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The Proposed Standing Multilateral Mechanism and Its Potential Relationship with the Existing Universe of Investor – State Dispute Settlement

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SOUTH CENTRE

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THE PROPOSED STANDING MULTILATERAL MECHANISM AND ITS POTENTIAL RELATIONSHIP WITH THE EXISTING UNIVERSE OF INVESTOR – STATE DISPUTE SETTLEMENT

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ABSTRACT

The reform option on the Standing Multilateral Mechanism (SMM) currently under discussion at UNCITRAL's Working Group III (WGIII) has raised a number of important, systemic concerns for the procedural reforms of investor-State dispute settlement. This paper first seeks to situate the discussions on the SMM within its historical and contemporary contexts. Then it considers UNCITRAL Working Paper 213 and the legal provisions it contains, which form the basis of ongoing discussions of this reform option at WGIII. Further, it explores the potential relationship of this proposed SMM with different facets of the existing international investment law regime. The paper concludes by providing some elements which require further consideration in this process, particularly for safeguarding the interests of developing countries.

L'option de réforme du Mécanisme permanent de règlement des différends internationaux en matière d'investissements actuellement en discussion au sein du Groupe de travail III de la CNUDCI a soulevé un certain nombre de préoccupations importantes concernant la réforme du système de règlement des différends entre investisseurs et États. Le présent document s'attache, dans un premier temps, à situer les discussions sur le mécanisme de règlement des différends dans leurs contextes historique et actuel. Il examine ensuite le document de travail 213 de la CNUDCI et les dispositions juridiques qu'il contient, qui constituent la base des discussions en cours sur cette option de réforme au sein du Groupe de travail. Enfin, il explore les liens potentiels entre le projet de mécanisme de règlement des différends et les différentes facettes du régime des accords internationaux d'investissement. Il se conclut sur les différents points qui nécessitent un examen plus approfondi en vue notamment de préserver les intérêts des pays en développement.

La opción de reforma del Mecanismo Multilateral Permanente (SMM) que se está debatiendo actualmente en el Grupo de Trabajo III (GTIII) de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI) ha planteado una serie de importantes preocupaciones sistémicas para las reformas procesales de la solución de controversias entre inversionistas y Estados. El presente documento trata en primer lugar de situar los debates sobre la SMM en su contexto histórico y contemporáneo. A continuación, examina el Documento de Trabajo 213 de la CNUDMI y las disposiciones legales que contiene, que constituyen la base de los debates actuales sobre esta opción de reforma en el GTIII. Además, explora la posible relación de esta propuesta de SMM con diferentes aspectos del régimen jurídico internacional vigente en materia de inversiones. El documento concluye proporcionando algunos elementos que requieren una mayor consideración en este proceso, especialmente para proteger los intereses de los países en desarrollo.

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PART I. INTRODUCTION

The decentralized nature of the international investment regime and its accompanying investor-State dispute settlement (ISDS) mechanism were long seen as features rather than drawbacks of the system. This regime has undergone a severe legitimacy crisis[2], which in turn prompted efforts towards its reform, most prominently at the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WGIII)[3]. However, the mandate given to WGIII was interpreted narrowly to only consider reforms of "procedural aspects" of ISDS, leaving aside the substantive aspects of international investment agreements (IIAs)[4].

The ongoing process at WGIII has led to the consideration of several reform options. One such option is the proposed 'Standing Multilateral Mechanism' (SMM), which is discussed in this document. It addresses, first, the historical background and context for this particular reform option, including the position of its main proponent, the European Union (EU). Part II provides insights on UNCITRAL Working Paper (WP.) 213, the draft provisions contained therein, as well as certain relevant elements of the proposed appellate mechanism. Part III explores key issues and some concerns with regard to the proposed two-tier Standing Mechanism, while Part IV offers some concluding remarks.

Given the still early stage of discussions, this document does not seek to prejudge or comment on the utility or otherwise of this reform option, but hopes to highlight some important questions and elements for consideration by the reader.

History, background & context

In his recent book *Investment Treaties and the Legal Imagination*,[5] Perrone highlights how the earliest investment treaties were structurally engineered to favour foreign investors. Its proponents "were optimistic about the possibility of 'the conventional progress of international law', particularly by creating an international court or arbitration system to resolve foreign investor disputes. International arbitration was fundamental to the plan, as the standards in international investment treaties, such as due process and fairness, are inherently vague and ambiguous"[6].

While the international investment regime developed on the basis of *ad hoc* arbitration tribunals, the possibility of setting up of an 'international investment court' has been part of the discussions since the very beginning of this mandate of the WGIII in 2017[7], with "some type of hierarchical system, an appellate body, an investment court"[8] being touted as potential

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[2] See: M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015).
[3] UNCITRAL Secretariat, Possible reform of investor-State dispute settlement (ISDS), A/CN.9/WG.III/WP.142, 18 September 2017. Available from https://undocs.org/en/A/CN.9/WG.III/WP.142.
[4] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session, Part I (Vienna, 27 November–1 December 2017), A/CN.9/930/Rev.1, 19 December 2017, para. 20. Available from https://undocs.org/en/A/CN.9/930/Rev.1.
[5] Nicolás M. Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (Oxford University Press, 2021).
[6] Ibid., p. 68.
[7] Note by UNCITRAL Secretariat, Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS), A/CN.9/917, 20 April 2017. Available from https://undocs.org/en/A/CN.9/WG.III/WP.142.
[8] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session - Part II, A/CN.9/930/Add.1/Rev.1, 26 February 2018, para. 34. Available from https://undocs.org/en/A/CN.9/930/Add.1/Rev.1

solutions. However, some "States questioned whether such a formal structure was necessary and whether it would provide the appropriate remedy."[9]

Developing countries have provided a variety of views on this issue, with some in favour of a permanent adjudicative body; while others consider that greater attention should be devoted to the reform of ISDS procedural rules, including the reform options on frivolous claims, multiple proceedings, reflective loss, counterclaims, security for costs, third party funding and treaty interpretation, among others.[10] Given that all reform options are intertwined and that solutions included under 'ISDS Procedural Rules Reform' are cross-cutting to any structural reform options, developing countries' delegations have highlighted the need to focus on the wider context of substantive reform as well[11].

