 38th Session' (Vienna, 14–18 October 2019) UN Doc A/CN.9/1004.

[212] Martins Paparinskis, 'The Limits of Lawfulness: Legitimate Expectations and Investor Rights in International Investment Law' (2013) 8(1) *ICSID Review* 1.

incorporated. Such clarifications would help align the MIC's remit with its foundational objectives of legal coherence and investor-State balance.

Another core concern involves the treatment of precedent. Unlike domestic legal systems, ISDS tribunals lack a binding stare decisis doctrine, which results in "inconsistent, unpredictable and incoherent" outcomes, as noted by Van Harten and Loughlin. A standing court, however, risks going too far in the opposite direction: a rigid application of binding precedent could fossilize legal doctrine, stifle evolution, and diminish judicial creativity. Puig and Shaffer note that a middle ground—a qualified precedent regime—may be more appropriate, whereby appellate or chamber-level decisions are persuasive but not absolutely binding, allowing for reasoned departures based on legal or factual distinctions.This approach, seen in the WTO Appellate Body practice, enhances coherence while preserving adjudicative flexibility. The MIC should also adopt an institutional memory mechanism: a searchable, open-access jurisprudential database maintained by the registry, ensuring accessibility for future panels and stakeholders. This infrastructure would reduce interpretive divergence while promoting transparency and consistency. Additionally, periodic restatements or interpretive commentaries—issued by an internal judicial committee—could guide future tribunals on evolving points of law.

Finally, to prevent overreach, the MIC should incorporate a margin of appreciation doctrine—especially in sensitive public policy matters—where deference to domestic legal frameworks is warranted. Similar principles have been employed by the European Court of Human Rights and can serve as interpretative boundaries for MIC judges navigating cross-border regulatory disputes.

In essence, defining a clear and flexible jurisdictional structure, coupled with a balanced approach to precedent, will help the MIC achieve greater legitimacy and ensure it remains a coherent, efficient, and responsive forum for investor-State disputes.

## 7.7. Transitional Framework and Forum Shopping

The transition from ad hoc Investor–State Dispute Settlement (ISDS) to a standing Multilateral Investment Court (MIC) poses considerable structural and doctrinal

challenges, especially with respect to temporal applicability, legacy cases, and potential jurisdictional overlap. An improperly calibrated transition risks systemic fragmentation and encourages opportunistic behaviour, including forum shopping by both States and investors.

The current ISDS landscape operates through a patchwork of thousands of bilateral and multilateral investment treaties, many of which contain legacy clauses, survival provisions, and Most-Favoured Nation (MFN) protections. As noted by Gazzini, such clauses have a legal afterlife that may extend a treaty's applicability for up to 20 years, allowing claimants to invoke old procedural regimes to avoid newer, more restrictive dispute settlement mechanisms.This legal inertia fosters regime collision between the old and new systems, undermining the MIC's institutional credibility and defeating its coherence objective.

UNCITRAL Working Group III recognises this issue and has debated various mechanisms for integrating pending disputes into the MIC. Broadly, three options have emerged: (i) opt-in protocols, whereby States and investors voluntarily subject their disputes to MIC jurisdiction; (ii) automatic succession, through amendment or termination of BITs with mandatory MIC clauses; and (iii) sunset mechanisms, allowing ad hoc arbitration to persist for a limited period post-MIC entry into force. However, each presents trade-offs between investor certainty, State sovereignty, and institutional efficacy.

A voluntary opt-in approach, although consensual and respectful of party autonomy, risks underutilisation. States may avoid MIC jurisdiction fearing adverse outcomes, while investors may resist any procedural change that alters their strategic position. On the other hand, automatic succession—especially via joint interpretative statements or multilateral override treaties—raises questions about retroactivity and legitimate expectations under customary international law, as seen in *Mondev v United States*, where the tribunal stressed that procedural rules should not shift mid-course without due notice.

