Cutting the Gordian Knot

Investment Dispute Settlement à la Carte

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Abbreviations

BIT	bilateral investment treaty
CETA	Comprehensive Economic and Trade Agreement
CIFA	Cooperation and Investment Facilitation Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DSU	Dispute Settlement Understanding
EU	European Union
FTA	free trade agreement
IBA	International Bar Association
ICJ	International Court of Justice
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
IIA	international investment agreement
ISDS	investor-state dispute settlement
ITLOS	International Tribunal for the Law of the Sea
MIC	Multilateral Investment Court
MIDSI	Multilateral Investment Dispute Settlement Institution
PCA	Permanent Court of Arbitration
TPP	Trans-Pacific Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention for the Law of the Sea
UNCTAD	United Nations Conference on Trade and and Development
USMCA	United States-Mexico-Canada Agreement
WTO	World Trade Organization

Executive Summary

There is widespread consensus that investor-state dispute settlement (ISDS) is in need of reform. This consensus, however, obscures stark differences among states with respect to how to reform the current system of investment arbitration. This think piece examines the different approaches proposed for investment dispute settlement reform by major players in the global North and global South and considers both differences and commonalities between the different models – ranging from incremental changes that respond to specific criticisms of the ISDS system to the development of far-reaching institutional reforms, such as the establishment of a multilateral investment court.

The analysis of the main models points to convergence in the objectives of investment dispute settlement reform and many procedural features. Yet, in relation to core elements of dispute settlement design, the main models are not only incompatible with each other but are often presented as non-negotiable red lines that reflect either constitutional constraints or deeply enshrined ideological choices. Should these positions remain entrenched, arriving at a consensual model for the future of investment dispute settlement may be impossible, leading to a fragmented system that in fact defeats important goals of the current reform process. The question therefore arises whether (and how) the Gordian Knot of competing investment dispute settlement designs can be cut, and whether and how competing ideologies in the current reform process can be bridged.

Following a review of the principal challenges to the legitimacy of the current investment dispute settlement framework, the think piece presents the main models proposed for reforming the investment arbitration system and introduces the idea of "dispute settlement à la carte" as a way forward. Drawing on the dispute settlement design under the United Nations Convention for the Law of the Sea (UNCLOS), the think piece suggests a model that allows states to choose, under the umbrella of a common framework, among different modes of investment dispute settlement. This would encompass the creation of a multilateral investment dispute settlement institution, which would include a multilateral investment court to whose jurisdiction states and organisations can voluntarily submit, but also provide states with the option of continuing to use investor-state arbitration or inter-state arbitration to settle investment disputes.

Such a model could provide a common framework for investment dispute settlement reform, allowing different states and organisations to pursue different structural models for investment dispute settlement, while providing them with a platform that promotes convergence where possible. This would ensure representativeness of the regime and a degree of interpretative unity and safeguard the ability of states and organisations to shape their reciprocal obligations.

1. Introduction: Four Main Models for Investment Dispute Settlement Reform

There is widespread consensus that investor-state dispute settlement (ISDS) is in need of reform. At the beginning of November 2018, Working Group III of the United Nations Commission on International Trade Law (UNCITRAL), tasked with considering investor-state dispute settlement reform, agreed by consensus that reforming the current system of investor-state arbitration was "desirable" in order to address concerns relating to: (1) consistency, coherence, predictability, and correctness of arbitral rulings; (2) independence, impartiality, and diversity of decision-makers; and (3) costs and duration of proceedings.[1]

The consensus on the desirability of reform, however, obscures stark differences among states and regional organisations with respect to how the present system of investment dispute settlement should be reformed. At one end of the spectrum, we find proposals for incremental changes to ISDS that retain and cautiously reform investment arbitration. Such proposals are included most prominently in the Agreement for Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), the successor to the Trans-Pacific Partnership (TPP),[2] and the United States-Mexico-Canada Agreement (USMCA), which retains investment arbitration between the United States and Mexico only.[3] At the other end of the spectrum, actors like the European Union (EU) are promoting the creation of a Multilateral Investment Court (MIC), which would replace investment arbitration entirely.[4] Leading countries in the Global South are also proposing alternatives to the current ISDS system. Most notably, India developed a new model bilateral investment treaty (BIT) that is highly deferential to the host state and introduces major changes to ISDS design, in particular the exhaustion of local remedies.[5] Brazil, which has traditionally stayed away from the treaty-based ISDS system, has come forward with an alternative model, opting for inter-state adjudication rather than ISDS (Vidigal and Stevens 2018).

This think piece examines the different approaches proposed for investment dispute settlement reform by these major players, and considers both differences and commonalities between the various models. As will become apparent from the analysis, important differences in institutional design aside, there is considerable convergence in the objectives of investment dispute settlement reform and with respect to many procedural features. This is only logical, as all actors that are currently vocal in the reform debates have agreed, in 2016, to the "G20 Guiding Principles for Global Investment Policymaking," which set out that

> [i]nvestment policies should … includ[e] access to effective mechanisms for the prevention and settlement of disputes, as well as to enforcement procedures. Dispute settlement procedures should be fair, open

[1] See UNCITRAL 2018, paras 40, 53, 63, 83, 90, 98, 108, 123, 127, 133.

[2] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed 8 March 2018, enters into force 30 December 2018. The CPTPP incorporates the text of the Trans-Pacific Partnership (TPP), signed 4 February 2016.

[3] United States-Mexico-Canada Agreement (USMCA), text agreed 1 October 2018 (signature pending). Subject to a period of three years in which "legacy investment claims" may be brought, investment arbitration can be brought only between the United States and Mexico (USMCA, Art 14.2(4)).

[4] For an overview, see European Commission 2018.

[5] See Model Text for the Indian Bilateral Investment Treaty (January 2016) http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560.

and transparent, with appropriate safeguards to prevent abuse.[6]

In relation to core elements of dispute settlement design, however, the main models are not only incompatible with each other but are often presented as non-negotiable red lines that reflect either constitutional contraints or deeply enshrined ideological choices (Roberts 2018). Should these positions remain entrenched, the obstacles to a consensual model for the future of investment dispute settement may be insurmountable, resulting in fragmentation and the failure to attain key objectives of investment dispute settlement reform, namely to enhance consistency, coherence, and predictability. The question therefore arises how the Gordian Knot of competing investment dispute settlement designs can be cut and how competing ideologies in the current reform process can be bridged.

This think piece begins by reviewing the principal challenges to the legitimacy of the current investment dispute settlement framework (Section 2). It continues by reviewing the main models proposed for reforming the investment arbitration system, focusing first on converging features (Section 3), then on the divergences in institutional design (Section 4). Section 5 then introduces the idea of "dispute settlement à la carte" as a way to cut the Gordian Knot of ISDS reform. Drawing on the dispute settlement design under the United Nations Convention for the Law of the Sea (UNCLOS),[7] we suggest a model that allows states to choose – under the umbrella of a common framework – among different modes of investment dispute settlement. This would encompass the creation of a multilateral investment court to whose jurisdiction states and organisations can voluntarily submit, but it would also provide the option of continuing to use investor-state arbitration or opt for inter-state arbitration to settle investment disputes. We argue that such a model would provide a common framework for investment dispute settlement, allowing different states and organisations to pursue different structural models for investment dispute settlement, while also providing them with a platform that promotes convergence where possible. This would ensure representativeness of the regime and a degree of interpretative unity and safeguard the ability of states and organisations to shape their reciprocal obligations.

2. Legitimacy Challenges to Investment Dispute Settlement

The current international legal regime for the protection of foreign investment emerged as a response to decolonisation and the concern by investors from capital-exporting countries that their investments in newly independent states would be under threat of expropriation without compensation or subject to other arbitrary treatment, and were insufficiently protected in the host states' own judicial system (Schill 2009, 23-65; Miles 2013, 19-70). The main instrument of protection that ensued were the now more than 3,000 international investment agreements (IIAs) (which include BITs and investment chapters in free trade agreements (FTAs)), which started proliferating during the "second wave of globalisation" post-1990 (UNCTAD 2018, 88-89). These IIAs create a set of substantive protections and allow investors to resort to international arbitration in addition to, or as an alternative

[6] "G20 Guiding Principles for Global Investment Policymaking," Point III http://investmentpolicyhub.unctad.org/Upload/Documents/Annex%20III%20G20%20Guiding%20Principles%20for%20Global%20Investment%20Policymaking.pdf.