Suggestions for establishing a permanent structure for hearing investment disputes can be found in the negotiations on a 'Multilateral Agreement on Investment' (MAI) which was discussed at the Organisation for Economic Co-operation and Development (OECD) between 1995 and 1998. In those discussions, "there was a proposal for the creation of a standing appeals body to entertain both investor-to-State and State-to-State disputes, similar to the WTO appeals system. Such an appeals body would have been relatively easy to construct for State-to-State disputes. However, it raised technical difficulties with respect to investor-to-State disputes, which were not examined in detail before the negotiations ended"[12]. Still, the possibility of using the World Trade Organization (WTO)'s two-tier dispute settlement mechanism for resolving investment disputes was very much considered by the proponents of the MAI, most notably the European Communities[13].

The recent push towards setting up of a standing multilateral mechanism through the WGIII process has come yet again from the EU, though in somewhat different circumstances. The EU itself[14] as well as its Member States[15] have been at the receiving end of claims from both intra and extra-EU foreign investors in recent years. This has prompted greater awareness[16] about and backlash against ISDS within Europe[17]. According to United Nations Conference on Trade and Development (UNCTAD) data[18], there were 276 instances where an EU Member was a respondent, 199 claims of which have been filed in the last ten years.

The initial proposal[19] for setting up an Investment Court System (ICS) was made in the context of the Transatlantic Trade and Investment Partnership (TTIP) negotiations in 2015[20]. While

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[9] Ibid.
[10] Ibid.
[11] UNCITRAL, Submission from the Government of South Africa, A/CN.9/WG.III/WP.176, 17 July 2019, para. 110. Available from https://undocs.org/en/A/CN.9/WG.III/WP.176.
[12] United Nations Conference on Trade and Development (UNCTAD), Lessons from the MAI, UNCTAD/ITE/IIT/MISC. 22, 1999, p. 19. Available from https://unctad.org/system/files/official-document/psiteiitm22.en.pdf.
[13] Martin Khor, "The WTO and the Proposed Multilateral Investment Agreement: Implications for Developing Countries and Proposed Positions" (Penang, TWN, 1996).
[14] *Nord Stream 2 AG* v. *European Union* (PCA Case No. 2020-07). Available from https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1008/nord-stream-2-v-eu.
[15] As per UNCTAD data, Spain, Poland and Czechia are among the top 10 respondent States globally in ISDS claims against them.
[16] Friends of the Earth Europe and International, the Transnational Institute and Corporate Europe Observatory, *Red Carpet Courts*, June 2019. Available from https://www.tni.org/en/redcarpetcourts.
[17] Christian Oliver, "Public backlash threatens EU trade deal with the US", *Financial Times*, 13 January 2015. Available from https://www.ft.com/content/8c17a17e-9b33-11e4-882d-00144feabdc0.
[18] All UNCTAD data sourced from UNCTAD Investment Policy Hub: https://investmentpolicy.unctad.org/.
[19] European Commission, "EU finalises proposal for investment protection and Court System for TTIP", Press Release, 12 November 2015. Available from https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6059.
[20] EU Concept Paper, "Investment in TTIP and beyond – the path for reform", May 2015. Available from https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

the TTIP negotiations themselves failed[21] the idea of the ICS survived and was subsequently included in agreements negotiated by the EU, "namely the agreements concluded between the EU and Canada (Article 8.29 of CETA), Vietnam (Article 3.41 of the EU-Vietnam Investment Protection Agreement), Singapore (Article 3.12 of the EU-Singapore Investment Protection Agreement) and Mexico (Section C of the Chapter on Investment of the EU-Mexico Agreement in Principle), all contain a clause pursuant to which the parties to these agreements shall pursue the establishment of a multilateral investment tribunal and a multilateral appellate mechanism for the resolution of investment disputes"[22].

The EU Commission has been at the forefront of the initiative to establish an SMM. It specifically received negotiating directives for a 'Multilateral Investment Court' (MIC) from the EU Council in March 2018[23]. Thus, an EU Commission communication from July 2018 reads:

> "For the Commission, investor-to-State arbitration in EU trade and investment agreements is a thing of the past and has been replaced by the Investment Court System (ICS), already included in CETA, the EU-Singapore, EU-Viet Nam and EU-Mexico agreements and the negotiation basis for negotiations with 3rd countries. ICS offers the guarantees of independence and impartiality of a permanent court.
>
> The Commission is also actively promoting the initiative of developing a Multilateral Investment Court - work which is also being pursued in the context of UNCITRAL (...) The EU's overall objective is to set up a permanent multilateral body to decide investment disputes. Both within the EU as well as in its trade policy towards third countries EU policy aims to depart from a system of investor-to-State dispute settlement (ISDS) based on ad hoc arbitration"[24].

Another catalyst for the ICS appears to have come from judicial developments in Europe, with the decision of the Court of Justice of the European Union (CJEU) in *Slovak Republic* v. *Achmea BV*[25], which struck down ISDS under intra-EU bilateral investment treaties (BITs) due to the "adverse effect on the autonomy of EU law". Following this decision, the CJEU also issued an Opinion[26] in April 2019, confirming the "compatibility of Investment Court System with EU Treaties"[27].

While discussions are ongoing at WGIII, the EU has been moving ahead bilaterally with the implementation of the ICS with trade partners[28]. Moreover, the EU aims at establishing an ICS through the multilateral process at WGIII, which has prompted concerns from some

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[21] Matt Ford, "Is the TTIP Doomed?", *The Atlantic*, 28 August 2016. Available from https://www.theatlantic.com/news/archive/2016/08/is-the-ttip-doomed/497789/.
[22] Jus Mundi, Multilateral Investment Court. Available from https://jusmundi.com/en/document/wiki/en-multilateral-investment-court.
[23] European Commission, "Commission welcomes adoption of negotiating directives for a multilateral investment court", News Article, 20 March 2018. Available from https://policy.trade.ec.europa.eu/news/commission-welcomes-adoption-negotiating-directives-multilateral-investment-court-2018-03-20_en.
[24] European Commission, "Commission provides guidance on protection of cross-border EU investments – Questions and Answers", Memo, 19 July 2018. Available from https://ec.europa.eu/commission/presscorner/detail/fi/MEMO_18_4529.
[25] *Slovak Republic* v. *Achmea BV*, Case C-284/16, Judgment of the Court (Grand Chamber), 6 March 2018.
[26] Opinion 1/17 of the Court, 30 April 2019. Available from https://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4976548.
[27] European Commission, "Trade: European Court of Justice confirms compatibility of Investment Court System with EU Treaties", Press Release, 30 April 2019. Available from https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2334.
[28] See: "Stepping up the enforcement of EU trade agreements: the European Commission appoints members of expert panel assisting in the selection of arbitrators", *EinNews*, 24 September 2021. Available from https://www.einnews.com/pr_news/552239765/stepping-up-the-enforcement-of-eu-trade-agreements-the-european-commission-appoints-members-of-expert-panel-assisting-in-the-selection-of-arbitrators.

commentators[29]. The Commission has clearly stated in this regard that the "EU seeks to champion the creation of an international court and ensure that EU's policy for resolving international investment disputes mirrors the EU's approach to settling international disputes more generally"[30].

