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Investment Dispute Settlement à la carte: A Proposal for the Reform of Investor–State Dispute Settlement

STEPHAN W. SCHILL AND GERALDO VIDIGAL

9.1 Introduction: Five Main Models for Investment Dispute Settlement Reform

There is widespread consensus that investor–state dispute settlement (ISDS) is in need of reform. In late 2018, Working Group III of the United Nations Commission on International Trade Law (UNCITRAL), tasked with considering investor–state dispute settlement reform, concluded 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 (UNCITRAL 2018). Since then, delegations at UNCITRAL have started looking at potential solutions in order to address the concerns identified (Sachetim and Codeço 2019; UNCITRAL 2019a).[1]

The consensus on the desirability of reform, however, obscures stark differences among states and regional organizations with respect to how the present system of investment dispute settlement should be reformed. Several states (including the United States and Japan) favour incremental changes to ISDS that retain and cautiously reform investment arbitration, as exemplified by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), to which Japan is a party and whose predecessor, the Trans-Pacific Partnership (TPP), was heavily influenced

[1] For the relevant documents, see the website of Working Group III, https://uncitral.un.org/en/working_groups/3/investor-state. Accessed 28 January 2020.

by the United States,[2] and by the United States–Mexico–Canada Agreement (USMCA), which retains investment arbitration, but only between the United States and Mexico.[3] At the other end of the spectrum, we find the proposal to establish a 'standing mechanism for the settlement of investment disputes', a Multilateral Investment Court (MIC) that would replace investment arbitration entirely, as supported by the European Union (EU) and its Member States (EU 2018; UNCITRAL 2019d).

Leading countries in the Global South are also proposing alternatives to the current ISDS system. Several of them support the return to domestic courts as the principal forum for settling investor–state disputes (UNCITRAL 2019a). This proposal is most prominently reflected in India's 2016 Model Bilateral Investment Treaty (India Model BIT), which is highly deferential to the host state and foresees the exhaustion of local remedies prior to any international recourse.[4] Brazil, which has traditionally stayed away from the treaty-based ISDS system, has come forward with the model to settle international investment disputes through inter-state arbitration, rather than between investors and states (UNCITRAL 2019b). Finally, China, which has recently entered into international investment agreements (IIAs) featuring both classical and reformed ISDS (Ning and Qi 2018), and which is developing a parallel system for investment dispute settlement through its Belt and Road Initiative (Chen 2018; Yee 2018), has proposed to retain investment arbitration with party-appointed arbitrators as a first instance and embed it in a system featuring a 'permanent appeal mechanism' (UNCITRAL 2019c).

This chapter examines the resulting five different models for investment dispute settlement and explores their potential for convergence. After all, if more consistency and coherence in investment dispute settlement is one of the goals of reform, it will be difficult to achieve

[2] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed 8 March 2018, entered into force 30 December 2018. CPTPP incorporates the text of the Trans-Pacific Partnership (TPP), signed 4 February 2016. In the following, we refer generally to the CPTPP/TPP as a model that encompasses both the actually concluded agreement, and its predecessor, to which the United States adhered.

[3] United States–Mexico–Canada Agreement (USMCA), signed 10 December 2019, entered into force 1 July 2020.

[4] Model Text for the Indian Bilateral Investment Treaty, submitted 28 December 2015, adopted 14 January 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download. Accessed 20 April 2021. The Indian Model BIT is sometimes referred to as the 2015, sometimes as the 2016 Model BIT. See Ranjan and Anand (2017, 7). We refer to it as India's 2016 Model BIT.

that goal without some form of multilateral solution. Yet, in relation to core elements of dispute settlement design, the five models not only diverge starkly, they are often also presented as non-negotiable red lines that reflect either constitutional constraints or deeply enshrined ideological choices (Roberts 2018). Should these positions remain entrenched, the obstacles to a multilateral model for the future of investment dispute settlement may be insurmountable, resulting in fragmentation and the failure to enhance consistency, coherence, and the predictability of the legal regime for foreign investment. This raises the question 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.

To address this dilemma, we propose the creation of a single institution – the Multilateral Institution on Dispute Settlement for Investment (MIDSI) – which would provide for different dispute settlement options, including reformed investor–state arbitration, inter-state arbitration, and establishment of a permanent investment court. The resulting system of 'dispute settlement à la carte' would permit the emergence of a multilateral regime, within which states can negotiate new rules, act collectively to interpret existing ones, and entrust a multilateral adjudicator with certain core functions in the administration of investment dispute settlement, and respect states' ability to determine core design features of the dispute settlement mechanism used to settle their own disputes.

In order to lay out our proposal, this chapter begins by reviewing the principal challenges to the legitimacy of the current investment dispute settlement framework (section 9.2). It continues by reviewing the five main models proposed for reforming the investment arbitration system (section 9.3). The chapter then argues that the existing differences in institutional design should not obscure the broad agreement on the objectives of reform and the significant convergence of the main models on adapting ISDS procedures and on other key ISDS design features to meet the concerns raised in respect of the present-day system of ISDS (section 9.4). Based on the underlying interest of states in convergence in investment dispute settlement, we then proceed to introduce the idea of dispute settlement à la carte under the auspices of a newly created multilateral institution – MIDSI – as a way to cut the Gordian Knot of ISDS reform and to integrate the current fragmented legal landscape into one institutional setting, while preserving states' flexibility and accounting for different preferences in investment dispute settlement design (section 9.5).