[7] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397 (entered into force 1 November 1994), Part XV.

to, the host state's domestic courts (Dolzer and Schreuer 2012).[8]

This complex legal and institutional framework allows investors to file claims against the host state and obtain, in case of success, an enforceable award, usually for damages arising from the state's unlawful conduct. Crucially, an investor does not need authorisation from its home state to file a claim and in many cases can do so without prior access to the host state's own courts. Investment arbitrations therefore remove investment disputes from the vagaries of both political negotiations between governments in the context of diplomatic protection and governmental influence in adjudication in the host state's courts. Investors have made ample use of this system, with investment treaty arbitrations having grown exponentially over the past two decades to now more than 900 cases.[9]

At the same time, the success of investment treaty arbitration has brought the system under strain, resulting in what is widely referred to as a "legitimacy crisis" (Brower and Schill 2009; Van Harten 2007; Schneiderman 2008; Tienhaara 2009; Van Harten et al. 2010; Sornarajah 2015). The growing number of cases has made states acutely aware of the possibility that their conduct might be challenged in international fora beyond their control and result in adverse awards for damages. This led to a "backlash" not only from governments seeking to increase the role of the state in the economy at the expense of private capital, but also from governments concerned about the impediment of investment arbitration to democratic decision-making (Waibel et al. 2010; Hindelang and Krajewski 2016; Kulick 2016; de Mestral 2017). The high-profile *Vattenfall* case, which involves an investment treaty challenge to Germany's nuclear power phase-out,[10] as well as investment arbitrations initiated by tobacco companies seeking compensation for plain-packaging and other anti-tobacco legislation,[11] have caused uproar and fueled public protest. The notion that there were "secret corporate courts," in which private lawyers selected in part by transnational companies — unaccountable to either the electorate or higher courts — could render confidential awards that overruled decisions made by democratic governments, led to growing calls for reform of the system (Eberhardt and Olivet 2012; de Mestral and Lévesque 2012; Echandi and Sauvé 2013; Sauvant and Ortino 2013; Kalicki and Joubin-Bret 2015; UNCTAD 2015, 119-173; Sauvant 2016).

Challenges to the legitimacy of investment arbitration, and calls for reform, focus on two main aspects and are increasingly framed in terms of constitutional principles and values (Schill 2017b, 649, 652-657). First, a widespread demand is that investment treaty arbitration, which functionally resembles judicial review of government acts by domestic administrative or constitutional courts,[12] adhere more closely to the constitutional norms and standards governing the settlement of such disputes at the domestic level. This includes in particular demands flowing from the concept of the rule of law. In fact, many of the concerns recognised by the UNCITRAL Working

[8] Arbitrations can be conducted under a variety of procedural rules, including most importantly those of the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL), but also those of commercial arbitration institutions, such as the Stockholm Chamber of Commerce or the International Chamber of Commerce, depending on the consent of the disputing parties.

[9] For statistics on investment treaty arbitration, see UNCTAD, 'Investment Dispute Settlement Navigator', available at http://investmentpolicyhub.unctad.org/ISDS.

[10] *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12 (registered 31 May 2012).

[11] *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015); *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016).

[12] On this functional equivalence, see Van Harten 2007; Schill 2010.

Group (UNCITRAL 2018) relate to the rule of law, including those about consistency, predictability, and correctness of outcomes in investment dispute settlement; independence, impartiality, and neutrality of dispute resolvers; and duration and cost.

The second main locus of criticism is the lack of democratic accountability of arbitrators in the current system of investor-state arbitration. Enhancing democratic accountability explains calls for increased transparency in investment dispute settlement procedures and decisions, broader possibilities for participation of all those affected by dispute settlement outcomes, and heightened influence of governments in appointing dispute resolvers and controlling interpretations of IIAs in dispute settlement. In addition, stressing the need for tribunals to take into account reasons of public order and the right of states to regulate in the public interest, as well as increasing precision in the drafting of substantive standards of treatment, would enhance democratic accountability in investment dispute settlement.

The agreements and models reviewed for this think piece react to these constitutional challenges. In fact, as we discuss in the next section, with respect to many of the remedies demanded in order to better ensure the rule of law and democratic principles in investment dispute settlement, the models discussed converge. This is true in particular with respect to ensuring transparency and third-party participation and respecting states' right to regulate and in developing mechanisms to enhance consistency and to allow for better control of dispute resolvers.

3. Areas of Convergence in Investment Dispute Settlement Reform

Despite important points of divergence, the main models currently proposed for investment dispute settlement reform (CPTPP/TPP, USMCA, the Comprehensive Economic and Trade Agreement (CETA), the Indian Model BIT, and Cooperation and Investment Facilitation Agreements (CIFAs)) exhibit covergence on a significant number of aspects. These include selective judicialisation, mechanisms to avoid formal dispute settlement, increasing efficiency, preventing multiple proceedings, enhancing independence and impartiality of dispute resolvers, ensuring transparency and third-party participation, and establishing treaty organs to control dispute resolvers.[13] All of these features address challenges the current system of investor-state arbitration has generated by bringing investment dispute settlement better in line with the constitutional principles of the rule of law and democracy.

3.1 Selective Judicialisation

One area of convergence consists in efforts by investment treaty makers to narrow the possibilities of recourse to dispute settlement. CPTPP/TPP, USMCA, CETA, the Indian Model BIT, and Brazilian CIFAs all feature what can be called "selective judicialisation," that is, restrictions in the type of claims that can be submitted to investment dispute settlement in the first place.[14] This ensures above all that issues that are considered to be particularly sensitive, including from the perspective of democratic self-determination, are not reviewable at the international level. Selective judicialisation is therefore a mechanism to stress democratic control in the investment treaty regime. It can play out through a number of mechanisms, including carve-outs, the creation of special regimes for dispute settlement on certain issues, or the introduction of exceptions.

[13] The review in Section 3 builds on analysis first presented in Schill 2017a; and Vidigal and Stevens 2018.

[14] Selective judicialisation differs in particular from the recalibration of substantive standards by reducing the grasp dispute resolvers have on reviewing government conduct procedurally, not by changing the scope of obligations in substance. For changes in the scope of substantive standards of treatment in new generation IIAs, see Titi 2018.

CPTPP/TPP, for example, provides for specific carve-outs from dispute settlement and modifications for subject-matters that are specifically sensitive for public policy-making, be it for all countries involved or for individual contracting parties. CPTPP/TPP contains a number of country-specific limitations on ISDS,[15] as well as specific limitations for claims relating to sensitive areas of government conduct, such as the restructuring of public debt,[16] and specific carve-outs, such as safeguarding measures to reduce tobacco consumption.[17] CETA excludes access to ISDS for certain areas of government action, including notably procurement and subsidies, but also services supplied in the exercise of governmental authority, air services, as well as audio-visual services for the EU and cultural services for Canada.[18] Similar to CPTPP/TPP, USMCA and CETA also establish limitations on claims relating to public debt.[19]

Furthermore, both CPTPP/TPP and CETA provide for special dispute settlement regimes for ISDS in the financial services sector.[20] These regimes require not only dispute resolvers to have specific expertise in financial services law and regulation;[21] they also provide for the involvement of the Financial Services Committees established under the agreements[22] to determine with binding effect on the ISDS mechanism whether the agreements' "prudential carve-out" applies in specific cases.[23] In USMCA, investment disputes cannot be brought at all with respect to measures covered by the chapter on financial services.[24] With respect to taxation, CETA, USMCA, and CPTPP/TPP ensure additional policy space by providing for enhanced involvement of the contracting parties, which can, through inter-governmental consultations, decide, with binding effect for a tribunal, *inter alia*, whether a taxation measure breaches the substantive standards of protection.[25]

[15] See, for example, the exceptions for certain claims against Mexico for breach of investment agreements of investment authorisations, listed in CPTPP/TPP, Annex 9-L(C), or the exceptions for claims against Malaysia for breach of specific government procurement contracts in CPTPP/TPP, Annex 9-K.

[16] See CPTPP/TPP, Annex 9-G, which excludes investor-state proceedings in case of "negotiated restructurings" of public debt.

[17] See CPTPP/TPP, Art 29.5.

[18] Access to ISDS here is excluded because the scope of application of the entire investment chapter is subject to carve-outs. See the list in CETA, Art 9.2(2).

[19] See CETA, Art 8.18(4) and Annex 8-B (excluding *inter alia* dispute settlement in case it concerns a negotiated restructuring and imposing a time-bar of 270 days on claims in order to ensure more policy space); USMCA, Chapter 14, Appendix 2.

[20] For modifications of the general ISDS regime, see CETA, Art 13.21 and CPTPP/TPP, Art 11.22.

[21] See CETA, Art 13.21(2) in connection with Art 13.20.3 and 4; CPTPP/TPP, Art 11.22(1).