A middle path may be offered by a staged sunset clause—as proposed in EU documents on MIC transition—which allows the old system to wind down over a finite period (e.g., 5–10 years), while gradually phasing in MIC jurisdiction for new or pending disputes. This ensures stability, facilitates institutional learning, and grants States and investors a realistic window to adjust expectations.

Equally important is the risk of forum shopping, where litigants exploit jurisdictional overlaps or temporal loopholes to secure favourable fora. Puig and Shaffer note that if the MIC is perceived as more restrictive or pro-State, investors may pre-emptively file under legacy BITs or route claims through subsidiaries in jurisdictions still governed by ad hoc rules. Conversely, States may resist enforcement of MIC awards that conflict with existing domestic jurisprudence or strategic policy objectives.

To curb such behaviour, the MIC statute must include a fork-in-the-road provision, requiring claimants to irrevocably choose between domestic remedies, ad hoc arbitration, or MIC adjudication. Additionally, a Temporal Jurisdiction Clause should clarify the scope of the MIC's jurisdiction over acts that occurred before its creation but are adjudicated post-entry. These safeguards reduce strategic manoeuvring and promote rule-based consistency.

Lastly, transitional justice must be participatory. States, investors, and civil society actors should be consulted through public hearings and stakeholder comment rounds to finalise MIC procedural rules. The approach mirrors WTO accession processes and promotes buy-in across diverse legal traditions.

## 7.8. Appellate Review: Finality Versus Accuracy

The inclusion of an appellate mechanism is one of the most transformative aspects of the Multilateral Investment Court (MIC) architecture. Proponents argue that appellate review enhances legal certainty, coherence, and legitimacy in Investor–State Dispute Settlement (ISDS), while critics warn that it may prolong proceedings and undermine finality. The challenge is to design an appellate structure that corrects material errors without replicating the inefficiencies that have plagued systems like the WTO Appellate Body.

As Puig and Shaffer note, the absence of a second-tier review in traditional ISDS has resulted in jurisprudential fragmentation, where tribunals interpret identical clauses (e.g., “fair and equitable treatment” or “indirect expropriation”) inconsistently. The consequence is unpredictability, exacerbating investor uncertainty and state pushback. An appellate body with the authority to harmonise interpretations could mitigate this problem, much like the WTO Appellate Body has done in trade law. However, the WTO model also illustrates the perils of overreach: excessive legalism, member

politicisation, and resource gridlock led to the Appellate Body's paralysis in 2019. These lessons must inform any MIC design.

The scope of appellate review should therefore be strictly limited. Appeals should be permitted only on grounds of errors of law or manifest excess of jurisdiction, excluding factual reassessment to avoid duplicative litigation. Moreover, timelines must be rigid: a 90-day window for appeal submission, and 120-day resolution deadline, as suggested by UNCITRAL WG III proposals, would preserve procedural economy.

Composition is equally critical. The appellate panel must be institutionally independent from the first-instance tribunal. A pool of appellate judges—distinct from trial adjudicators—should be pre-selected based on legal expertise, diversity, and impartiality. To avoid panel shopping or politicisation, a randomised roster system akin to the European Court of Human Rights could be employed.

Furthermore, an automatic stay of enforcement of awards under appeal must be narrowly tailored. Broad suspensions risk abuse and delay. A stay should only be granted upon preliminary scrutiny establishing a prima facie legal error, and even then, must be time-bound.

Importantly, MIC appellate rulings should have binding force—on the parties and on future panels within the same institutional hierarchy—to prevent re-litigation of settled law. Nevertheless, limited overruling mechanisms may be included to accommodate exceptional developments in international law or fundamental shifts in treaty interpretation.

Finally, transparency and reasoned judgments should be mandatory. Each decision must contain detailed legal reasoning, citation of precedents, and a public record. This would reinforce institutional legitimacy and promote legal development.

In sum, an appellate mechanism should be designed to balance finality with accuracy, inspired by the successes—and limitations—of existing models in the WTO, ICJ, and regional courts.