The submissions of the EU to WGIII as included in WP. 145[31] and WP. 159[32] lay out their rationale for having a "permanent standing two-tier mechanism with full-time adjudicators" for investment disputes, and going as far as suggesting that it is the *only* option that can successfully respond to all of the concerns identified and thus should be further developed by WGIII as a matter of priority[33].

The export of EU norms and regulations to non-EU entities through the use of unilateral regulations and leveraging of its market power is a well-known phenomenon. However, as noted by Bradford in 'The Brussels Effect',[34] the EU seeks multilateral solutions where unilateralism through market power may be less effective or efficient:

> "…the EU can also entrench its norms globally through cooperative mechanisms, such as via bilateral or multilateral treaties. The EU has negotiated an extensive array of economic and political agreements that, in their strongest form, set out the type of regulations that the EU's trade partners must adopt in order to secure access to the single market. These treaty obligations, at times, lead to a direct transposition of EU laws abroad. The EU can also shape global norms though participation in international institutions, standard-setting bodies, and transgovernmental networks."[35]

As the EU seeks to 'multilateralize' its preferred architecture for investment disputes, some commentators consider that there may be benefits beyond gaining legitimacy and buy-in from other States. For instance, Morris-Sharma suggests that

> "For the EU, and other early adopters who may introduce the system of permanent investment tribunals across a series of their investment agreements, there would potentially be particular cost savings to be had from multilateralization, from the perspective of being able to share the costs of employing full time adjudicators."[36]

In addition, the EU might also be seeking to provide reassurance to some "concerns that non-EU investors would be granted better protections than EU investors, since the latter do not benefit from investment arbitration under intra-EU BITs"[37].

Prof. Sornarajah has highlighted the contradictions in the EU's position, noting that,

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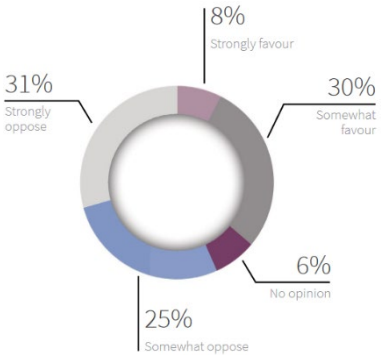
[29] See: Robert Li, "New EU investment court could dominate ISDS", ICLG.com, 7 October 2021. Available from https://iclg.com/cdr/arbitration-and-adr/17259-new-eu-investment-court-could-dominate-isds.
[30] European Commission, "Commission welcomes adoption of negotiating directives for a multilateral investment court", *supra.*
[31] UNCITRAL, Submission from European Union, A/CN.9/WG.III/WP.145, 12 December 2017. Available from https://undocs.org/en/A/CN.9/WG.III/WP.145.
[32] UNCITRAL, Submission from the European Union, A/CN.9/WG.III/WP.159/Add.1, 24 January 2019. Available from http://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1.
[33] Ibid, para. 57.
[34] Anu Bradford, *The Brussels Effect* (Oxford University Press, 2020).
[35]Ibid., p. 68.
[36] Natalie Morris-Sharma, "The T(h)reat of Party Autonomy in ISDS Arbitrator Selection: Any Options for Preservation?", in *Evolution and Adaptation: The Future of International Arbitration* (ICCA Congress Series No. 20), J. Kalicki *et al.,* eds. (Kluwer Law International, 2020), p. 432. Available from http://dx.doi.org/10.2139/ssrn.3594997.
[37] Linklaters, "The CJEU extends Achmea to intra-EU Energy Charter Treaty arbitrations and interprets the term 'investment'", 3 September 2021. Available from https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2021/september/komstroy-cjeu-on-intra-eu-ect-arbitration.

> "The EU proposal suggests that an International Investment Court is not different from a domestic court. If so, why not permit existing domestic courts to perform the function of deciding investment disputes? They are more familiar with the circumstances in which a state interfered with foreign investments and can assess the fairness of the interference in its political and social context more effectively. This is the way chosen in South Africa and Brazil. Domestic courts are part of a democratic system"[38].

Resolving investor-State disputes through the legal and judicial systems of States has been recognized as an effective method for ensuring the protection of investors' rights. For example, the recent United States-Mexico-Canada Agreement (USMCA)[39] does not provide for international arbitration for non-legacy or pending claims arising between the United States and Canada. Instead, it recognizes the domestic courts of both countries as the appropriate forum for hearing investment disputes[40].

There has also been some opposition from practitioners benefitting from the current system, such as prominent arbitrators[41] attacking the SMM proposal, and WGIII delegates representing corporate interests opposing it during formal and informal meetings. There also appears to be an assortment of views in the investor community on the issue of a standing mechanism replacing current *ad hoc* investment arbitration. A survey[42] of 'corporate counsel and management representatives of organisations investing internationally' shows the distribution of 'investor views on the creation of a MIC for ISDS to replace arbitrators' (see Figure 1). The wide range of prevalent views on the topic thus indicates the need to have much more inclusive and in-depth discussions on it.

Figure 1 – Investor views on the creation of a MIC for ISDS to replace arbitrators



Source: 2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS, p. 22

[38] M. Sornarajah, "An International Investment Court: panacea or purgatory?", Columbia FDI Perspectives No. 180, 15 August 2016. Available from https://academiccommons.columbia.edu/doi/10.7916/D8CJ8P5H/download.
[39] USMCA Annex 14-C. Available from https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf.
[40] Juan Miguel Alvarez, "The United States–Mexico–Canada Agreement (USMCA): A New Chapter in the Discussion About ISDS Between Developed Countries", *Yearbook on International Investment Law & Policy 2019*. Available from https://oxia.ouplaw.com/view/10.1093/law-iic/9780192896988-203.016.0022/law-iic-9780192896988-yiilp203-document-22.
[41] Joel Dahlquist, "At UNCITRAL Working Group Sessions, prominent arbitrator Charles Brower cautions against 'revolution' of investor-state arbitration system", *IAReporter*, April 11, 2019. Available from https://www.iareporter.com/articles/at-uncitral-working-group-sessions-prominent-arbitrator-charles-brower-cautions-against-revolution-of-investor-state-arbitration-system/.
[42] 2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS, May 2020. Available from https://arbitration.qmul.ac.uk/media/arbitration/docs/QM-CCIAG-Survey-ISDS-2020.pdf.