[22] See CETA, Art 13.18 and CPTPP/TPP, Art 11.19.

[23] See CPTPP/TPP, Art 11.22(2)(a) and (b), Art 11.22(3). Almost identical provisions exist under CETA, Art 13.21(3), which provides for referral to the Committee. If the Committee accepts respondent's reliance on the prudential carve-out, the ISDS proceeding is discontinued (CETA, Art 13.21(4)3); in case of partial acceptance of the defense, this decision is binding on the tribunal (CETA, Art 13.21(4)4. Under CPTPP/TPP, in case no determination by the Committee can be reached, the respondent can initiate state-to-state arbitration under the financial services chapter whose decision on whether an exception applies, in particular whether it was covered as a prudential measure, is equally binding on an investor-state tribunal. See CPTPP/TPP, Art 11.22(3); see also CPTPP/TPP, Art 11.11(1)1 fn. 11 (clarifying that an investor-state dispute settlement tribunal has to accept the determination pursuant to CPTPP/TPP, Art. 11.22 by the Committee that a measure was for prudential reasons).

[24] See USMCA, Art 14.3(2).

[25] See CETA, Art 28.7(7). Under CPTPP/TPP and USMCA, the involvement of the respondent state and the investor's home state is slightly more limited. Still, the two parties can determine whether the measure in question constituted an expropriation (CPTPP/TPP, Art 29.4(8) and USMCA, Art 32.3(8)). However, the scope of application of these agreements to taxation measures is more limited. They

Finally, CPTPP/TPP, CETA, and USMCA each contain certain self-judging clauses relating to national security in order to restrict review in core areas of public policy. While not excluding dispute settlement altogether, these provisions expressly modify the standard of review to be applied by the dispute settlement body.[26] All of these features provide nuanced reactions to square the need for contracting states to have policy space in order to govern effectively in the public interest with the goal of ensuring effective protection and fair treatment of foreign investors.

India's 2016 Model BIT also adheres to the idea of selective judicialisation. It excludes from the scope of application of the BIT, and hence from access to dispute settlement, measures of local governments, as well as measures of the central government relating to taxation, compulsory licenses in intellectual property, government procurement, commercial contracts, and subsidies.[27] It also provides for general exceptions that ensure the state's right to regulate and introduce measures for the protection of public interests, including *inter alia* for the maintenance of public order, human, animal and plant health, and the protection of the environment and cultural heritage.[28] These exceptions are not self-judging and therefore justiciable. This differs from the exception, equally contained in the Indian Model BIT that allows contracting states to take measures for the protection of essential security interests.[29] This exception is self-judging and, as the Model BIT expressly clarifies, "non-justiciable."[30]

Brazil's CIFAs show slightly fewer elements of selective judicialisation, but they are nevertheless present. The Brazil-Chile CIFA, for example, prevents parties from resorting to arbitration with respect to measures taken to protect national security and to fight corruption and illegality, as well as measures that relate to protection of health and the environment, labour issues and "other regulatory matters." It also excludes the arbitrability of the parties' commitments on social responsibility policies.[31] Furthermore, Brazil's CIFAs achieve many of the same objectives of selective judicialisation through other means. In particular, Brazil's restriction of investment dispute settlement to the inter-state context and the filter mechanisms included in its CIFAs (discussed below),[32] ensure that only a very limited number of disputes ultimately end up in formal dispute settlement.

3.2 Mechanisms to Avoid Formal Dispute Settlement

A second common design feature of the four main models for investment dispute settlement discussed is that they all include mechanisms to avoid formal dispute settlement. CPTPP/TPP and CETA require consultations between the disputing parties for six months prior to formal recourse to ISDS,[33] while USMCA requires claimants to deliver to the prospective respondent a written notice of their intention to bring a claim 90 days prior to bringing it.[34]

exclude taxation matters generally from the scope of coverage of the treaty, except for those causes of action specifically permitted. See CPTPP/TPP, Art 29.4(2); USMCA, Art 32.3(2).

[26] See CETA, Art 28.6(b); CPTPP/TPP, Art 29.2(b); USMCA, Art 32.2(b). With regard to issues covered by a self-judging exception, the adjudicator cannot conduct a full *de novo* review, but only assess whether the discretion granted was exercised contrary to good faith. See generally on self-judging clauses and the good faith standard of review that applies in review: Schill and Briese 2009.

[27] See India Model BIT, Art 2.6(i).

[28] See India Model BIT, Art 32.

[29] See India Model BIT, Art 33.

[30] See India Model BIT, Arts 2.4(ii) and 34.4 in connection with Annex 1: Security Exceptions, para (ii).

[31] See Brazil-Chile CIFA, Annex I, Art I(2).

[32] See below Section 4.D.

[33] See CETA, Art 8.23(1)(b) and CPTPP/TPP, Art 9.19(1).

[34] See USMCA, Annex 14-D, Art 3.2.

All three agreements mention mediation in order to settle investor-state disputes under the agreements amicably, with CETA going slightly further in putting emphasis on the fact that mediation can take place at any time during the course of a dispute, including in parallel to adjudication, and providing for the development of formalised rules for investor-state mediation by CETA's Committee on Services and Investment.[35]

India's Model BIT also contains mechanisms that aim at avoiding formal international investment dispute settlement. Above all, its requirement that investors exhaust domestic remedies first (discussed in further detail below)[36] will result in many disputes being settled before they reach the international level. Once access to ISDS is possible, the India Model BIT requires the disputing parties to undertake "best efforts to try to resolve the dispute amicably through meaningful consultation, negotiation or other third party procedures."[37]

Brazil's CIFAs also seek to prevent formal dispute settlement. First, parties to CIFAs are required to set up "Focal Points" to deal with "issues" arising out of foreign investments before they become disputes. In case Focal Points are unable to address the issue satisfactorily, CIFAs require that parties then have to refer "questions of specific interest to an investor" to the treaty's Joint Committee. The Joint Committee must examine the matter; hear the parties, as well as the investor and the governmental and non-governmental entities involved; and issue a public report, which describes the matter in dispute and the positions of the interested parties.[38] Only if the Joint Committee fails to settle the dispute within 60 days may a party resort to inter-state arbitration. Joint Committees, also seen in other international agreements,[39] play an important institutional role in CIFAs. They provide a further avenue for resolving potential conflicts without recourse to adversarial international procedures.

3.3 Efficiency in Investment Dispute Settlement

A third area of convergence concerns the interest of investment treaty makers to make investment dispute settlement more effective and expedient, thus responding to the rule of law's demand for effective access to justice. Thus, CETA, USMCA, and CPTPP/TPP allow for the expedient dismissal of frivolous and spurious claims at the stage of preliminary objections.[40] These agreements also provide for temporal limitation for bringing ISDS claims.[41] The agreements further limit the available remedies to monetary damages and restitution, providing that the state maintain the possibility to substitute restitution for the payment of compensation;[42] punitive damages are excluded.[43] Furthermore, the provisions on costs are adapted in order to limit the bringing of unmeritorious claims, with CETA expressly incorporating the "loser pays" principle[44] and CPTPP/TPP and USMCA containing a clause that permits

[35] See CETA, Art 8.20; CPTPP/TPP, Art 9.18(1); USMCA, Art 5.1(c).

[36] See below Section 4.C.

[37] See India Model BIT, Art 15.4.

[38] See Brazil-Mozambique CIFA, Art 15; Brazil-Angola CIFA, Art 15; Brazil-Malawi CIFA, Art 13; Brazil-Colombia CIFA, Art 22; Brazil-Mexico CIFA, Art 18; Brazil-Chile CIFA, Art 24.

[39] See US-Korea FTA, Art 22.2; Australia-New Zealand-ASEAN FTA, Chapter 16.

[40] See the provisions on preliminary objections under CETA, Art 8.32 for claims that are "manifestly without legal merit" and under CETA, Art 8.33 for claims that are "unfounded as a matter of law." For the parallel provisions in CPTPP/TPP and USMCA, see CPTPP/TPP, Art 9.23(4) and Annex 14-D; USMCA, Arts 7.4 and 7.5.

[41] See CETA, Art 8.19(6) (three years); CPTPP/TPP, Art 9.21(1) (three-and-a-half years); USMCA, Art 5.1(c) (four years).

[42] See CETA, Art 8.39(1); CPTPP/TPP, Art 9.29(1).

[43] See CETA, Art 8.39(4); CPTPP/TPP, Art 9.29(6).