9.2 Legitimacy Challenges to Investment Dispute Settlement

The current international legal regime for the protection of foreign investment emerged as a response to decolonization 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 (Miles 2013; Schill 2009; St John 2020). The main instruments of protection that ensued were the now more than 3,300 IIAs (which include bilateral investment treaties (BITs) and investment chapters in free trade agreements (FTAs)), which started proliferating during the 'second wave of globalisation' post-1990 (UNCTAD 2019). These IIAs create a set of substantive protections and allow investors to resort to international arbitration in addition to, or as an alternative to, the host state's domestic courts (Dolzer and Schreuer 2012).[5]

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 authorization 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 arbitration therefore removes investment disputes from the vagaries of both political negotiations between governments in the context of diplomatic protection and governmental influence on 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 1,000 cases (Langford, Behn and Usynin 2018; UNCTAD 2019, 102–3).

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; Schneiderman 2008; Sornarajah 2015; Tienhaara 2009; Van Harten 2007; Van Harten 2010). The growing number of cases has made states acutely aware of the possibility that their conduct might be challenged in international fora

[5] Arbitrations can be conducted under a variety of procedural rules, including most importantly the arbitration rules of the International Centre for Settlement of Investment Disputes (ICSID) and of 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.

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and result in adverse awards for damages. This has 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 impediments investment arbitration poses to democratic decision-making (De Mestral 2017; Hindelang and Krajewski 2016; Kulick 2016; Waibel 2010). The high-profile *Vattenfall* case, which involves an investment treaty challenge to Germany's nuclear power phase-out,[6] as well as investment arbitrations initiated by tobacco companies seeking compensation for plain packaging and other anti-tobacco legislation,[7] have caused uproar and fuelled public protest. The notion that there existed '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 (Eberhardt and Olivet 2012), led to growing calls for reform of the system (De Mestral and Lévesque 2012; Echandi and Sauvé 2013; Kalicki and Joubin-Bret 2015; Sauvant 2016; Sauvant and Ortino 2013).

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 2017). First, a widespread demand is that investment treaty arbitration, which functionally resembles judicial review of government acts by domestic administrative or constitutional courts, must adhere more closely to the constitutional norms and standards governing the settlement of such disputes at the domestic level, including in particular demands flowing from the concept of the rule of law (Schill 2017, 654–6). In fact, many of the concerns recognized by UNCITRAL Working Group III relate to rule-of-law problems, 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 (Schill 2017, 656). Enhancing democratic accountability explains calls for

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

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

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.

9.3 Divergence in Institutional Design

The five main models for investment dispute settlement reform that we review for this chapter, principally in the form they have taken in already existing agreements,[8] all react to these constitutional challenges. They do so, however, through fundamentally different ideas as regards dispute settlement design. Divergences among the main models exist in respect of three core aspects: (i) the degree of institutionalization of dispute settlement (ad hoc or institutionalized arbitration v. standing mechanisms); (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.

Thus, as an illustration of reformed investor–state arbitration, we analyse the provisions included in CPTPP/TPP and USMCA, although the latter in parts also means a return to domestic courts and inter-state arbitration (section 9.3.1).[9] To illustrate the MIC model endorsed by the EU and its Member States, we have recourse to the provisions in the EU's FTAs with Canada, Vietnam, and Singapore, although a MIC would be a multilateral rather than a bilateral mechanism (section 9.3.2). The proposal to strengthen domestic courts in the settlement

[8] If available, we use existing agreements that illustrate the underlying institutional choice, rather than submissions by states to UNCITRAL Working Group III. Furthermore, in some cases, we abstract from existing nuances in the agreements in order to better illustrate the underlying model, even though a certain agreement may also contain institutional design features of some of the other models.

[9] USMCA only allows for investor–state arbitration in the relationship between the United States and Mexico. See USMCA, Art. 14.2(4). Investment disputes arising in other relations have to be settled either in domestic courts or inter-state dispute settlement. However, between Canada and Mexico investor–state arbitration is available under CPTPP.

of investment disputes is illustrated by India's 2016 Model BIT, which requires recourse to, and exhaustion of, local remedies prior to (reformed) investor–state arbitration (section 9.3.3). State-to-state arbitration as a mode for investment disputes settlement is illustrated by Brazil's approach in its cooperation and facilitation investment agreements (CFIAs) (section 9.3.4). The model to create an appellate mechanism as a second instance, finally, is illustrated by China's submission to UNCITRAL WG III (section 9.3.5).

9.3.1 CPTPP/TPP/USMCA: Reformed Investor–State Arbitration

The current 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 9.4, 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 includes as contracting parties Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. As the successor to the TPP, and despite the Trump administration's withdrawal from it, it is also reflective, of a long-standing US position. Evidence of this is that the same system of (reformed) investor–state arbitration is kept in respect of Mexico–United States relations in USMCA. Together, then, CPTPP/TPP and USMCA provide a blueprint for a modernized single-instance 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),[10] the International Centre for Settlement of

[10] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted 18 March 1965, entered into force 14 October 1966, 575 UNTS 159.

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Investment Disputes (ICSID) Additional Facility Rules,[11] or the UNCITRAL Arbitration Rules[12] (CPTPP/TPP, Art. 9.19(5); USMCA, Annex 14-D, Art. 3.3). Generally, under any of these 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. Although arbitrators are appointed on a case-by-case basis, repeat appointments are frequent, resulting in a core group of arbitrators that sit in a large number of cases and has considerable impact on shaping and further developing the law governing international investment relations (Puig 2014; Schill 2009).