PART II. COMMENTARY ON UNCITRAL WORKING PAPER 213 ON 'STANDING MULTILATERAL MECHANISM: SELECTION AND APPOINTMENT OF ISDS TRIBUNAL MEMBERS AND RELATED MATTERS'[43]

The UNCITRAL Secretariat had published an initial draft on a '*Standing multilateral mechanism: selection and appointment of ISDS tribunal members and related matters*', which was open for comments till 15 November 2021. Following this, the revised WP. 213 was published and subsequently discussed at the 42nd Session of WGIII in February 2022. As only draft provisions 1 – 7 included in WP. 213 were considered in that session, the rest of the provisions will be taken up during the 43rd Session of WGIII, currently scheduled for 5 – 16 September 2022 in Vienna[44].

WP. 213 includes several legal provisions on its possible jurisdiction, governance structures, and various other aspects such as interpretation and applicable law, which are considered below.

Draft provision 1 establishes a 'multilateral investment tribunal' that will function on a permanent basis. There are some questions on whether it would be better to set up the standing mechanism as a 'court' or as a 'tribunal'. The different terms signify the nature of the proposed mechanism. They could influence its purposes, character, the precedential value given to its decisions and even the procedures to be followed by them. During WGIII meetings, the mechanism has been referred to by different delegations interchangeably as both 'tribunal' and 'court'. Further, it would also be essential to specify in this provision the 'seat' of the tribunal, as it may also impact aspects such as the applicable law for enforcement of its decisions.

Draft provision 2 regarding 'Jurisdiction' envisages two options. First, that "*[t]he jurisdiction of the Tribunal shall extend to any dispute, between Contracting States as well as between a Contracting State and a national of another Contracting State, arising out of an investment [under an international investment agreement], which the parties consent to submit to the Tribunal.*" Second, that "*[t]he Tribunal shall exercise jurisdiction over any dispute which the parties have consented to submit to the Tribunal.*" This is followed by another sub-provision which suggests that consent given to submit disputes to arbitral tribunals established under IIAs will be presumed to apply to the proposed mechanism as well.

This provision is still quite unclear and raises many questions on how it would operate in practice. WP. 213 suggests that the tribunal's jurisdiction may extend to disputes regardless of the underlying instrument, which can be an investment treaty, investment law or contract. It also seeks to emphasise on the notion of consent by parties being required and not being automatically granted due to membership in the tribunal alone.

The consent of States to arbitration or mediation of investment disputes, whether automatic or on a case-by-case basis, is usually included in their national laws, investment contracts, or investment treaties. WP. 213, however, does not include any specifics on how the consent has to be given for hearing of claims by this tribunal. Instead, as noted, it seems to consider that the consent previously given by States under IIAs would be automatically applicable.

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[43] UNCITRAL Secretariat, Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters, A/CN.9/WG.III/WP.213, 8 December 2021. Available from http://undocs.org/en/A/CN.9/WG.III/WP.213.

[44] See letter from the chair of Working Group III to Member States of UNCITRAL, 28 April 2022. Available from https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/280422_letter_from_chair_of_wg_iii_1.pdf.

Without the qualifier of *[under an international investment agreement]*, it is unclear what might be treated as an 'investment' and on what basis the tribunal will determine it. If the term 'investment' is used broadly regardless of the underlying instrument, it could possibly refer to any investment whatsoever, even if it does not qualify as a 'protected investment' under any law or treaty. This may even bring about instances where the Tribunal would also have to determine as a preliminary matter whether the investment was validly established or not and is subject to protection.

The need for a possible appellate mechanism has also been part of WGIII discussions.[45] Some countries have considered that such a mechanism could allow tribunals to reach a "coherent and fair decision that it is in accordance with the law"[46]; "[r]ectify errors in awards that could have a significant impact on public funds"[47]; and "ensure the correctness of decisions rendered in ISDS" even if not effectively ensuring coherence of such decisions[48]. Nevertheless, several other questions could be raised in this context, beyond the discussions on the SMM. This includes what kind of institutional framework would be appropriate for governing appeal procedures; what would be the basis for parties to bring appeals; which party(ies) would have the right to appeal, and what would be the impact of such decisions on other institutional arrangements and the domestic judicial systems of the concerned states.

Extending the possible second-tier revision mechanism to disputes regardless of the underlying instrument, including domestic law and investment contracts, might require not only the reform of domestic legislation of State parties, but could also have unintended impacts on arbitral processes at the domestic level.

Given that discussions on the establishment of an appellate mechanism in WGIII have addressed the possibility to ensure that "existing annulment or setting aside procedures […] not apply alongside an appellate mechanism,"[49] it is necessary to consider how the remand authority and suspensive effects applicable in this proposed appellate mechanism would work with existing procedures in other existing treaties and domestic law.

One case in point is the possible relationship of the SMM with the International Centre for Settlement of Investment Disputes (ICSID) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). For example, the history of negotiation[50] of the ICSID Convention shows that its drafters intended to expressly make arbitration awards final and without recourse to appeal. The objective was to avoid further examination of the merits of the case and to limit any revision of the final award to cases of egregious abuses of the fundamental principles of law governing the Tribunal's proceedings. Accordingly, Articles 53 and 54 of the ICSID Convention expressly make the arbitral award a final decision to be enforced by a domestic court. In addition, the New York Convention[51] recognises foreign arbitral awards as binding and enforceable, and requires State Parties to

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[45] In a different paper (which is currently an initial draft), the UNCITRAL Secretariat has discussed the possible establishment of an appellate mechanism either as part of the current ISDS institutional setting, by establishing a stand-alone review mechanism, or as part of the SMM. Available from https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_wp_-_appeal_14_december_for_the_website.pdf.

[46] UNCITRAL, Submission from the Government of Ecuador, A/CN.9/WG.III/WP.175, 17 July 2019, para. 13. Available from http://undocs.org/en/A/CN.9/WG.III/WP.175.

[47] UNCITRAL, Submission from the Government of Morocco, A/CN.9/WG.III/WP.161, 4 March 2019, para. 34. Available from http://undocs.org/en/A/CN.9/WG.III/WP.161.

[48] UNCITRAL, Submission from the Government of South Africa, A/CN.9/WG.III/WP.176, 17 July 2019, para. 77. Available from https://undocs.org/en/A/CN.9/WG.III/WP.176.