[44] See CETA, Art 8.39(5).

the shift of costs, including attorney fees.[45] All three agreements also provide that enforcement of awards is stayed until annulment or set-aside proceedings are completed.[46]

India's 2016 Model BIT also establishes temporal limits within which the investor can initiate international arbitration[47] and provides for the possibility for dismissal of frivolous claims.[48] Similar to CETA and CPTPP/TPP, a tribunal can only award monetary compensation; punitive and moral damages, as well as injunctive relief, are excluded.[49] Brazil's CIFAs, on the other hand, take the exact opposite approach and focus on performance of substantive obligations instead of monetary compensation for injury. In some cases, tribunals are prevented from awarding compensation at all unless the parties agree to this.[50] Brazilian CIFAs that do provide for compulsory arbitration tend to establish a temporal limitation of five years from the knowledge of the facts for states to start arbitral proceedings.[51]

3.4 Preventing Multiple Proceedings

All IIA models discussed also contain mechanisms to prevent parallel, overlapping and subsequent proceedings, thus minimising the risk of inconsistent decisions that would undermine the rule of law's demand for legal certainty and predictability. To start with, CPTPP/TPP, while much less systematic in this respect than CETA, prohibits recourse to domestic courts by requiring a waiver of such proceedings when ISDS proceedings are initiated.[52] Fork-in-the-road provisions that would exclude recourse to ISDS once domestic proceedings have been initiated, by contrast, are only provided for under CPTPP/TPP with respect to Chile, Mexico, Peru, and Vietnam.[53] Parallel and subsequent proceedings are further excluded to the extent CPTPP/TPP provides for the primacy of forum selection clauses in relation to claims involving breach of an investment agreement.[54] Finally, more consistency is achieved by the possibility of consolidation of claims[55] if two or more proceedings have a "question of law or fact in common and arise out of the same facts or circumstances."[56] In such a case, the constitution of a consolidation tribunal can be requested.

CETA, in turn, is stricter and more systematic when it comes to limitations on parallel, overlapping, and subsequent proceedings. It contains a version of a fork-in-the-road clause under which parallel domestic and international proceedings are prohibited.[57] When submitting a claim under CETA's investment chapter, investors are required to waive any future recourse to domestic or other international proceedings.[58] Where a claim is pending under the ISDS disciplines of CETA and under another international agreement, which would affect the remedies due, CETA requires the tribunal to stay its proceedings or ensure through other means that the outcome of the other

[45] See CPTPP/TPP, Art 9.29(3); USMCA, Annex 14-D, Art 7.6.

[46] See CETA, Art 8.41(3); CPTPP/TPP, Art 9.29(9); USMCA, Annex 14-D, Art 13.9.

[47] See India Model BIT, Art 15.5.

[48] See India Model BIT, Art 21.

[49] See India Model BIT, Art 26.3 and 4.

[50] See Brazil-Chile CIFA, Annex I, Art 3; Brazil-Colombia CIFA, Art 23.2; Brazil-Mexico CIFA, Art 19.2; Brazil-Peru CIFA, Art 2.21(2).

[51] See Brazil-Chile CIFA, Annex I, Art 1.5; Brazil-Peru CIFA, Art 2.21:4; Brazil-Colombia CIFA, Art 23.5.

[52] See CPTPP/TPP, Art 9.21(2)(b).

[53] See CPTPP/TPP, Annex 9-J.

[54] See CPTPP/TPP, Annex 9-L(A).

[55] See CPTPP/TPP, Art 9.28.

[56] CPTPP/TPP, Art 9.28(1).

[57] See CETA, Art 8.22(1)(f).

[58] See CETA, Art 8.22(1)(g). Turning back to dispute settlement before domestic courts is only possible if the claim under CETA's investment chapter is not successful on procedural grounds; see CETA, Art 8.22(5).

proceeding is taken into account.[59] Furthermore, CETA in principle excludes inter-state proceedings in parallel to ISDS, unless measures of general application are at issue; in this case, inter-state arbitration may contribute to limiting the number of claims as it creates an incentive for investors to refrain from initiating investor-state claims.[60] Finally, CETA includes provisions on the consolidation of investor-state claims that are similar to those under CPTPP/TPP.[61]

USMCA also provides for the possibility of consolidating claims[62] and includes a unidirectional fork-in-the-road clause, prohibiting the submission of claims against Mexico, if the investor has alleged, before a Mexican court or administrative tribunal, a breach of a USMCA investment obligation (as distinguished from the breach of other obligations under Mexican law).[63] Like CPTPP/TPP and CETA, therefore, USMCA aims at ensuring consistency by limiting the possibilities of parallel, subsequent, and overlapping proceedings that could create inconsistencies contravening the idea of the rule of law.

India's 2016 Model BIT also requires tribunals to stay their proceedings if a parallel claim is brought under another international agreement and can result in an overlap of compensation or otherwise have a "significant impact" on the investment arbitration.[64] It also aims at preventing parallel claims at the international and domestic levels by reinstating the exhaustion of local remedies rule usually set aside in the ISDS context, thus requiring aggrieved investors to resort to domestic courts or administrative instances before presenting a claim at the international level.[65]

[59] See CETA, Art 8.24.

[60] See CETA, Art 8.42(1).

[61] See CETA, Art 8.43.

[62] See USMCA, Annex 14-D, Art 12.

[63] See USMCA, Annex 14-D, Appendix 3.

[64] See India Model BIT, Art 14.

[65] See India Model BIT, Art 14.3.

Brazil's CIFAs, finally, only allow parties to suspend proceedings by mutual agreement.[66] Yet, the inter-state nature of the proceedings under CIFAs and the absence of monetary remedies also contribute to avoiding parallel proceedings and the risk of inconsistent decisions.

3.5 Independence and Impartiality of Dispute Resolvers

The next element of covergence concerns rules in the agreements assessed that aim at enhancing the independence, impartiality, and neutrality of decisionmakers and ensuring their expertise in the matters under dispute. This element of reform fulfills a demand for adjudication that incorporates features associated with the rule of law with respect to the administration of justice.

CPTPP/TPP and USMCA are the least demanding agreement in this regard. CPTPP/TPP stipulates solely that parties appointing arbitrators must "take into account" their expertise in the law governing the investment.[67] They must also abide by a code of conduct that is still to be established.[68] USMCA does not set up any requirements with respect to arbitrator expertise and focuses on the conduct of arbitrators, requiring compliance with the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) and prohibiting the giving of instructions by governments as well as "double-hatting" (acting as counsel or experts in other international investment disputes under USMCA).[69]

CETA panelists, by contrast, must possess the qualifications needed for appointment to judicial office or have recognised competence as jurists, and hold

[66] See Brazil-Chile CIFA, Annex I, Art 6.

[67] See CPTPP/TPP, Art 9.22(5).

[68] See CPTPP/TPP, Art 9.22(6).

[69] See USMCA, Annex 14-D, Art 6.5.

demonstrable expertise in public international law and preferably expertise in international investment law, international trade law, and the resolution of disputes arising under international investment or international trade agreements.[70] Additionally, CETA prevents dispute resolvers explicitly from acting in cases of conflict of interest: besides being independent, they must abide by the IBA Guidelines as well as the ethical rules to be adopted by the CETA Services and Investment Committee. CETA dispute resolvers are also prohibited from double-hatting (acting as counsel or experts in other international investment disputes, not only those under CETA itself) and must disclose third-party funding arrangements.[71]

The Indian Model BIT requires arbitrators to remain "impartial, independent and free of any actual or potential conflict of interest" during the whole arbitration proceedings, offering a list of possible reasons for conflict of interest.[72] Brazilian CIFAs require arbitrators to have experience or specialisation in public international law or international investment rules; to be selected on the basis of objectivity, credibility and reputation; to be independent and unrelated to either the parties or other abitrators; and to fulfill the requirements and follow the procedure relating to conflicts of interest set up for adjudications at the World Trade Organization (WTO).[73] All in all, these rules show that strengthening the independence and impartiality of investment dispute resolvers is a key concern for all models under discussion and helps to strengthen the idea of the rule of law in investment dispute settlement.

[70] See CETA, Art 8.27(4).

[71] See CETA, Arts 8.30(1), 8.27(2).

[72] See India Model BIT, Arts 19.1 and 19.10.

[73] See Brazil-Chile CIFA, Annex I, Art 4.5; Brazil-Colombia CIFA, Art. 23.8(c); Brazil-Peru CIFA, Art. 2.21:8(c) (all referring to WTO Document WT/DSB/RC/1 of 11 December 1996).