CPTPP/TPP (as 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 (CPTPP/TPP, Art. 9.19(1)). USMCA is similar, but requires claimants to either exhaust local remedies or pursue local remedies for thirty months before initiating arbitration proceedings (USMCA, Art. 5.1(a) and (b)). In terms of remedies, the preference of both agreements is for monetary damages: tribunals cannot award specific performance, such as the granting of a licence 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 (CPTPP/TPP, Art. 9.29(1)(b); USMCA, Annex 14-D, Art. 13.1). 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 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' (USMCA, Annex 14-D, footnote 26).

[11] Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules), Doc. ICSID/11 (10 April 2006), Schedule C – Arbitration (Additional Facility) Rules, effective 10 April 2006, https://icsid.worldbank.org/sites/default/files/AFR_2006%20English-final.pdf. Accessed 20 April 2021.

[12] UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) February 2014, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf. Accessed 20 April 2021.

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All in all, the CPTPP/TPP/USMCA model does not engage in fundamental institutional reform of the current ISDS system. It does not even follow the positions previously pursued by the United States in foreseeing the creation of an appeals facility for ISDS.[13] CPTPP/TPP only contains an 'opening clause' that requires the contracting parties to consider opting into a future appellate mechanism (CPTPP/TPP, Art. 9.23(11)), and USMCA does not even include this. The CPTPP/TPP/USMCA model therefore continues to rely on arbitration as an appropriate mechanism for settling investor–state disputes. In the eyes of the contracting parties involved, 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 centralized appeals body, a significant risk of inconsistent, incoherent, or incorrect interpretations remains, raising tensions with the goals 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, unlike tenured judges, are not 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 their other professional roles, notably when acting as counsel in other investment arbitrations.

9.3.2 CETA and the Multilateral Investment Court

The EU and its Member States have 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,

[13] See e.g. US Model BIT (2004) Art. 28(10), https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf; US Model BIT (2012), Art. 28(10), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf. Both accessed 20 April 2021.

which would hear disputes between foreign investors and host states. The first tangible concretizations of the underlying idea can be found in the Canada–EU Comprehensive Economic and Trade Agreement (CETA),[14] as well as in the EU–Vietnam[15] and the EU–Singapore[16] Investment Protection Agreements, which were signed together with, but separately from, the respective trade agreements, all of which provide for institutionalized, court-like dispute settlement bodies on a bilateral basis, but serve as stepping stones to a 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 (CETA, Arts 8.27 and 8.28). 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 (CETA, Art. 8.27(5)). The Tribunal would not be a standing court sitting in a courthouse but a group of fifteen individuals, three of whom would serve in each dispute. Tribunal members would be paid a monthly retainer to secure their availability, but would otherwise 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) (CETA, Arts 8.27(6)–(7) and 8.30(2)). 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 (CETA, Art. 8.28(2)).

[14] Comprehensive Economic and Trade Agreement (CETA), signed 30 October 2016, in parts provisionally applied since 21 September 2017, chapter 8, section F.

[15] See EU–Vietnam Investment Protection Agreement, signed 30 June 2019, not yet entered into force, chapter 3.

[16] See EU–Singapore Investment Protection Agreement, signed 19 October 2018, not yet entered into force, chapter 3.

The EU's ultimate goal, however, is to replace the dispute settlement system included in CETA and its other recent trade and investment agreements 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'.[17] Once established, the MIC would therefore replace the bilateral tribunals under CETA as well as those established under other EU FTAs. The MIC's institutional features would be, however, comparable to the ICS mechanisms already included in the EU's agreements with Canada, Singapore, and Vietnam, and would include a two-tier structure with first-instance and appeal tribunals, with independent judges and an effective enforcement of its decisions (EU 2018, paras 10–14).

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 that we find in the current ISDS system. The key goal is to respond to the criticism that party-appointed arbitrators make investment arbitration insufficiently accountable to democratic institutions, posing threats to the rule of law and its demands for consistency, predictability, and accountability.[18] 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 a permanent investment court. 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.[19]

[17] CETA, Art. 8.29. See also EU–Singapore Investment Protection Agreement, Art. 3.12; EU–Vietnam Investment Protection Agreement, Art. 3.41.

[18] See also Treaty on European Union [2008] OJ C115/13 (TFEU) Art. 21, which requires the EU to promote democracy, the rule of law, and the protection of fundamental rights in its external relations.

[19] For further analysis of the MIC proposal, see e.g. Bungenberg and Reinisch (2018), Fach Gómez (2018), Álvarez Zárate (2018), Schill (2019).

9.3.3 The Indian Approach: Back to Local Remedies

India's 2016 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 to access 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 (India Model BIT, Art. 15.1). The investor must then exhaust all domestic judicial and administrative remedies or establish that continuing to pursue them would be futile (India Model BIT, Art. 15.1 and 2). Investors that manage to exhaust local remedies are then required to spend 'no less than six months' seeking amicable dispute settlement (India Model BIT, Art. 15.4) before being able to submit a claim to investor–state arbitration. This claim cannot be filed more than six years after the violation or injury is known or no more than twelve months after the exhaustion of local remedies (India Model BIT, Art. 15.5(i) and (ii)).

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. At the same time, any dispute that 'is or has been' subject to inter-state arbitration lies outside the jurisdiction of the Tribunal (India Model BIT, Art. 13.5(ii)), with the apparent result that a host state can prevent the making of a decision by an investor-state 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 manoeuvre 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 incentivize 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

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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.[20] So far, only few actual agreements have been concluded on the basis of India's 2016 Model BIT.[21]

9.3.4 *Brazilian CFIAs: The Return to State-to-State Arbitration*

The fourth model of institutional design for investment dispute settlement put forward is that of Brazil's CFIAs. While until 2018 CFIAs had been negotiated solely with Latin American and African states,[22] Brazil's network of agreements now includes CFIAs signed with the United Arab Emirates and India as well.[23] Two of these, signed with Angola and Mexico, are

[20] For critical analysis of India's 2016 Model BIT, see Hanessian and Duggal (2017); Ranjan and Anand (2017); Leikin, Gadodia, and Loudon (2018). Comprehensively on India's foreign investment policy and practice, see Rajput (2017); Ranjan (2019).