[49] Ibid., para. 20.

[50] ICSID, History of the ICSID Convention, Volume II-1, 1968, Washington D.C. Available from https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf.

[51] Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Available from https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.

not impose "more onerous conditions" for their enforcement than those imposed on domestic arbitral awards[52].

Considering the nature of what is requested under the provision 2, States Parties to the proposed SMM, which are also parties to the ICSID Convention and the New York Convention, might face a conundrum when a given award is rendered by a first-tier tribunal of the SMM, given that such a tribunal award could be recognised and enforced as an 'arbitral award' for the purposes of the New York Convention Article I (2). This could be the basis for a claimant to request enforcement of such an award without waiting for an appeal to take place. Further, WP. 213 suggests that the "reference to the term 'parties' could refer either to the States parties to an investment treaty or to the disputing parties, *depending on the situation*"[53]. However, it does not explain or give any example of how the situation could determine who the 'parties' are, and suggests it be further considered by WGIII.

The use of the term 'national' is also confusing as the conditions for nationality are not elaborated on. Similar language used in the ICSID Convention specifically defines 'national of another contracting State' in Article 25(2)(a) and (b), encompassing natural and legal persons respectively[54]. This definition is particularly important given the widespread practices of 'nationality planning' and 'forum shopping'[55].

Draft provision 3 titled 'Governance Structure' envisions the creation of a 'Committee of the Parties', including representatives of all the parties to the agreement establishing the tribunal. The Committee will be responsible for establishing its own rules of procedure, as well as those of the Selection Panel, first instance, appellate level, advisory centre and the secretariat of the tribunal. It is further considered that "[t]he committee of the parties would delegate to the tribunal the determination of rules of procedure pertaining to its routine functioning."[56]

This provision raises questions around the relationship and possible overlaps between the work of WGIII, the proposed Committee and the administrative functions of the Tribunal. It is unclear as to where and in what form the laws, rules and regulations governing the tribunal will be laid out and by whom. For instance, if this is included in the agreement establishing the tribunal, it will have to be decided by WGIII. However, if it is decided by the Committee, it would only be done by the parties to the agreement, in the form of secondary law[57]. Moreover, there is no clear distinction between the 'rules of procedure' and 'rules of functioning', which are to be elaborated by the Committee and the tribunal, respectively. There are also questions on whether the Committee will be empowered to amend the agreement itself and what would happen if there is a conflict between any of the rules created by three different bodies.

Draft provision 4 on 'Tribunal Members' considers different aspects of eligibility criteria for individuals who will be part of the tribunal, whether employed full time or part time. It includes the number of tribunal members, who should reflect "the principles of diversity and gender equality". It also spells out the minimum standards to be adopted for selecting such members, including that they be persons of high moral character, enjoy highest reputation for fairness and integrity, and have recognised competence in the fields of public international law, including international investment law and international dispute settlement. Currently, the bracketed text also includes options according to which the members might be "jurists of

[52] UNCITRAL, New York Convention Guide. Available from https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=619&opac_view=-1.
[53] UNCITRAL Secretariat, WP. 213, para. 13.
[54] ICSID Convention, Article 25 (1). Available from https://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/parta-chap02.htm.
[55] Jus Mundi, "Nationality Planning". Available from https://jusmundi.com/en/document/wiki/en-nationality-planning.
[56] UNCITRAL Secretariat, WP. 213, para. 17.
[57] UNCITRAL Secretariat, WP. 213, para. 73.

recognized competence"[58] or "have experience working in or consulting governments including as part of the judiciary". A possible procedure for adjusting the number of tribunal members is provided, as well as a restriction on more than a single national from a State being appointed (with an option for future reconsideration).

Draft provision 5 refers to the possibility of ad hoc members being chosen to sit in any 'chambers' that the tribunal might decide to form, and may be limited to "dealing with particular categories of cases…". The inclusion of ad hoc members has been an issue of some concern, given that it might bring in the same problems associated with the current model of ISDS, with possible bias of ad hoc members towards those who nominate and appoint them[59].

The questions on nationality and competence of the tribunal members, including ad hoc ones, are quite open ended, and linked with the issue of nomination, selection and appointment of candidates covered in draft provisions 6-8.

Draft provision 6 allows Parties to nominate candidates for election to the tribunal, while seeking gender equality and encouraging consultation with "representatives of civil society, judicial and other State bodies, bar associations, business association, academic and other relevant organizations", before making such nominations. An alternative option considers self-nomination by candidates, as well as nomination by "[c] ivil society, bar associations, academic and relevant organizations in the investing community". In all cases, the candidates must fulfil the eligibility criteria listed in draft provision 4.

Draft provision 7 envisages setting up a 'Selection Panel' whose function will be to "give an opinion on whether the candidates meet the eligibility criteria stipulated in this Agreement before the Committee of the Parties makes the appointments…". The provision details the mandate and composition of the Panel, the qualifications required of Panel members, their term of office, appointment process, having a Chair and Secretariat for the Panel, and its tasks and modes of deliberation.

The provision is quite exhaustive, though its worth considering that the Committee, which is seemingly already tasked with the appointment of adjudicators, could also be given the responsibility of selecting and screening eligible candidates as one of its roles, thereby lowering costs and avoiding possible duplication of work.

Draft provision 8 concerns the appointment process of tribunal members, which is suggested to be via an election, conducted through regional groupings. It requires the Committee to appoint only from the established list of suitable candidates, and to "ensure the representation of the principal legal systems of the world, equitable geographical distribution, as well as equal gender representation in the Tribunal as a whole".

The provision is not clear on how the appointment of adjudicators at the appellate level or their qualifications might differ from those at the first instance. It suggests that recommendations be "based on the extensive adjudicatory experience of such candidates". It might be worth clarifying if such adjudicatory experience is to be based in judicial institutions or arbitral ones, as that will feed into the nature and procedures of the tribunal as well. Further, it still remains to be seen if the adjudicators can be appointed on a full time or part time basis, especially at the appellate level.

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[58] UNCITRAL Secretariat, WP. 213, para. 19.

[59] See: Lise Johnson, "Proposed Standing Multilateral Mechanism for Investor-State Disputes: Navigating the Negotiations", CCSI, 14 February 2022. Available from https://ccsi.columbia.edu/news/proposed-standing-multilateral-mechanism-investor-state-disputes-navigating-negotiations.