## 7.9. Regulatory Sovereignty and Public Interest

A key challenge confronting the proposed Multilateral Investment Court (MIC) is the balance between investor protection and the sovereign right of States to regulate in the public interest. Traditional ISDS mechanisms have been critiqued for enabling "regulatory chill," where States hesitate to enact legitimate public welfare regulations for fear of investor claims. This criticism has been especially pronounced in sectors such as environmental regulation, public health, and social welfare, where tribunals have sometimes construed regulatory actions as indirect expropriation or violations of fair and equitable treatment (FET).

UNCITRAL Working Group III has acknowledged the need to restore a regulatory equilibrium that ensures State autonomy is not compromised by private investor interests. Similarly, academic commentators like Chen Yu have cautioned that a permanent adjudicatory body could inadvertently entrench a pro-investor bias unless robust public interest safeguards are embedded within its design.

One foundational solution is the inclusion of a “Right to Regulate” clause in the MIC’s constitutive statute. This clause would reaffirm that non-discriminatory regulations enacted in pursuit of legitimate public purposes—including health, environment, public morality, and national security—do not constitute breaches of investment obligations unless proven manifestly arbitrary or discriminatory. The EU–Vietnam Investment Protection Agreement and CETA already incorporate such clauses as normative blueprints.

Further, MIC panels should be directed—through interpretative guidelines or statutory mandates—to conduct proportionality and necessity assessments when evaluating regulatory measures. This would ensure that awards are rendered not merely on the basis of investor loss but in consideration of the legitimacy and public purpose of the regulatory action. Such a model draws from jurisprudence of the European Court of Human Rights (ECtHR) under Article 1 of Protocol No. 1, which permits interference with property rights for legitimate social aims.

Moreover, Public Interest Exceptions should form an integral part of MIC jurisdictional assessment. Before proceeding to the merits, tribunals could apply a threshold test that

excludes or limits claims against bona fide non-compensable public welfare regulations. This threshold filter would prevent overreach while preserving legitimate recourse in cases of arbitrary or abusive regulation.

Transparency mechanisms also enhance regulatory legitimacy. Open hearings, third-party interventions (amicus curiae), and public access to tribunal records bolster confidence that decisions are made in the broader societal interest. The UNCITRAL Transparency Rules, if made applicable by default to MIC proceedings, would ensure public participation and scrutiny.

Lastly, the MIC's institutional design must shield States from disproportionate liability exposure. Damages should be calculated in a manner consistent with customary international law principles—not speculative expectations. Encouraging reliance on the "differential damages" approach, as adopted in recent BITs, may help align remedies with public interest considerations.

In conclusion, embedding public interest considerations into the MIC's adjudicative and procedural framework is essential for restoring trust, enhancing democratic accountability, and ensuring that international investment law complements rather than subverts sovereign governance.

## 7.10. Conclusion

The proposal for a Multilateral Investment Court (MIC) represents a decisive step toward reforming the international investment law regime. Designed to address systemic flaws in the Investor–State Dispute Settlement (ISDS) mechanism—such as arbitral inconsistency, legitimacy deficits, and lack of transparency—the MIC aspires to introduce a rule-based, institutionalised framework akin to other international judicial bodies like the WTO Appellate Body and the International Court of Justice (ICJ).

However, merely transplanting judicial architecture without careful institutional design would risk entrenching existing flaws or creating new ones. As Puig and Shaffer observe, ISDS reform must be structural, not symbolic, to ensure lasting legitimacy and functionality. This necessitates addressing a comprehensive matrix of issues: appointment and representation, judicial ethics, procedural architecture, budgetary

fairness, jurisdictional clarity, transitional safeguards, appellate efficacy, and protection of State regulatory space.

The MIC's appointment process must reflect merit-based selection, balanced by geographical and stakeholder inclusivity. Judicial independence can be strengthened through non-renewable terms, ethics codes, and cooling-off periods. Procedural uniformity should not eclipse case-specific flexibility, especially in investment disputes involving complex commercial and regulatory intersections.