[21] See e.g. Bilateral Investment Treaty between the Government of the Kyrgyz Republic and the Government of the Republic of India (India-Kyrgyzstan BIT), signed 14 June 2019, not entered into force.

[22] See Acordo de Cooperação e Facilitação de Investimentos entre o Governo da República Federativa do Brasil e o Governo da República de Moçambique (Brazil–Mozambique CFIA), signed 30 March 2015, not yet in force; Acordo de Cooperação e Facilitação de Investimentos entre o Governo da República Federativa do Brasil e o Governo da República de Angola (Brazil–Angola CFIA), signed 1 April 2015, entered into force 28 September 2017; Acordo de Cooperação e Facilitação de Investimentos entre a República Federativa do Brasil e os Estados Unidos Mexicano (Brazil–Mexico CFIA), signed 26 May 2015, entered into force 10 September 2018; Acordo de Cooperação e Facilitação de Investimentos entre a República Federativa do Brasil e a República da Colômbia (Brazil–Colombia CFIA), signed 9 October 2015, not yet in force; Acordo de Ampliação Econômico-Comercial entre a República Federativa do Brasil e a República do Peru (Brazil–Peru CFIA), signed 29 April 2016, not yet in force; Investment Cooperation and Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Malawi (Brazil–Malawi CFIA), signed 25 June 2016, not yet in force; Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and the Republic of Suriname (Brasil-Suriname CFIA), signed 2 May 2018, not yet in force; Acordo de Livre Comércio entre a República Federativa do Brasil e a República do Chile (Brazil–Chile CFIA), signed 21 November 2018, not yet in force; Acordo de Cooperação e Facilitação em Matéria de Investimentos entre a República Federativa do Brasil e o Reino de Marrocos (Brazil–Morocco CFIA), signed 13 June 2019, not yet in force. For further analysis, see Vidigal and Stevens (2018).

[23] Investment Cooperation and Facilitation Treaty Between the Republic of India and the Federative Republic of Brazil (Brazil-India CFIA), signed 25 January 2020, not entered into force; Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and the United Arab Emirates, signed 15 March 2019, not entered into force.

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already in force, as is the Mercosur Protocol on Cooperation and Investment Facilitation with respect to Brazil and Uruguay (Mercosur Protocol),[24] which endorses the same approach. CFIAs break entirely with the idea of giving investors direct access to international review and feature solely state-to-state dispute settlement. CFIA 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 come largely from the dispute settlement system of the World Trade Organization (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, sixty days after having seized the agreement's Joint Committee.[25] 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 CFIA 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 (Brazil–Chile CFIA, Annex I, Art. 4.3). 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 (Brazil–Mexico CFIA, Art. 19; Brazil–Chile CFIA, Annex I, Art. 4.4).

CFIAs also share with WTO adjudication the goal of re-establishing compliance following a finding of inconsistency (Brazil–Colombia CFIA, Art. 23.2; Brazil–Mexico CFIA, Art. 19.2; Brazil–Peru CFIA, Art. 2.21(2)). While investment tribunals concentrate on awarding damages, many CFIAs explicitly prohibit tribunals from awarding monetary damages or even calculating the amount of injury. Instead, they are limited to ordering specific performance of obligations (Brazil–Mexico CFIA, Art. 19.2; Brazil–Colombia CFIA, Art. 23.14; Brazil–Morocco CFIA, Art. 20.2; Brazil–Suriname CFIA, Art. 25.13). This changes the relationship between CFIA

[24] Mercosur Protocol on Cooperation and Investment Facilitation, signed 7 April 2017, entered into force between Brazil and Uruguay 26 September 2019 and for Argentina on 24 November 2020.

[25] The CFIAs 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. See Brazil–Angola CFIA, Art. 15(6); Brazil–Mozambique CFIA, Art. 15(6); Brazil–Malawi CFIA, Art. 13(6).

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dispute settlement and the domestic legal system. While ISDS operates largely in parallel to domestic courts, CFIA arbitration operates purely on the inter-state plane, not producing any rights directly for the investor. The sole references to local remedies appear in CFIAs signed with African countries, in which recourse to arbitration depends on an agreement by the two parties. These CFIAs preclude inter-state recourse to challenge 'disputes previously settled through exhaustion of local remedies' (Brazil–Angola CFIA, Art. 16.1; Brazil–Mozambique CFIA, Art. 16.2).

The key difference between CFIAs and the other models discussed is the lack of standing of affected investors. In the CFIAs 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 was highly successful until reappointment of Appellate Body members was blocked by the United States – it conflicts with one of the key purposes of ISDS from the viewpoint of many governments and investors. This is to isolate investment disputes from the vagaries of inter-state relations, and in this sense depoliticize them, and leave the enforcement of rights granted in IIAs to affected investors, thus ensuring access to justice and rule of law accountability vis-à-vis foreign investors. CFIA inter-state arbitration is a form of making investment dispute settlement more accountable and increase its legitimacy, but it does so exclusively in respect of inter-state relations, not in investor–state relations.