The remaining provisions are related to different aspects of the employment and functioning of the tribunal members. Draft provision 9 covers aspects of the terms of office of tribunal members, their renewal and removal from office. Draft provision 10 lists the conditions of service of tribunal members, requiring compliance with the Code of Conduct (which is also a reform option under discussion). Draft provision 11 covers the assignment of cases to adjudicators who will sit in chambers, as determined by the President of the Tribunal or on a randomized basis.

The WP. 213 then considers issues such as the means of establishment of the tribunal and its related aspects, such as whether it would be an independent international organization or set up under an existing one, whether it would need to have a permanent secretariat and whether an advisory centre on international investment law (which is another reform option) might be attached to it.

In summary, the content of WP. 213 goes beyond the selection and appointment of ISDS tribunal members, and includes statutory provisions for the establishment of a future standing mechanism. The fact that the paper covers a large number of topics which are far more complex than only appointment of arbitrators or tribunal members raises some concerns for further consideration by WGIII, particularly whether all proposed reform options are being treated equally.

In addition, it also raises questions for WGIII on the procedural framework for the tribunal, where it might be included and how to introduce other reform options currently being discussed in WGIII - such as “means to address frivolous claims; multiple proceedings; reflective loss; counterclaims; security for costs; and regulation of third-party funding” - [60] into this framework. It is worth emphasising here that any reform option must not be made contingent on any other options being adopted and should be flexible enough for States to opt-in as per their requirements and national priorities.

[60] UNCITRAL Secretariat, WP. 213, para. 74.

PART III. THE POTENTIAL RELATIONSHIP OF THE STANDING MULTILATERAL MECHANISM AND THE EXISTING INTERNATIONAL INVESTMENT REGIME

Given the modalities currently being followed at the WGIII, the use of Working Papers already containing draft language and provisions means that discussions are focused at a very micro and technical level and often tend to miss out on macro aspects. This includes missing the larger issue of how the reform options being discussed in WGIII will interact with and impact the international investment regime already in place or currently under development outside UNCITRAL. This section therefore seeks to highlight certain macro aspects of the discussions on the Standing Multilateral Mechanism taking place in WGIII.

The SMM and international investment instruments

The evolution of the international investment regime has created a fairly decentralized and diffused regime for ISDS. This comprises instruments such as bilateral investment treaties, investment chapters of free trade agreements (FTAs), national investment laws and investment contracts, all of which may include some provision for ISDS, including arbitration at the national or international level[61].

The proposed SMM seeks to centralize the hearing of all ISDS claims, though it is unclear at this point how this could be achieved. For instance, there are many uncertainties on how it will interact with the different existing investment treaties, which include bilateral investment agreements from the 1950's to new mega-regional agreements with investment chapters.

Further complexity is added in the case of investment contracts, as "foreign direct investments are often made in the form of direct contractual arrangements between the private investor and the host State's relevant agency or State-owned company. As such, one same investment may lead to claims of different nature, either contract-based, or treaty-based"[62]. This would require some means to clearly determine the nature of the claims that the SMM will be able to hear, and to differentiate between contract based and treaty based claims.

It has been suggested that States will be able to recognise the jurisdiction of the SMM through a specific action, such as accession to its establishing agreement or through an opt-in mechanism that would apply to its relevant legal instruments[63].

States have the right to amend and modify their treaties in accordance with Part IV of the Vienna Convention on the Law of Treaties. Thus, if two States become signatories to the SMM, it will be effective with regard to the investment agreements between them and be extended to their investors in the host State.

Similarly, States can also unilaterally amend their national laws to reflect the acceptance of the SMM as a forum for ISDS. However, the same will be difficult to implement in the case of existing investment contracts, given that the other parties are foreign investors who may not wish to relinquish their access to *ad hoc* arbitration in favour of the proposed SMM.

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[61] M. Sornarajah, *The International Law on Foreign Investment* (5th ed.) (Cambridge, Cambridge University Press, 2021).
[62] Jus Mundi, "Treaty Claims vs. Contractual Claims in ISDS". Available from https://jusmundi.com/en/document/wiki/en-treaty-claims-vs-contractual-claims-in-isds.
[63] UNCITRAL Secretariat, Appellate and multilateral court mechanisms, A/CN.9/WG.III/WP.185, 29 November 2019, para. 59. Available from http://undocs.org/en/A/CN.9/WG.III/WP.185.

This would place some States in a position where some ISDS claims would continue being heard under the *ad hoc* arbitration system, while others shift to the SMM. In the short to medium term, this is likely to further increase the fragmentation of the system, given the generally long length of investment contracts. Furthermore, there are risks that even investors active in those States that have accepted the jurisdiction of the SMM could continue using the *ad hoc* arbitration through the use of Most-Favoured-Nation (MFN) provisions commonly found in investment treaties.

Further, there is a question about how the SMM will interact with investment agreements that are currently under negotiation, most notably the Investment Protocol of the African Continental Free Trade Area (AfCFTA). For instance, the settlement of any investment disputes under the Protocol would have to take place within the African context[64]. For the proposed SMM to have any relevance to this Protocol, it would have to be localized in the African continent and include individuals from AfCFTA Member States as adjudicators. Furthermore, by establishing the SMM in Africa, it would also be able to take advantage of local conditions such as reduced costs[65].

Other regions might also start considering their interactions with the SMM in light of their relations with the EU. For instance, it has been suggested that "it is highly likely that future EU-ASEAN FTA/IPA to include ICS mechanism. EU-Singapore and EU-Viet Nam IPAs [Investment Protection Agreements] were just the starting point of the expansion. Multilateral investment court clauses found in EU-Viet Nam and EU-Singapore IPAs likely to function to enable ASEAN's participation towards multilateral investment court"[66].

The Regional Comprehensive Economic Partnership (RCEP), which currently does not have ISDS provisions will also be important to consider in this context. In the text of the agreement, it was agreed that "signatories to the RCEP would start negotiations on ISDS provisions within two years of the RCEP coming into force, and for these negotiations to be concluded within three years"[67]. It came into force for most of the RCEP signatories on 1 January 2022[68], which gives a timeline for the conclusion of negotiations on ISDS provisions by 31 December 2027 at the latest.