3.6 Transparency and Third-Party Participation

Convergence is also visible with respect to the need for investment dispute settlement to be transparent, that is, open to the public, and to allow affected third parties, including parties acting as *amicus curiae* and non-disputing parties (i.e., the home state of the investor, or third states in the case of multilateral treaties), to express their views on the issues under consideration. Building on earlier developments heralded by the revisions to the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules in 2006,[74] the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in 2013,[75] and the adoption of the Mauritius Convention on Transparency in Investment Arbitration in 2014,[76] the main models for investment dispute settlement all embrace transparency and third-party participation, thus enhancing the democratic accountability of dispute resolvers.

CETA, CPTPP/TPP, and USMCA provide for largely identical rules on transparency of proceedings as well as participation of *amici curiae*[77] and non-disputing

[74] For analysis of the changes introduced in 2006, see Antonietti 2006; Wong and Yackee 2010.

[75] The UNCITRAL Transparency Rules are available at United Nations, "Report of the United Nations Commission on International Trade Law of Its Forty-Sixth Session (8-26 July 2013)." *Official Records of the General Assembly, Sixty-eighth Session*, Supplement No. 17 (UN Doc No A/68/17) para 128. The UNCITRAL Transparency Rules apply to UNCITRAL arbitrations initiated on the basis of IIAs concluded on or after 1 April 2014.

[76] See United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, opened for signature on 17 March 2015, entered into force 18 October 2017. The Convention extends the application of the UNCITRAL Rules on Transparency to IIAs concluded before 1 April 2014.

[77] See CETA, Art 8.36(1) in connection with UNCITRAL Transparency Rules, Art 4; CPTPP/TPP, Art 9.23(3); USMCA, Annex 14-D, Art 7.3.

parties.[78] Building on the UNCITRAL Transparency Rules,[79] all three agreements foresee public hearings[80] and publication of relevant documents,[81] while ensuring the protection of "confidential or protected information."[82]

India's Model BIT, in turn, requires the host state to make available to the public not only awards rendered, but all key documents relating to ISDS proceedings, including transcripts of the hearings; it also provides that hearings be open to the public.[83] India's Model BIT also allows the non-disputing state party to make oral and written submissions to the tribunal regarding the interpretation of the treaty.[84]

Brazil's CIFAs are more restrictive in this regard. Only the Brazil-Chile CIFA requires the parties to make arbitral awards available to the public within 15 days of their date of issue, due regard being paid to information flagged as confidential.[85] Furthermore, because of Brazil's state-centred dispute settlement model inserted in bilateral treaties, there is little need for non-disputing state parties to intervene. The Brazil-Chile CIFA reproduces for arbitral tribunals the provision in the WTO Dispute Settlement Understanding (DSU) that allows a WTO panel to "seek information and technical advice from any individual or body which it deems appropriate," and which has been interpreted in the WTO as allowing panels to receive *amicus curiae* submissions.[86] Brazil's position notwithstanding, at least for ISDS proceedings, there is broad agreement on the principle of transparency and third-party participation.

3.7 Treaty Organs to Control Dispute Resolvers

A degree of convergence can also be seen with respect to the introduction of mechanisms that allow contracting parties to "correct" interpretations of the governing agreement by dispute resolvers with which they are dissatisfied. These mechanisms allow the contracting parties to effectively react to unwanted interpretations and further development of the governing agreement through dispute resolution, increases state control over dispute settlement, and enhances the democratic accountability of dispute resolvers.

CETA, USMCA, and CPTPP/TPP each put in place treaty organs that can render authoritative interpretations of the investment chapter with binding effect on the ISDS mechanism.[87] Contrary to what is sometimes feared, these provisions do not allow the treaty organs in question to resolve a specific dispute in a binding fashion. They only empower the treaty organ to "interpret" the agreements, that is, to give an abstract and general determination of the meaning of its terms without applying this interpretation to specific facts. By establishing the treaty organs in question, the

[78] See CETA, Art 8.38; CPTPP/TPP, Art 9.23(2); USMCA, Annex 14-D, Art 7.2.

[79] See CETA, Art 8.36. CPTPP/TPP contains a transparency regime that does not expressly mention the UNCITRAL Transparency Rules but matches them by and large in terms of content. See CPTPP/TPP, Art 9.24.

[80] See CETA, Art 8.36(5)1; CPTPP/TPP, Art 9.24(2); USMCA, Annex 14-D, Art 8.2.

[81] See CETA, Art 8.36(2) (4); CPTPP/TPP, Art 9.24(1); USMCA, Annex 14-D, Art 8.1.

[82] See CETA, Art 8.36(4) and (5)3 (covering "confidential or protected information"); CPTPP/TPP, Art 9.24(3) (covering "protected information ... that it may withhold in accordance with Article 29.2 (Security Exceptions) or Article 29.7 (Disclosure of Information)"); USMCA, Art 14.8(4).

[83] See India Model BIT, Art 14.8.

[84] See India Model BIT, Art 14.8(4).

[85] See Brazil-Chile CIFA, Annex I, Art 7(4).

[86] See Brazil-Chile CIFA, Annex I, Art 5(2)(c). For the situation in the WTO, see WTO Appellate Body Report, *US – Shrimp* (6 November 1998) WT/DS58/AB/R, paras 79-91.

[87] See CETA, Art 8.31(3); CPTPP/TPP, Art 9.25(3); regarding the interpretation of Annexes, see also CPTPP/TPP, Art 9.26(2); USMCA, Art 9.2 (the Commission has the peculiarity of including Canada, which is not a party to the Annex on investment dispute settlement).

contracting parties maintain better control of ISDS, in particular as it relates to the potential for law-making through interpretation. In addition, the CETA Joint Committee and the CPTPP/TPP Commission are competent to adapt the dispute settlement provisions to changing circumstances, if needed, without the need to formally renegotiate the agreements.[88] This also ensures that parties can react to defects in the operation of dispute settlement that may become apparent over time.

The Indian Model BIT also allows the parties to issue joint interpretations that are binding on tribunals and allows tribunals, *proprio motu* or at the request of the respondent, to request a joint interpretation of a provision from the contracting parties. In case the contracting parties fail to agree on an interpretation, interpretations issued by individual parties are to be forwarded to the tribunal anyway.[89] The Indian Model BIT further specifies that other forms of subsequent agreement or practice between the parties may also constitute authoritative interpretations of the agreement that "must be taken into account" by tribunals.[90] Finally, the Indian Model BIT appears to allow either a respondent or the home state to prevent an ISDS tribunal from making findings on an issue, since ISDS tribunals cannot "accept jurisdiction over any claim that is or has been subject to" inter-state arbitration.[91] In Brazilian CIFAs, disputes must be submitted to the inter-party Joint Committee before a claim is brought to arbitration.[92] Since the states parties to the dispute are the same as the parties to the treaty, no dispute will be brought if the two states can agree on a solution.

All in all, despite differences in detail, our survey of the CPTPP/TPP/USMCA, CETA, the 2016 Indian Model BIT, and Brazil's CIFAs show that there is considerable convergence on a number of investment dispute settlement features. All models address the same types of problems that traditional investor-state arbitration creates for the idea of the rule of law and the idea of democratic accountability, and employ similar tools to address these problems. This convergence is encouraging when considering the prospects of the debates on how to reform ISDS, both at UNCITRAL and beyond.

4. Divergence in Institutional Design

The considerable convergence on a number of important features of investment dispute settlement notwithstanding, fundamental disagreements remain on questions of institutional design. Divergences among the main models discussed concentrate on three aspects: (i) the degree of institutionalisation of dispute settlement (*ad hoc* or institutionalised arbitration v. standing tribunal); (ii) questions of standing and access to international investment dispute settlement (investor-state v. state-to-state); and (iii) the relationship between domestic and international remedies.

In this regard, four competing and seemingly mutually exclusive models can be identified:

(1) the CPTPP/TPP/USMCA model of reformed investor-state arbitration, which presents the least changes compared to traditional ISDS;

[88] Under CETA, the CETA Joint Commission and the Committee Services and Investment work jointly in this respect; see CETA, Art 8.44(3). Under CPTPP/TPP, the competences of the CPTPP/TPP Commission are arguably more restricted than those of the CETA Joint Committee, but include the monitoring of the implementation of the agreements and its interpretation, issuing binding interpretations and proposing amendments or changes if needed and its competences (see CPTPP/TPP, Chapter 27). Matters relating to dispute settlement that fall short of an amendment of CPTPP/TPP can be implemented under CPTPP/TPP, Art 27.2(1)(a).

[89] See India Model BIT, Art 24.3.

[90] See India Model BIT, Art 24.2.

[91] See India Model BIT, Art 13.5.