9.3.5 China's UNCITRAL Proposal: Arbitral Tribunals with an Appellate Mechanism

The final model for reforming investment dispute settlement is found in China's submission to UNCITRAL WG III (UNCITRAL 2019c). It contains the outlines of an institutional design that would retain, at the 'first-instance stage', an arbitral procedure in which each party would appoint an arbitrator; at a second stage, a Permanent Appellate Mechanism (PAM) would be added. The PAM would be created by multilateral agreement with three aims: acting as an 'error-correcting mechanism', providing stability and predictability, and preventing 'the abuse of rights by parties to disputes' (UNCITRAL 2019c, 4). Although China's submission does not go into detail with respect to the composition or operation of the adjudicatory body responsible for hearing appeals, it does refer approvingly to the 'practical experience of the World Trade Organization' in establishing

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a dispute settlement system that provides 'high efficiency' at 'moderate operating costs' (UNCITRAL 2019c, 4).

China's submission in fact reflects positions taken at different periods by other major players, and may also be viewed as a form of reforming investor–state arbitration, rather than making fundamental changes to the institutional structure of investment dispute settlement. Thus, in its 2004 and 2012 Model BITs, the United States refers to the possible development of an appellate mechanism for reviewing awards rendered by investor–state dispute settlement tribunals (US Model BIT 2004, Art. 28(10); US Model BIT 2012, Art. 28(10)). CPTPP/TPP also envisages a future 'appellate mechanism', established not under CPTPP/TPP itself, but 'under other institutional arrangements' to review awards issued by investment arbitral tribunals, and provides that parties will then consider subjecting these investment awards to such a mechanism (CPTPP/TPP, Art. 9.23(11)). The India–Kyrgyzstan BIT foresees the development of an 'Appeals Facility . . . to review awards rendered by tribunals' under its dispute settlement chapter (India–Kyrgyzstan BIT, Art. 29). Finally, since July 2019, Mercosur has the first operational two-tiered arbitration system for (state-to-state) investment disputes (Mercosur Protocol, Art. 24).

At the core of China's proposal to create an appellate mechanism or appellate body is the objective of promoting the rule of law, as it aims to establish an organ that could operate as a check on investor-state arbitration tribunals, while creating a limited multilateral institutional structure. Establishing this structure would mean that arbitral tribunals still conduct the bulk of the work of assessing facts and hearing parties' legal arguments; it would also ensure that resulting awards are still able to benefit from the enforcement possibilities under the New York Convention,[26] or, if a combination with it is possible, under the ICSID Convention.[27] Foreseeably, the appeals procedure would be similar to the existing ICSID annulment procedure with the important difference that it would allow parties to challenge the awards on grounds of substantive legal reasoning, rather than essentially only on procedural grounds, and

[26] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed 10 June 1958, entered into force 7 June 1959, 330 UNTS 38.

[27] For discussion of the possibilities to modify the institutional structure of dispute settlement under the ICSID Convention, see the contrasting positions of Reinisch (2016) and Calamita (2017).

that the decision on appeal would be made not by individuals sitting in ad hoc committees but by persons appointed for a fixed term as members of the appellate jurisdiction. This would aim at promoting both the rule of law and democratic accountability in investment dispute settlement by introducing a new body that would start disciplining the existing system top–down.

9.4 Areas of Convergence in Investment Dispute Settlement Reform

When only looking at these features of institutional design, and considering how entrenched the positions of several of the main actors involved are, it would seem difficult to imagine any positive outcome of the current UNCITRAL process in terms of developing systemic solutions to the concerns identified with present-day ISDS. In this section, however, we show that despite the important points of divergence addressed in respect of questions of institutional design, the main models for investment dispute settlement reform we discussed exhibit convergence on a significant number of aspects.

As before, we analyse CPTPP/TPP/USMCA as an illustration of reformed investor–state arbitration, the EU's FTAs with Canada, Vietnam, and Singapore as an illustration of the MIC model, India's 2016 Model BIT as a proposal to return to domestic courts, and Brazil's CFIA approach as a proposal for settling disputes in inter-state proceedings. The Chinese model is only occasionally referenced in this section, as so far no detailed agreement exists whose text could be analysed. Moreover, since China's proposal builds on investor–state arbitration and only provides for the introduction of an appellate level, it sits squarely between the CPTPP/TPP/USMCA approach and the EU's proposal for fully fledged institutionalization.

Convergence among the different models exists in the following respects: the idea of selective judicialization (section 9.3.1), creating mechanisms to avoid formal dispute settlement (section 9.3.2), increasing efficiency and reducing costs and duration (section 9.3.3), preventing multiple proceedings (section 9.3.4), enhancing independence and impartiality of dispute resolvers (section 9.3.5), ensuring transparency and third-party participation (section 9.3.6), and establishing treaty organs to control dispute resolvers (section 9.3.7). All of these features address challenges the current system of investor–state arbitration has

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generated by bringing investment dispute settlement better in line with the constitutional principles of the rule of law and democracy.

9.4.1 Selective Judicialization

One important area of convergence consists in efforts by investment treaty makers to narrow the possibilities of recourse to dispute settlement. CPTPP/TPP, USMCA, CETA, the India's 2016 Model BIT, and Brazil's CIFAs all feature what can be called 'selective judicialization', that is, restrictions in the type of claims that can be submitted to investment dispute settlement in the first place.[28] This ensures above all that issues considered particularly sensitive, including from the perspective of democratic self-determination, are not reviewable at the international level. Selective judicialization 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.

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,[29] as well as specific limitations for claims relating to sensitive areas of government conduct, such as the restructuring of public debt,[30] and specific carve-outs, such as safeguarding measures to reduce tobacco consumption (CPTPP/TPP, Art. 29.5). 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 audiovisual services for the EU and cultural services for

[28] Selective judicialization differs from the recalibration of substantive standards by reducing the authority dispute resolvers have over 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).