In the case of Latin America, several efforts were taken to consider the establishment of a regional investment arbitration centre hosted by the Union of South American Nations (UNASUR in Spanish). This proposal was presented by Ecuador and discussed for almost five years. It included provisions on facilitation and conciliation of disputes, exhaustion of local remedies, and an appeals mechanism.[69] Although the draft agreement constituting the centre was not adopted, it demonstrated an interest among countries to move away from existing ISDS mechanism, a trend that has been included in some national constitutions. For example, the current draft constitution discussed in Chile recognises the President's competence to

[64] Talkmore Chidede, "Investor-state dispute settlement in Africa and the AfCFTA Investment Protocol", Tralac, 11 December 2018. Available from https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html.
[65] Africa Arbitration Academy, *Survey on Costs and Disputes Funding in Africa*, April 2022. Available from https://www.africaarbitrationacademy.org/wp-content/uploads/2022/04/AAA-Survey-Report-English....pdf.
[66] Rizky Banyualam Permana, "Achieving Multilateral Investment Court Through EU-ASEAN Expansion of Bilateral Investment 'Court': Is It Possible?," *Indonesian Journal of International Law*, Vol. 16, No. 4 (2019).Available from https://scholarhub.ui.ac.id/ijil/vol16/iss4/2.
[67] RCEP, Article 10.18.
[68] Association of Southeast Asian Nations (ASEAN) Secretariat, "RCEP Agreement enters into force", 1 January 2022. Available from https://rcepsec.org/2022/01/14/rcep-agreement-enters-into-force/.
[69] See: Maria Sarmiento, "Draft Constitutive Agreement of the Investment-Related Dispute Settlement Centre of the UNASUR", SSRN Electronic Journal, 2015. Available from http://dx.doi.org/10.2139/ssrn.2698574.

negotiate international investment treaties or agreements that include dispute resolution bodies which are preferably "permanent, impartial and independent"[70].

The SMM and investment arbitration institutions

The current system of *ad hoc* arbitration for ISDS cases counts upon a number of administering institutions which provide the forum for hearing these disputes. These include the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), the Cairo Regional Center for International Commercial Arbitration (CRCICA), among others. Generally, the underlying instrument for the investment claim provides for where the dispute might be heard, as well as its applicable law. Commonly found options include arbitration under ICSID or UNCITRAL rules; and litigation in the domestic courts of the Host State. In addition, as per UNCTAD data, 870 out of its 2574 mapped treaties include the possibility of an "other forum" for settlement of investor-State disputes.

The proposed SMM would come into being in this landscape, and it remains to be seen whether it will function alongside these institutions or seek to assume the role they currently play in ISDS. To give an illustration, there are two likely scenarios which might play out.

First, the proposed SMM is given the sole jurisdiction for hearing any and all claims by foreign investors against a signatory State, without the possibility of *ad hoc* arbitration. This would entail an amendment of all legal instruments that provide for ISDS against the State, replacing the jurisdiction clause in them and vesting such jurisdiction in the SMM alone. If this happens, then the utility of existing arbitration institutions for ISDS would greatly decline.

Nevertheless, it is entirely plausible that an existing institution such as ICSID or the PCA may be tapped to become the administrative secretariat of the proposed SMM. A briefing prepared for the EU Parliament suggests that these institutions "could also be viewed by the European Commission as good hosts for a future multilateral court for investment-state disputes. ICSID may indeed harbour some ambitions in this respect"[71]. There is some precedent for this, given that ICSID serves as the secretariat for the ICS established under the EU-Canada Comprehensive Economic and Trade Agreement (CETA), and even for dispute settlement under the USMCA.

Second, the proposed SMM would become yet another avenue for investors to bring their disputes, in addition to the already existing ones. For instance, the ISDS provision commonly found in existing IIAs gives the option to the concerned investor to "submit at his preference" the dispute to *inter alia* ICSID; an *ad hoc* tribunal under UNCITRAL Rules; or any other arbitral institutions or any arbitration rules, if the disputing parties so agree[72]. The proposed SMM would be added to this list of options, and also be subject to the 'preference' of the investor. In which case, questions arise about its added value and attractiveness to investors over ad hoc arbitration.

The role of domestic courts is also pertinent in this regard, since the SMM may be called upon to hear cases dealing with national laws or measures. In its submission to WGIII, South Africa

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[70] See: *Consolidado Normas Aprobadas para La Propuesta Constitucional por el Pleno de la Convención*, Draft Article 21, 14 May 2022. Available from https://www.chileconvencion.cl/wp-content/uploads/2022/05/PROPUESTA-DE-BORRADOR-CONSTITUCIONAL-14.05.22.pdf.

[71] Laura Puccio and Roderick Harte, "From arbitration to the investment court system", European Parliamentary Research Service, June 2017, p. 20. Available from https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607251/EPRS_IDA(2017)607251_EN.pdf.

[72] See for example, the Morocco – Nigeria BIT, Article 27 (https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download); and the Paraguay – Qatar BIT, Article 8 (https://www.mre.gov.py/pdfs/qatar/APPRI_QATAR_Ingl%C3%A9s.pdf).

has suggested that the SMM "should be required to involve domestic courts of the host state for matters of domestic law. This would not only ensure proper guidance on how domestic law should be understood, but also help to avert the risk of the agreement being found incompatible with national laws"[73].

The SMM, appeals and investment arbitration enforcement mechanisms

WGIII has touched upon the issue of enforcement of decisions rendered through a multilateral tribunal and it was "emphasized that enforcement was a key feature of any system of justice and was essential to ensure its effectiveness"[74]. In its 38th Resumed Session in January 2020, WGIII discussed this issue at some length.

The issue of recognition and enforcement of the decisions of the proposed SMM has been outlined as a key issue in WP. 185, based on submissions. It notes that,

> "… the international instrument creating a multilateral investment court should create its own enforcement regime, which would not provide for review at domestic level. [It] further suggests that awards under a future multilateral investment court should additionally be capable of enforcement under the New York Convention, on the basis that enforcement is possible for awards made by 'permanent arbitral bodies'…"[75]

There are still many questions and possible options on how, where and by whom the decisions of the SMM would be executed and/or enforced. Some confusion is generated on the prospective nature of the SMM itself. The WGIII has not quite discussed whether it should be structured as a court, a permanent standing arbitral tribunal or a hybrid version thereof. This distinction is critical for assessing the legal value and enforceability of its decisions, whether they be judgments or arbitral awards.

The inclusion of an enforcement mechanism through a provision in the Statute of the SMM is one possibility. It may be assumed that countries which accede to this Statute would also be required to enforce its decisions. In such scenario, the nature of the SMM would be inconsequential, since there would be a clear acceptance of its jurisdiction. However, if such enforcement is sought to be done through the use of domestic courts, it must accommodate the possibility of review by such courts prior to any directives for enforcement can be given. This would be the case if the SMM includes the New York Convention for enforcement of its decisions. However, there will be an additional need for national courts to recognise such SMM as a "permanent arbitral body" within the meaning of Article I.2 of the Convention.