Financial viability demands equitable cost-sharing mechanisms and safeguards for developing countries and SMEs. Jurisdictional design must respect State sovereignty, promote exhaustion of local remedies, and incorporate qualified precedent regimes to ensure legal predictability without rigidity. Transitional challenges such as forum shopping can be mitigated through opt-in clauses and sunset provisions that maintain legal certainty for both States and investors.

A properly circumscribed appellate mechanism—limited to errors of law and jurisdiction—enhances coherence while preserving procedural economy. Above all, regulatory sovereignty must be safeguarded through express "right to regulate" clauses, public interest exceptions, and proportionality analysis, ensuring that the MIC strengthens rather than undermines democratic governance.

In essence, a well-calibrated MIC—anchored in transparency, accountability, and inclusivity—has the potential to restore public confidence in international investment law. But the path forward requires sustained multilateral dialogue, attention to power asymmetries, and continuous evaluation of how institutions evolve in response to global legal and economic shifts.[213] If these dimensions are addressed holistically, the MIC could become not just a tribunal for investor–State disputes, but a beacon of legitimacy and fairness in global economic governance.

[213] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 201–204.

# Bibliography

### a. Treaties, Rules & Official Instruments


- Statute of the International Court of Justice arts. 13–17 (1945).
- UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration arts. 2–6 (2014).
- European Commission, *Proposal for the Modernisation of the Energy Charter Treaty* art. 12(4) (2020).
- WTO Appellate Body, *Ethical Guidelines* (1996).


### b. United Nations & International Organization Documents


- UNCITRAL Working Group III, *Report … on the Work of its 38th Session* (Vienna, 14–18 Oct. 2019), U.N. Doc. A/CN.9/1004 (2019).
- UNCITRAL Working Group III, *Report … on the Work of its 39th Session* (Vienna, 5–9 Oct. 2020), U.N. Doc. A/CN.9/1044 (2020).
- UNCITRAL Working Group III, *Possible Reform of ISDS: Draft Code of Conduct*, U.N. Doc. A/CN.9/WG.III/WP.167 (2020).
- UNCITRAL Working Group III, *Draft Code of Conduct*, U.N. Doc. A/CN.9/WG.III/WP.245 (2024).
- UNCITRAL, *Working Group III: Investor-State Dispute Settlement Reform*, U.N. Doc. A/CN.9/WG.III/WP.240 (Apr. 2025).


### c. European Union / European Commission Materials


- European Commission, *Investment Court System in CETA: Permanent Tribunal with Public Hearings and Appellate Mechanism* (2014).
- European Commission, *Proposal for Investment Protection and Resolution of Investment Disputes in TTIP Negotiations* (2015), https://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf.
- European Commission, *Investment Protection and the Multilateral Investment Court* (Factsheet, Feb. 2021), https://policy.trade.ec.europa.eu/news/european-commission-presents-proposal-establish-multilateral-investment-court-2021-02-19_en.

- European Commission, *Multilateral Investment Court: Concept Paper* (2017), https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf (accessed 12 June 2025).

TradeLab_Draft (1)

### d. UNCTAD & Other Institutional Reports

- UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA Issues Note No. 3 (2013).
- UNCTAD, *Reform of Investor–State Dispute Settlement: An Overview*, IIA Issues Note No. 2 (2019).
- UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II (2012).
- Allen & Overy LLP & BIICL, *Empirical Study: Costs, Damages and Duration in Investor-State Arbitration* (2021).
- Columbia Ctr. on Sustainable Inv. (CCSI), Lise Johnson & Lisa Sachs, *Investor-State Dispute Settlement and the Rule of Law* (2016).
- IISD, Diana Rosert, *The Stakes Are High: A Review of the Financial Costs of Investment Treaty Arbitration* (2014).