[29] See, for example, the exceptions for certain claims against Mexico for breach of investment agreements of investment authorizations, 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.

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

Canada.[31] Similar to CPTPP/TPP, USMCA and CETA also establish limitations on claims relating to public debt.[32]

Furthermore, both CPTPP/TPP and CETA provide for special ISDS regimes in the financial services sector.[33] These regimes not only require dispute resolvers to have specific expertise in financial services law and regulation (CETA, Art. 13.21(2) in connection with Art. 13.20.3 and 4; CPTPP/TPP, Art. 11.22(1)); they also provide for the involvement of the Financial Services Committees established under the agreements (CETA, Art. 13.18; CPTPP/TPP, Art. 11.19) to determine with binding effect on the ISDS mechanism whether the agreements' 'prudential carve-out' applies in specific cases.[34] In USMCA, investment disputes cannot be brought at all with respect to measures covered by the chapter on financial services (USMCA, Art. 14.3(2)). 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 intergovernmental consultations, decide, with binding effect for a tribunal, inter alia, whether a taxation measure breaches the substantive standards of investment protection.[35]

[31] 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).

[32] See CETA, Art. 8.18(4) and Annex 8-B (excluding inter alia dispute settlement in case of negotiated restructurings and imposing a time-bar of 270 days on claims in order to ensure more policy space); USMCA, chapter 14, appendix 2.

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

[34] See CPTPP/TPP, Arts. 11.22(2)(a) and (b), 11.22(3). Almost identical provisions exist under CETA, Art. 13.21(3), which provides for referral to the Committee. If the Committee accepts the 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 defence, 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).

[35] 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); USMCA, Art. 32.3(8)). However, the scope of application of these agreements to taxation measures is more limited. They 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). More

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.[36] 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 judicialization. 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 licences in intellectual property, government procurement, commercial contracts, and subsidies (India Model BIT, Art. 2.4). 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 (India Model BIT, Art. 32.1). These exceptions are not self-judging and are therefore justiciable. In this they differ from the exception, equally contained in the Indian Model BIT that allows contracting states to take measures for the protection of essential security interests (India Model BIT, Art. 33). This exception is self-judging and, as the Model BIT expressly clarifies, 'non-justiciable' (India Model BIT, Annex 1: Security Exceptions, para (ii)). Similarly, a determination by the host state that a measure is 'a subject matter of taxation' and is thereby carved-out from the application of the treaty is declared 'non-justiciable' (India Model BIT, Art. 2.4(ii)).

Brazil's CFIAs show slightly fewer elements of selective judicialization, but they are nevertheless present. The Brazil–Chile CFIA, for example, prevents parties from resorting to arbitration with respect to measures taken to protect national security and to fight corruption

generally, on ways to include the participation of governments of contracting states in ISDS mechanisms, see Polanco (2019).

[36] 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 to the invoking state was exercised contrary to good faith; see Schill and Briese (2009) on self-judging clauses and the good faith standard of review that applies.

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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 (Brazil–Chile CFIA, Annex I, Art. I(2)). Furthermore, Brazil's CFIAs achieve many of the same objectives of selective judicialization through other means. In particular, Brazil's restriction of investment dispute settlement to the inter-state context and the filter mechanisms included in its CFIAs (discussed in section 9.3.4), ensure that only a very limited number of disputes ultimately reach the stage of formal dispute settlement.

9.4.2 Mechanisms to Avoid Formal Dispute Settlement

A second common design feature of all main models for investment dispute settlement discussed is that they all include (or foresee) mechanisms to avoid formal dispute settlement. In this respect, they build on features that are already commonly found in traditional BITs, but aim at giving them more bite, and making sure that they cannot be as easily circumvented as it has occurred in a number of investment arbitrations.

CPTPP/TPP and CETA require consultations between the disputing parties for six months prior to formal recourse to ISDS (CETA, Art. 8.23(1)(b); CPTPP/TPP, Art. 9.19(1)), while USMCA requires claimants to deliver to the prospective respondent a written notice of their intention to bring a claim ninety days prior to actually bringing it (USMCA, Annex 14-D, Art. 3.2). All three agreements mention mediation in order to settle investor–state disputes under the agreements amicably. CETA goes slightly further, emphasizing the fact that mediation can take place at any time during the course of a dispute, including in parallel to adjudication, and provides for the development of formalized rules for investor–state mediation by CETA's Committee on Services and Investment (CETA, Art. 8.20; CPTPP/TPP, Art. 9.18(1); USMCA, Art. 5.1(c)).

India's 2016 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 detail in section 9.3.3) 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' (India Model BIT, Art. 15.4).

Brazil's CFIAs also seek to prevent formal dispute settlement. First, parties to CFIAs 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, CFIAs require that parties refer 'questions of specific interest to an investor' to the respective 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 that describes the matter in dispute and the positions of the interested parties (Brazil–Mozambique CFIA, Art. 15; Brazil–Angola CFIA, Art. 15; Brazil–Malawi CFIA, Art. 13; Brazil–Colombia CFIA, Art. 22; Brazil–Mexico CFIA, Art. 18; Brazil–Chile CFIA, Art. 24). Only if the Joint Committee fails to settle the dispute within sixty days may a party resort to inter-state arbitration. Joint Committees, which are also seen in other international agreements,[37] play an important institutional role in CFIAs. They provide a further avenue for resolving potential conflicts without recourse to adversarial international procedures.