[92] See Brazil-Chile CIFA, Annex I, Art 24.

(2) the MIC Model endorsed by the EU, which has already found its way into the EU FTAs with Canada, Vietnam, and Singapore;

(3) the domestic-courts-first model, supported by India in its 2016 Model BIT, which requires recourse to, and exhaustion of, local remedies prior to recourse to (reformed) investor-state arbitration; and

(4) the state-to-state dispute settlement model, which is followed by Brazil and included in its CIFAs.

4.1 CPTPP/TPP/USMCA: Reformed Investor-State Arbitration

The currently predominant model for investment dispute settlement relies on investor-state arbitration to enforce the host state's obligations vis-à-vis foreign investors. The host state's consent to arbitration is usually given in IIAs in the form of an open invitation to qualifying investors to initiate, often without the need for prior recourse to domestic remedies, such proceedings. Investor-state arbitration, albeit subject to the procedural reform elements discussed in Section 3, remains the model of choice for a number of important actors in the current investment law reform debate. Most prominently, this model is included in the 11-party CPTPP, which is, despite the Trump administration's withdrawal, representative in this respect in particular of a long-standing US position. Evidence of this is that the same system is kept in USMCA. Together, then, CPTPP/TPP and USMCA provide a blueprint for a modernised investor-state arbitration procedure.

In terms of institutional design, CPTPP/TPP and USMCA operate under the traditional investor-state arbitration framework. They allow investors to initiate claims without their home state's involvement or permission and grant them the choice among different arbitration rules, including arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), the ICSID Additional Facilities Rules, or the UNCITRAL Arbitration Rules.[93] Under both ICSID and UNCITRAL Rules, each party – investor and state – is entitled to appoint one arbitrator. The presiding arbitrator is appointed by agreement either of the parties or of the party-appointed arbitrators, often in consultation with the parties. If no agreement can be reached, an appointing authority makes the appointment.[94] Although arbitrators are appointed on a case-by-case basis, repeat appointments are frequent, resulting in a core group of arbitrators that sits in a large number of cases and has considerable impact in shaping and further developing the law governing international investment relations (Puig 2014; Schill 2009).

CPTPP/TPP (as with most contemporary BITs) operates in parallel to the domestic judicial system, with investors being able to resort to ISDS without prior recourse to domestic courts.[95] USMCA is similar, but requires claimants to either exhaust local remedies or pursue local remedies for 30 months before initiating arbitration proceedings.[96] In terms of remedies, the preference of both agreements is for monetary damages: tribunals cannot award specific performance, such as the granting of a license to an investor, but they may order the restitution of property, with the proviso that the host state may always choose to pay damages instead.[97] As a result, CPTPP/TPP and USMCA do not interfere with the host state's freedom to adopt any conduct it deems fit in relation to foreign investors, including discriminatory measures, although this freedom may come at the price of paying compensation or damages. USMCA

[93] See CPTPP/TPP, Art 9.19(5); USMCA, Annex 14-D, Art 3.3.

[94] See UNCITRAL Arbitration Rules, Art 6; USMCA, Annex 14-D, Art 6.

[95] See CPTPP/TPP, Art 9.19(1).

[96] See USMCA, Art 5.1(a) and (b).

[97] See CPTPP/TPP, Art 9.29(1)(b); USMCA, Annex 14-D, Art 13.1.

specifies that "in the final award the tribunal may not order the respondent to take or not to take other actions, including the amendment, repeal, adoption, or implementation of a law or regulation."[98]

All in all, the CPTPP/TPP/USMCA model does not engage in fundamental institutional reform of the current ISDS system. It does not even pursue positions earlier held by the United States on creating an appeals facility for ISDS.[99] CPTPP/TPP only contains an "opening clause" that requires the contracting parties to consider opting into a future appellate mechanism,[100] and USMCA does not even include this. The CPTPP/TPP/USMCA model therefore continues to trust in arbitration as an appropriate mechanism for settling investor-state disputes. In the eyes of its contracting parties, the inclusion of a reformed version of investor-state arbitration strikes an appropriate balance between the protection of foreign investors, consistency in decision-making, and control of contracting parties, and reacts sufficiently to the legitimacy concerns raised by critics of ISDS.

Still, reformed investor-state arbitration, such as the one included in CPTPP/TPP and USMCA, retains certain shortcomings from the perspective of the rule of law and the principle of democracy. In particular, without a centralised appeals body, a significant risk of inconsistent, incoherent, or incorrect interpretations remains, raising tensions with the goal of legal certainty and predictability associated with the rule of law. The appointment of arbitrators by the disputing parties, including foreign investors, in turn, continues to raise tensions with the principle of democracy. Finally, as arbitrators are not, unlike tenured judges, full-time adjudicators, tensions may continue to exist between their duty of independence, impartiality, and neutrality with respect to an individual case, their objective interest in obtaining future appointments in other cases, and their duties and interests in other professional roles they fulfill, notably when acting as counsel in other investment arbitrations.

4.2 CETA and the Multilateral Investment Court

The EU has reacted to the continued challenges arbitration poses as a model for ISDS with the proposal to establish a MIC, that is, a standing international court composed of decision-makers appointed for fixed terms, created on the basis of a multilateral treaty, which would hear disputes between foreign investors and host states. The first tangible concretisations of the underlying idea can be found in CETA, as well as in the EU-Vietnam[101] and the EU-Singapore[102] Investment Protection Agreements, signed together with, but separately from, the respective trade agreements, which all provide for institutionalised court-like dispute settlement bodies on a bilateral basis as a stepping stone to an MIC.

CETA establishes a so-called Investment Court System (ICS), which makes use of existing procedural rules for international arbitration and retains the ISDS concept of a system that operates as an alternative to domestic courts. However, it entrusts the settlement of investment disputes to a permanent adjudicatory body, which consists of a Tribunal of First Instance and an Appellate Tribunal.[103] Rather than being appointed by disputing investors and states, the ICS members would be appointed jointly by the EU and Canada for fixed terms of five years, renewable once.[104] The Tribunal would not be a standing court

[98] USMCA, Annex 14-D, footnote 26.

[99] See 2004 US Model BIT, Art 28(10), www.state.gov/documents/organization/117601.pdf; United States–Chile FTA, Art 10.19(10); and Dominican Republic–Central America–United States FTA, Art 10.20(10).

[100] See CPTPP/TPP, Art 9.23(11).

[101] See EU-Vietnam Investment Protection Agreement, Chapter 3.

[102] See EU-Singapore Investment Protection Agreement, Chapter 2.

[103] See CETA, Arts 8.27 and 8.28

[104] See CETA, Art 8.27(5).

sitting in a courthouse, but a group of 15 individuals, three of whom would serve in each dispute. Tribunal members would be paid a monthly retainer to secure their availability, but otherwise would receive compensation on a case-by-case basis, following the model and rates currently in place for investor-state arbitration. Disputes would be administered by ICSID, and challenges to members would be decided by the President of the International Court of Justice (ICJ).[105] The Appellate Tribunal, to be composed of a yet to be determined number of members, would be tasked with reviewing Tribunal awards for (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts and relevant domestic law; and (c) compliance with the grounds for annulment under the ICSID Convention.[106]

The EU's ultimate goal, however, is to replace the dispute settlement system included in CETA and its other recent FTAs with a fully-fledged permanent judicial institution. Under CETA, the parties agreed to "pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes."[107] Once established, the MIC would replace the bilateral tribunals under CETA and the other EU FTAs (European Council 2018).

Both the ICS model and the MIC project preserve the standing of individual investors as well as the relationship between investment dispute settlement and the domestic judicial system. The key goal is to respond to the criticism that party-appointed, *ad hoc* arbitrators make investment arbitration insufficiently accountable to democratic institutions, posing threats to the rule of law and its demands for consistency, predictability, and accountability.[108] Having all dispute resolvers selected by states, reducing their number, and establishing an appellate mechanism would address some of these issues. In addition, the appointment mechanism, which leaves the choice of dispute resolvers entirely in the hands of states, would increase the democratic accountability of the investment courts. At the same time, a pressing question remains whether foreign investors will feel that their interest in receiving effective protection against illegitimate government conduct will be met by a MIC, or whether it will result in an institution that is overly deferential to state interests.