Similarly, it is necessary to consider whether the expansion of grounds for appeal as suggested by the initial draft[76] on this reform option may have unintended impacts on the ICSID annulment proceedings, and even the recognition and enforcement of awards under the New York Convention. The implementation of the appellate mechanism as currently structured will require a new waiver of judicial review by State parties in order to avoid overlap of multiple proceedings (annulment, setting aside and enforcement of awards). In the majority of cases, States will have to undertake extensive reforms of their domestic laws, in particular national arbitration laws, in order to make them compatible.

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[73] UNCITRAL, Submission from the Government of South Africa, A/CN.9/WG.III/WP.176, 17 July 2019, para. 86. Available from http://undocs.org/en/A/CN.9/WG.III/WP.176.
[74] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, A/CN.9/1004/Add.1, para. 62.
[75] UNCITRAL Secretariat, WP. 185, *supra,* para. 57.
[76] UNCITRAL Secretariat, Initial Draft on Appellate Mechanism, *supra*.

Another situation which needs some consideration is if the respondent State or the investor refuses to comply with the decision given by the SMM. It is not certain what means of enforcement the other disputing party would have recourse to in such circumstances.

While the possibility exists of including security for costs[77] (a reform option) for hearing disputes at the SMM, it remains to be seen if the parties, particularly investors, would be willing to provide financial security to satisfy claims in case of breaches being found against them. If investor obligations and counterclaims[78] (both also reform options) are to be taken up by the SMM, then it would also need to have some mechanism to ensure the enforcement of any decisions rendered against investors in this regard.

[77] UNCITRAL Secretariat, Security for cost and frivolous claims, A/CN.9/WG.III/WP.192, 16 January 2020. Available from https://undocs.org/en/A/CN.9/WG.III/WP.192.
[78] UNCITRAL Secretariat, Multiple proceedings and counterclaims, A/CN.9/WG.III/WP.193, 22 January 2022. Available from https://undocs.org/en/A/CN.9/WG.III/WP.193.

PART IV. ELEMENTS FOR FURTHER CONSIDERATION

While the proposed SMM will be a 'structural' reform for the international investment regime, the substantive provisions in investment agreements, including vaguely defined 'standards' such as fair and equitable treatment will continue to persist and introduce uncertainties into the system. In addition, the need to consider cross-cutting issues has been identified as a priority by developing countries in WGIII, including on the need to provide more conference time and resources to discuss issues such as alternatives to investor-State dispute settlement, dispute prevention methods, exhaustion of local remedies, counterclaims and investor obligations, third party participation, regulatory chill, and calculation of damages, among others.

Consideration of cross-cutting issues is critical for designing different reform options, including the institutional framework for an SMM or an appellate mechanism. It is worth considering if the SMM will start off from a blank slate or will the weight of decades of expansive interpretation by previous *ad hoc* arbitral tribunals influence how it interprets the same provisions in the same IIAs.

If the proposed SMM is unable to ensure a clean break from past practice of investment arbitration, it also risks entrenching the bad law and over-expansive interpretations of investment agreements by arbitrators over the past three decades[79]. Thus, South Africa has emphasised that the "proposal for an investment court put forward by the EU does not address any of the substantive inequities and imbalances from the terms of the investment treaties. As such, the system of pecuniary awards will continue to provide incentives to investors and law firms to pursue cases that they might not otherwise as the system is based on the many poorly drafted, ambiguous IIAs that allow for expansive interpretations"[80].

Another important goal that the SMM could pursue is to recreate the dividing line between commercial arbitration and public interest related dispute resolution[81]. Too often, investors have managed to use ISDS to challenge public policy related measures as 'impinging' on their commercial interests. For example, *Philip Morris* v. *Australia*[82] (public health), *Uniper* v. *Netherlands*[83] (climate change), *Pac Rim Cayman LLC* v. *El Salvador*[84] (environment) among many others, were all filed against public interest measures adopted by States in line with their constitutional and international obligations.

It is important for a greater diversity of views, particularly from developing countries, to be present in the discussions in WGIII meetings, since these also feed into the Working Papers being developed and subsequently discussed. Several developing countries have expressed their concerns that limited financial and human resources could impair the nature of government-led process of WGIII. Therefore, the principles of consistency, inclusive participation and transparency of WGIII discussions should be strengthened, avoiding a misleading perception of having 'approval' or 'agreement' through the 'silence' procedure adopted by the Commission during the COVID-19 pandemic period.

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[79] See: Jose Manuel Alvarez Zarate and Maciej Żenkiewicz, "Last chance for the Global South? Pursuing the South's interests in reforming the Investor-State Dispute Settlement system in the multilateral arena*", SouthViews* No. 186, 10 October 2019. Available from https://www.southcentre.int/southviews-no-186-10-october-2019/.
[80] UNCITRAL, WP. 176, Submission from South Africa, *supra,* para. 80.
[81] Gus Van Harten, "The Public-Private Distinction in the International Arbitration of Individual Claims against the State", *The International and Comparative Law Quarterly* 56, no. 2 (2007): 371–93. Available from http://www.jstor.org/stable/4498073.
[82] *Philip Morris Asia Limited* v. *The Commonwealth of Australia* (PCA Case No. 2012-12)
[83] *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V.* v. *Kingdom of the Netherlands* (ICSID Case No. ARB/21/22)
[84] *Pac Rim Cayman LLC* v. *Republic of El Salvador*, ICSID Case No. ARB/09/12

Further, the voices of many developing countries' delegations need to be further strengthened in these particular discussions to enable them to provide their views and ask questions on both the technical and procedural aspects. If their views and concerns are missing from the discussions, it risks creating a *fait accompli*, where the silence may be seemingly (mis)interpreted to imply their support for the process and its outcomes.

Finally, it is worth recalling the statement by the Group of 77 and China at the 36th session of WGIII, where it said that "the right to regulate and the flexibility of states to protect legitimate public welfare objectives should be respected. The challenges that States have faced, and the advantages and disadvantages of different options should be thoroughly discussed and, on that basis, propose the elements for the implementation of a possible solutions"[85]. This must be the guiding principle for WGIII in all its future discussions for reforming ISDS.

[85] Group of 77 and China Statement, 29 October 2019, para. 6. Available from https://uncitral.un.org/sites/uncitral.un.org/files/g77wgiiifinal_291018.pdf.

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