China's submission to UNCITRAL proposing the creation of a standing appeals mechanism for arbitral awards also stresses the need to combine ISDS procedures with mechanisms to avoid formal dispute settlement. Its submission emphasizes China's support for 'the inclusion of pre-arbitration consultation procedures . . . and stipulating consultation as a compulsory obligation of both parties' (UNCITRAL 2019c, 5). Furthermore, China avers that 'the establishment of a more effective investment conciliation mechanism should be actively explored' (UNCITRAL 2019c, 5).

9.4.3 *Efficiency in Investment Dispute Settlement*

A third area of convergence concerns the interest of states to make investment dispute settlement more effective and expedient by reducing costs and duration of proceedings, thereby 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

[37] See e.g. Free Trade Agreement between the United States of America and the Republic of Korea, signed 30 June 2007, entered into force 15 March 2012, Art. 22.2; Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area, signed 27 February 2009, chapter 16.

claims at an early procedural stage.[38] These agreements also provide for temporal limitation for bringing ISDS claims.[39] The agreements further limit the available remedies to monetary damages and restitution, providing that the state retains the ability to substitute restitution for the payment of compensation (CETA, Art. 8.39(1); CPTPP/TPP, Art. 9.29(1)) and excluding punitive damages (CETA, Art. 8.39(4); CPTPP/TPP, Art. 9.29(6)). Furthermore, the provisions on costs are adapted to limit the bringing of unmeritorious claims, with CETA expressly incorporating the 'loser pays' principle (CETA, Art. 8.39(5)) and CPTPP/TPP and USMCA containing a clause that permits the shifting of costs, including attorney fees (CPTPP/TPP, Art. 9.29(3); USMCA, Annex 14-D, Art. 7.6). All three agreements also provide that enforcement of awards is stayed until annulment or set-aside proceedings are completed (CETA, Art. 8.41(3); CPTPP/TPP, Art. 9.29(9); USMCA, Annex 14-D, Art. 13.9).

India's 2016 Model BIT also establishes temporal limits within which the investor can initiate international arbitration (India Model BIT, Art. 15.5(i) and (ii)) and provides for the early dismissal of frivolous claims (India Model BIT, Art. 21). Similar to CETA and CPTPP/TPP, a tribunal can only award monetary compensation; punitive and moral damages, as well as injunctive relief, are excluded (India Model BIT, Art. 26.3 and 4).

Brazil's CFIAs, by contrast, take the exact opposite approach and focus on the 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 within the context of the dispute (Brazil–Chile CFIA, Annex I, Art. 3; Brazil–Colombia CFIA, Art. 23.2; Brazil–Mexico CFIA, Art. 19.2; Brazil–Peru CFIA, Art. 2.21(2)). Brazilian CFIAs that do provide for compulsory arbitration tend to establish a temporal limitation of five years from the knowledge of the relevant facts for states to start arbitral proceedings (Brazil–Chile CFIA, Annex I, Art. 1.5; Brazil–Peru CFIA, Art. 2.21:4; Brazil–Colombia CFIA, Art. 23.5).

[38] 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.

[39] 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).

China's submission to UNCITRAL Working Group III is also wary of the problems relating to costs and duration of current ISDS procedures (UNCITRAL 2019c, 3). While not suggesting that the creation of an appellate mechanism will reduce overall costs, it nevertheless emphasizes that such a mechanism would need to function efficiently. Drawing parallels to WTO dispute settlement, China considers that an appeals mechanism could operate with high efficiency and moderate operating costs (UNCITRAL 2019c, 4).

All in all, and Brazil's somewhat divergent approach notwithstanding, convergence certainly exists among the main models for investment dispute settlement reform in the interest of states to make investment dispute settlement overall more efficient, less time-consuming, and less costly.

9.4.4 Preventing Multiple Proceedings

Most of the main models for investment dispute settlement reform discussed also contain mechanisms to prevent parallel, overlapping, and subsequent proceedings, thus minimizing 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 (CPTPP/TPP, Art. 9.21(2)(b)). 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 (CPTPP/TPP, Annex 9-J). 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 (CPTPP/TPP, Annex 9-L(A)). Finally, more consistency is achieved by the possibility of consolidating claims (CPTPP/TPP, Art. 9.28), if two or more proceedings have a 'question of law or fact in common and arise out of the same facts or circumstances' (CPTPP/TPP, Art. 9.28(1)). 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 limiting 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 (CETA, Art. 8.22(1)(f)). When submitting a claim under CETA's investment chapter, investors are required to waive any future recourse to domestic or other international proceedings.[40] 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 proceeding is taken into account (CETA, Art. 8.24). Furthermore, CETA in principle excludes inter-state proceedings in parallel to ISDS, except if host state measures are at issue that apply not only to an individual investor, but are of a more general nature. 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 (CETA, Art. 8.42(1)). Finally, CETA includes provisions on the consolidation of investor–state claims that are similar to those under CPTPP/TPP (CETA, Art. 8.43).

USMCA also provides for the possibility of consolidating claims (USMCA, Annex 14-D, Art. 12) 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) (USMCA, Annex 14-D, Appendix 3). No similar limitation applies to claims by Mexican investors against the United States. Like CPTPP/TPP and CETA, therefore, USMCA has elements that aim 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 (India Model BIT, Art. 14). India's Model BIT also aims at preventing parallel claims at the international and domestic levels by reinstating the exhaustion-of-local-remedies rule, which is usually done away with in the ISDS context, thus requiring aggrieved investors to resort to domestic courts or

[40] 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).

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administrative instances before presenting a claim at the international level (India Model BIT, Art. 15.1).

Brazil's CFIAs, finally, only allow parties to suspend proceedings by mutual agreement (Brazil–Chile CFIA, Annex I, Art. 6). Yet, the interstate nature of the proceedings under CFIAs and the absence of monetary remedies also contribute to avoiding parallel proceedings and the risk of inconsistent decisions. China's submission does not address the issue, except in noting that standardization and clarification of dispute settlement procedures would reduce the abuse of rights by disputing parties (UNCITRAL 2019c, 4).