4.3 The Indian Approach: Back to Local Remedies

India's Model BIT also responds to criticism of traditional investor-state arbitration through changes in institutional design. Its approach, however, is not to make institutional changes at the international level – it maintains investor-state arbitration to settle investment disputes – but to introduce significant hurdles for investors' access to international review. The hurdles include the obligation of investors to "first submit its claim before the relevant domestic courts or administrative bodies of the Host State" within a year of knowledge of the unlawful measure or injury.[109] The investor must then exhaust all domestic judicial and administrative remedies or establish that continuing to pursue them would be futile.[110] Investors that manage to exhaust local remedies are then required to spend "no less than a year" seeking amicable dispute settlement[111] before being able to submit a claim to investor-state arbitration. This claim cannot be filed more than three years after the violation or injury is known, or no more than 18 months after the exhaustion of local remedies.[112] It also must be

[105] See CETA, Arts 8.27(6)-(7) and 8.30(2).

[106] See CETA, Art 8.28(2).

[107] CETA, Art 8.29.

[108] See also Article 21 of the Treaty on European Union, which requires the EU to promote democracy, rule of law, and protection of fundamental rights in its external relations.

[109] See India Model BIT, Art 14.3(i).

[110] See India Model BIT, Art 14.3(ii).

[111] See India Model BIT, Art 14.3(iv).

[112] See India Model BIT, Art 14.4(A).

preceded by a 90-day notice of dispute, which has to contain both the legal arguments of the investor and the amount of damages sought.[113]

The Indian Model BIT preserves the traditional model for appointments in investment arbitration, allowing each party – investor and state – to appoint one arbitrator and requiring the two party-appointed arbitrators to appoint the chair. It also provides investors with a choice of whether to initiate arbitration under the ICSID Convention, ICSID's Additional Facility, or the UNCITRAL Arbitration Rules.[114] At the same time, any dispute that "is or has been" subject to inter-state arbitration lies outside the jurisdiction of the Tribunal,[115] with the apparent result that a host state can prevent the making of a decision by the tribunal by initiating state-to-state proceedings. Given the requirement that the investor reveals the dispute to the host state far in advance, this carve-out could make it possible for the host state to maneuver in such a way that resort to investor-state arbitration within the required timeframe becomes virtually impossible for investors.

The Indian Model BIT tries to ensure that investor-state disputes are principally resolved at the domestic level, giving domestic courts a first shot to correct possible violations of treaty commitments. This could incentivise domestic courts to exercise stronger control over the other branches of government and stress the democratic accountability of investment dispute settlement on the whole. Yet, while investors retain standing to bring claims, the temporal and procedural hurdles, and especially the need to exhaust local remedies, will make the system expensive and perhaps even ineffectual, therefore raising the question whether it will be sufficiently attractive to protect investors against illegitimate host state conduct.

[113] See India Model BIT, Art 16.

[114] See India Model BIT, Art 14.5.

[115] See India Model BIT, Art 14.2(c).

4.4 Brazilian CIFAs: The Return to State-to-State Arbitration

The final model of institutional design for investment dispute settlement put forward is that of Brazil's CIFAs. CIFAs break entirely with the idea of giving investors direct access to international dispute settlement and feature solely state-to-state dispute settlement. CIFA dispute settlement is modelled not so much on diplomatic protection, as it does not include the duty to exhaust domestic remedies. Rather, except for the fact that no Appellate Body exists or is envisaged, inspiration appears to have came largely from the dispute settlement system of the WTO. As in the WTO, only state parties may bring claims to adjudication, and they may only do so in the absence of a consensual resolution of the dispute, 60 days after having seized a Joint Committee.[116] A state-to-state dispute is then heard by an *ad hoc* arbitral tribunal, resulting in an award that must be complied with by the losing party.

The mechanism for composing CIFA tribunals is similar to that of the UNCITRAL Arbitration Rules. Each party appoints an arbitrator, selected on a case-by-case basis, and two arbitrators appoint a chair to the tribunal, who cannot be a national of, or resident in, any of the contracting parties. In case the appointments are not made in a timely manner, any party can request an appointing authority (the President of the ICJ or the Secretary-General of the Permanent Court of Arbitration (PCA)) to make the necessary appointments.

CIFAs also share with WTO adjudication the purpose of re-establishing compliance following a finding of inconsistency.[117] While investment tribunals

[116] The CIFAs with African countries, by contrast, make dispute settlement fully optional, conditioning state-to-state arbitration on an agreement between the parties to resort to it. Brazil-Angola CIFA, Art 15(6); Brazil-Mozambique CIFA, Art 15(6); Brazil-Malawi CIFA, Art 13(6).

[117] See Brazil-Chile CIFA, Annex I, Art 3; Brazil-Colombia CIFA, Art 23.2; Brazil-Mexico CIFA, Art 19.2; Brazil-Peru CIFA, Art 2.21(2).

concentrate on awarding damages, some CIFAs explicitly prohibit tribunals from awarding monetary damages or even calculating the amount of injury. Instead, they are limited to ordering specific performance of obligations. This changes the relationship between CIFA dispute settlement and the domestic legal system. While ISDS operates largely in parallel to domestic courts, CIFA arbitration operates purely on the inter-state plane, not producing any rights directly for the investor. The sole references to local remedies appear in CIFAs signed with African countries, in which recourse to arbitration depends on an agreement by the two parties. These CIFAs preclude recourse to their provisions to challenge "disputes previously settled through exhaustion of local remedies."[118]

The key difference between CIFAs and the other models discussed is the lack of standing of affected investors. In the CIFAs that do provide for compulsory arbitration, only states may initiate disputes. While this does not necessarily create an unsuccessful system – the WTO state-to-state dispute settlement system has so far been highly successful – it conflicts with one of the key purposes of ISDS from the viewpoint of many governments and investors, which is to depoliticise disputes and leave the enforcement of IIAs to affected investors.

5. Cutting the Gordian Knot: Dispute Settlement à la Carte

Despite considerable areas of convergence in reforming investment dispute settlement, CPTPP/TPP/USMCA, CETA, the Indian Model BIT, and Brazil's CIFAs differ fundamentally on questions of institutional design. It is possible that one of the proposed models will ultimately prevail and its proponent will persuade other states or organisations of its relative advantages,[119] in the same way that investor-state arbitration has become the dominant approach to investment dispute settlement in the 1990s. However, it is unlikely that proponents of proposals as divergent as the MIC and state-to-state dispute settlement will be able to agree on a uniform institutional design. Even some important supporters of ISDS reform oppose having disputes heard by the proposed MIC. Thus, the EU and Japan have been unable so far to agree on ISDS in their recent economic partnership agreement (IISD 2017). Similarly, an agreement with India or Brazil on a single legal framework for investment dispute settlement seems unlikely. The same would hold true with respect to relations between the contracting parties to CPTPP/TPP, on the one hand, and India or Brazil, on the other.

CETA applies provisionally since September 2017 (its provisions on ISDS will only become effective after ratification of the agreement by all EU Members States); Brazil's first CIFA, with Angola, has already entered into force. Following ratification by six signatories, CPTPP will enter into force on 30 December 2018. In such a scenario, a likely possibility for the future is increased fragmentation in investment dispute settlement. Contrary to the predominance of arbitration that exists today, adjudicating disputes between investors and states under the EU's MIC could coexist with CPTPP/TPP/USMCA-inspired reformed investor-state arbitration, while Brazil retains CIFA-inspired inter-state arbitrations, and India reintroduces the exhaustion of local remedies. Other actors may find inspiration from any of these four competing models, resulting in an institutionally fragmented landscape. Rather than addressing the challenges investment arbitration currently faces, fragmentation could end up exacerbating them. The competition between institutional designs with mutually incompatible features in investment dispute settlement may then run contrary to one of the central objectives of current reform efforts: to create a system that conforms better to central rule of law demands, in particular with

[118] See Brazil-Angola CIFA, Art 16.1; Brazil-Mozambique CIFA, Art 16.2.

[119] Cf also Puig and Shaffer 2018.

respect to consistency, coherence, and predictability in investment dispute settlement.

The question that arises then is whether it is possible to cut the Gordian knot and bridge the gap between the main models for investment dispute settlement. Rather than engaging in a debate as to which of the four dispute settlement models would be preferable as a model for all states, our proposal is to seek to combine the different dispute settlement options currently floated under one common institutional structure, which would be able to offer and administer different modes of settling investment disputes.

Inspiration for this idea can be drawn from dispute settlement under UNCLOS. While UNCLOS establishes an International Tribunal for the Law of the Sea (ITLOS),[120] the Convention in fact features what one may call "dispute settlement à la carte."[121] Parties to UNCLOS must make a "choice of procedure" among the possibilities provided for in UNCLOS, Article 287: ITLOS itself, the ICJ, or arbitration under UNCLOS Annex VII rules.[122] If two parties make the same choice of procedure, a dispute between them will in principle be settled accordingly. If the parties' declarations do not coincide, or if one of the parties has not made any choice, the default procedure is arbitration under UNCLOS Annex VII.