### e. Books & Book Chapters

- Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen & Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford Univ. Press 2017).
- Susan D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Oxford Univ. Press 2019).
- Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Univ. Press 2007).
- Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge Univ. Press 2009).
- Sergio Puig & Gregory Shaffer, *Imperfect Alternatives* (Cambridge Univ. Press 2015). *[as cited in your draft]*

- Stephan W. Schill, *Enhancing the Legitimacy of International Investment Law by Establishing an Appellate Mechanism*, in Karl P. Sauvant (ed.), *Appeals Mechanism in International Investment Law* 323 (Oxford Univ. Press 2008).
- Armand de Mestral, *Reforming the Investment Dispute Settlement System: The UNCTAD Perspective*, in Jean E. Kalicki & Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System* 631–33 (Brill/Nijhoff 2015).
- Gabrielle Kaufmann-Kohler & Michele Potestà, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Disputes* (CIDS 2017).

**f. Journal Articles**

- Thomas Dietz, Marius Dotzauer & Edward S. Cohen, The Legitimacy Crisis of Investor–State Arbitration and the New EU Investment Court System, 26 Rev. Int'l Pol. Econ. 749 (2019).
- Thomas Dietz, Marius Dotzauer & Edward S. Cohen, The Legitimacy Crisis of Investor-State Arbitration and the New Design of Investment Courts, 57 Stan. J. Int'l L. 295 (2021).
- Matthias Goldmann, Investor–State Dispute Settlement as a Challenge to Constitutionalism, 17 German L.J. 521 (2016).
- Caroline Henckels, Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP, 19 J. Int'l Econ. L. 27 (2017).
- Martins Paparinskis, The Limits of Lawfulness: Legitimate Expectations and Investor Rights in International Investment Law, 8 ICSID Rev.—FILJ 1 (2013).
- Sergio Puig & Gregory Shaffer, Imperfect Alternatives: Institutional Choice and the Reform of Investment Law, 112 Am. J. Int'l L. 361 (2018).
- Stephan W. Schill, Enhancing the Legitimacy of International Investment Law by Establishing an Appellate Mechanism, in Sauvant (ed.) (OUP 2008) (chapter; listed above under Books/Chapters).
- J. Christopher Thomas, Amicus Curiae in Investment Treaty Arbitrations: The Example of Methanex, 1(2) Law & Prac. Int'l Cts. & Tribs. 227 (2005).

- Tarcisio Gazzini, Interpretation of International Investment Treaties, 17 J. World Investment & Trade 131 (2016).
- Chen Yu, Binding Precedent in International Investment Law: Is the WTO Model Desirable?, 21 J. World Investment & Trade 561 (2020).
- Anthea Roberts, Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration, Am. J. Int'l L. (2018). *[vol./pages not specified in draft]*
- Mohit Sharma & Vera Weghmann, Balancing Standardisation and Flexibility in International Arbitration, 37 ICSID Rev.—FILJ 1 (2022).
- Vera Weghmann & David Hall, Repeat Appointments in ISDS: A Threat to Independence, J. Int'l Arb. 217 (2021). *[volume as "12" in draft; please verify]*
- Gus Van Harten & Martin Loughlin, Investment Treaty Arbitration as a Species of Global Administrative Law, 17 Eur. J. Int'l L. 121 (2006).
- Arcuri & Montanaro, Justice for All? Protecting the Public Interest in Investment Treaties, 59 B.C. L. Rev. 2797 (2018).

**g. Online Publications & Blogs**

- Kluwer Arbitration Blog, *Procedural Versus Substantive Reforms: Is the Work of UNCITRAL WGIII Worth the Wait?* (27 June 2021).
- Arbitri, *The Path of (R)evolution of the International Investor-State Dispute Settlement Regime* (EU submissions overview) (n.d.).
- IISD—Investment Treaty News, Frank G. García, *The Case Against Third-Party Funding in Investment Arbitration* (2018).

**h. Cases & Awards**

- James v. United Kingdom, 8 Eur. H.R. Rep. 123 (1986).
- Mondev Int'l Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002).