The same idea, to offer a choice among different forms of dispute settlement, could be transposed to the investment context, resulting in the creation of an institutional framework that allows different actors to have recourse to different models of investment dispute settlement under one uniform institutional umbrella. One could imagine a Multilateral Investment Dispute Settlement Institution (MIDSI), which integrates all aspects of dispute settlement reform on which the main models discussed above converge, while allowing parties a choice among different dispute settlement options. Thus, one pillar of this institution could operate as a fully-fledged two-tier MIC, allowing the EU and its Member States to put their ideas for investment dispute settlement into practice. Another pillar could administer inter-state arbitrations, allowing Brazil and its followers to participate in the creation of MIDSI, and yet another pillar could administer investor-state arbitrations, allowing those states that reject the idea of a standing court to participate.

The idea to seek a combination of different models for investment dispute settlement under a uniform institutional umbrella would also sit well with the flexibility that has always been a hallmark in dispute settlement design in international courts and tribunals. The ICJ, for example, may be called upon to decide in chambers, and has done so in the *ELSI* case (incidentally, an investment dispute).[123] WTO panels may be composed by three or five persons and, in fact, consenting parties may refer a dispute to arbitration under the WTO DSU itself.[124] International law also knows examples where claims between states, on the one hand, and between individuals and states, on the other hand, are adjudicated by one and the same institution. The European Court of Human Rights, for example, is principally an organ for disputes between states and individuals, but it also has jurisdiction over, and has adjudicated, inter-state disputes.[125]

The greatest challenge in this regard will be to determine what role the MIC pillar could have in an à la

[120] See UNCLOS, Annex VI, Art 1.

[121] For a good overview over the dispute settlement regime under UNCLOS, see Boyle 1997.

[122] See UNCLOS, Art 287. In addition, parties may choose to endow a special category of arbitral tribunals, under UNCLOS Annex VIII rather than VII, with jurisdiction over specific categories of disputes.

[123] *Elettronica Sicula SpA (ELSI) (United States v Italy)*, Judgment, ICJ Reports 1989, p 15.

[124] See WTO, *United States–Section 110(5) of the US Copyright Act,* Award of the Arbitrators (9 November 2011) WT/DS160/ARB25/1.

[125] See European Court of Human Rights, *Cyprus v Turkey,* App No 25781/94, Judgment (10 May 2001); *Republic of Ireland v The United Kingdom*, App No 5310/71, Judgment (18 January 1978).

carte system. Apart from functioning as a full-fledged two-tier dispute settlement institution for host states submitting to its jurisdiction, it could be designed to offer dispute settlement options also to states not submitting fully to its jurisdiction. For example, the MIC could be designed to function as an appeals body, in the same way the WTO Appellate Body acts with respect to panel decisions. States could, for example, provide in their IIAs that investors can first have recourse to investor-state arbitration, with the MIC's appellate division hearing appeals from the resulting awards. Similarly, states could provide that investors must have recourse to a domestic court first (ideally, a specialised court in the host state for foreign investment disputes with experienced and specialised judges), with the MIC appellate division acting as an appeals body against the resulting domestic court judgment.[126] If it were to act exclusively as an appeals court, the MIC would allow flexibility for states to structure the first instance of investment dispute settlement freely, while providing for a centralised appeals facility that could ensure consistency and predictability in legal interpretation.

Being an appeals mechanism, however, does not need to be the only role played by the MIC for states that do not entrust it with first-instance ISDS. The MIC could also have jurisdiction to issue advisory opinions concerning specific points of interpretation of IIAs, for example in case joint committees under IIAs cannot agree on an issue or if there is a divergence among first instance decision-makers. This would avoid the scenario (likely to happen under the CPTPP/TPP/USMCA model) in which divergent decisions concerning the interpretation of a single text are handed down and coexist with equal authority. One could also consider allowing arbitral tribunals and domestic courts, serving as adjudicators of first instance in investment dispute settlement, to submit requests for a preliminary ruling (or opinion) on question of international law to the MIC in certain circumstances in order to ensure consistent interpretation.[127]

Independently of a country's choice for investment dispute settlement, one could also consider to provide the MIC with certain competences for specific treaty-based investment dispute settlement procedures, in a way similar to the specific competences ITLOS has under the UNCLOS system. ITLOS, after all, is not only one of the possible options that parties may agree on to settle disputes under UNCLOS. Regardless of the choice parties make on UNCLOS dispute settlement, ITLOS retains a number of competences, including jurisdiction to award provisional measures and to hear requests for the prompt release of vessels.[128] Similarly, the MIC could be empowered to issue provisional measures and solve other disputes that require a speedy resolution (for example, challenges to arbitrators or objections of manifestly inadmissible claims), independently of the model of investment dispute settlement states adhere to otherwise.

A critical issue for any of these functions is of course the composition of such a MIC and of arbitral tribunals operating as part of the MIDSI more generally. As a multilateral institution, MIDSI and its MIC pillar would need to represent the various legal systems and regions of the world and would need to acquire the trust not only of contracting states and those interested in ensuring that public interests are not undermined in the investment context, but also of investors and capital-exporters who seek effective protection against illegitimate government conduct. This calls for inclusive mechanisms for appointing MIC members. In addition to serving on the MIC, MIC members could also, like ITLOS judges serving in UNCLOS Annex VII tribunals, serve in investor-state arbitrations administered by MIDSI, thereby further infusing consistency into the system. Alternatively, MIDSI could also maintain a formal or informal roster of individuals to serve on

[126] See Schill 2017a: 664-665 for details on how to better integrate dispute settlement at the domestic and the international levels.

[127] Cf Schreuer 2008; Diel-Gligor 2017.

[128] See UNCLOS, Art 290 ("Provisional measures") and Art 292 ("Prompt release of vessels and crews").

investment tribunals. Nomination to the roster could be organised in a fashion similar to what is currently the case with the ICSID List of Arbitrators or the List of Members of the PCA.

While many details will necessarily remain to be resolved once the proposed MIDSI is workable, it is important, in our view, not to think about the future of investment dispute settlement only in terms of the relative advantages and disadvantages of the core dispute settlement models presented under CPTPP/TPP/USMCA, CETA, the Indian Model BIT, and Brazils CIFAs. Instead, we believe it is important to direct the debate towards exploring possibilities under which the different models can be combined in a way that permits states to opt for their preferred model, while creating a framework to ensure sufficient consistency and uniformity across different dispute settlement options.

6. Conclusion

The days of investor-state arbitration as the "only game in town" for the settlement of investor-state disputes appear to be numbered. Although the inertia of the current system, survival clauses in BITs, and the almost unsurmountable difficulty of amending the ICSID Convention[129] ensure that traditional investor-state arbitration will remain available in many cases for a long time, the genie of reform is out of the bottle. Criticisms of the current system can no longer be ruled out as attacks on the international order by peripheral governments unhappy with having to consider rights of foreign investors in their actions. Reform has become mainstream, with even traditionally capital-exporting countries having faced the prospect of being on the receiving side of investment arbitrations and realising tensions between investor-state arbitration and their constitutional principles of the rule of law and democracy.

States and regional organisations, such as the EU, should therefore take advantage of the moment and establish a system for investment dispute settlement that is truly multilateral, conforms to the ideal of the rule of law and responds to concerns about democratic legitimacy. Pursuing divergent alternatives to ISDS by different proponents of reforms, by contrast, will risk increasing rather than decreasing inconsistency in interpretations and uncertainty in outcomes. Setting up a multilateral institution that can accommodate not only different substantive rules, but also different types of dispute settlement procedures (investor-state and state-to-state; one off arbitration and institutionalised dispute settlement) would provide the first step in building the institutional foundations of a truly multilateral investment system. For this purpose, we propose the creation of MIDSI, which allows states to pursue different forms of dispute settlement under one institutional umbrella. Once these foundations are set, negotiations could potentially start within the regime, for all or many parties to agree on a common set of substantive rules, allowing those states that would initially prefer not to join in to still have a role within the regime.

At the same time, as Section 5 has shown, once one contemplates the realm of possibilities, MIDSI could include essentially every form of investment dispute settlement, from state-to-state adjudication constrained by the requirement of exhaustion of local remedies to full-on supranational adjudication open to foreign or even local investors. Determining the precise scope for flexibility in this regard will be one of the key tasks for negotiators.

[126] See ICSID Convention, Art 66(1) (requiring all state parties to ICSID to ratify, accept, or adopt an amendment for it to enter into force).

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