9.4.5 Independence and Impartiality of Dispute Resolvers

The fifth element of convergence among the main models for reforming investment dispute settlement concerns rules that enhance the independence, impartiality, and neutrality of decision-makers and ensure their expertise in the matters under dispute. This element of reform fulfils a demand for adjudication that incorporates features associated with the rule of law with respect to the administration of justice.

USMCA is the least demanding agreement in this regard. It does not set up any requirements with respect to arbitrator expertise. It focuses solely on regulating the conduct of arbitrators by requiring compliance with the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines)[41] and prohibiting the giving of instructions by governments as well as 'double-hatting' (acting as counsel or expert at the same time as arbitrator), but only in respect of other disputes under USMCA (USMCA, Annex 14-D, Art. 6.5).

CPTPP/TPP and CETA are more demanding. CPTPP/TPP stipulates that parties appointing arbitrators must 'take into account' their expertise in the domestic and international law governing the investment (CPTPP/TPP, Art. 9.22(5)). Arbitrators must also abide by a Code of Conduct, which includes a prohibition on double-hatting that requires arbitrators to 'refrain, for the duration of the proceeding, from acting as counsel or party-appointed expert or witness in any pending or new

[41] IBA Guidelines on Conflicts of Interest in International Arbitration, adopted 23 October 2014, www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx. Accessed 20 April 2021.

investment dispute under the [CPTPP] or any other international agreement'.[42]

CETA panellists, in turn, must possess the qualifications needed for appointment to judicial office or have recognized competence as jurists, and hold 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 trade agreements (CETA, Art. 8.27(4)). Additionally, CETA prevents dispute resolvers explicitly from acting in cases of conflict of interest: besides having to be 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 (including acting as counsel or experts in international investment disputes under agreements other than CETA itself) and must disclose third-party-funding arrangements (CETA, Arts 8.30(1), 8.27(2)).

Ensuring independence and impartiality of adjudicators is also an important objective for India's 2016 Model BIT, even though it does not contain rules that are as detailed as those included in CETA and CPTPP/TPP. It merely requires arbitrators to remain 'impartial, independent and free of any actual or potential conflict of interest' during the whole arbitration proceedings and offers a list of possible reasons for conflicts of interest, which include not only situations involving the person of the arbitrator, but also situations of conflict involving other lawyers that are members of the same law firm as the arbitrator (India Model BIT, Art. 19).

Brazil's CFIAs require arbitrators to have experience or specialization 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 arbitrators; and to fulfil the requirements and follow the procedure relating to conflicts of interest set up for adjudications at the WTO.[43]

[42] Code of Conduct for Investor–State Dispute Settlement Under Chapter 9 Section B (Investor–State Dispute Settlement) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (Annex to CPTPP/COM/2019/D004). The development of the Code of Conduct is mandated by CPTPP/TPP, Art. 9.22(6).

[43] See Brazil–Chile CFIA, Annex I, Art. 4.5; Brazil–Colombia CFIA, Art. 23.8(c); Brazil–Peru CFIA, Art. 2.21:8(c) (all referring to the WTO Rules of Conduct for the

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China's submission to UNCITRAL Working Group III seconds the approach adopted by other actors, stressing that 'it is necessary to improve the process for dealing with arbitrator qualifications, conflicts of interest, selection and disqualification' (UNCITRAL 2019c, 5). In its view, '[c]onsidering the public-law nature of the ISDS mechanism, arbitrators should have professional knowledge in the fields of international public law and international economic law, avoid potential conflicts of interest and prevent inequities that may be caused by their improperly practising concurrently as lawyers'. (UNCITRAL 2019c, 5).

In sum, 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.

9.4.6 *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 legal issues under consideration in a concrete proceeding. Building on earlier developments heralded by the revisions to the ICSID Arbitration Rules in 2006,[44] the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration in 2013,[45] and the adoption of the Mauritius Convention on Transparency in Investment Arbitration in 2014,[46] most of

Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC/1, 11 December 1996).

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

[45] 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.

[46] 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.

the main models for investment dispute settlement (with China and Brazil appearing to be somewhat hesitant) 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* (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) and non-disputing parties (CETA, Art. 8.38; CPTPP/TPP, Art. 9.23(2); USMCA, Annex 14-D, Art. 7.2). Building on the UNCITRAL Transparency Rules,[47] all three agreements foresee public hearings (CETA, Art. 8.36(5)1; CPTPP/TPP, Art. 9.24(2); USMCA, Annex 14-D, Art. 8.2) and publication of relevant documents (CETA, Art. 8.36(2)-(4); CPTPP/TPP, Art. 9.24(1); USMCA, Annex 14-D, Art. 8.1), while ensuring the protection of 'confidential or protected information'.[48]

India's 2016 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 (India Model BIT, Art. 22). 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 (India Model BIT, Art. 22.4).

Brazil's CFIAs are more restrictive in this regard. Only the Brazil–Chile CFIA requires the parties to make arbitral awards available to the public within fifteen days of their date of issue, due regard being paid to information flagged as confidential (Brazil–Chile CIFA, Annex I, Art. 7(4)). 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 CFIA reproduces for arbitral tribunals the provision in the WTO Dispute Settlement Understanding (DSU) that allows a WTO panel to 'seek information and technical advice

[47] 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.

[48] 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).

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from any individual or body which it deems appropriate',[49] and which has been interpreted in the WTO as allowing panels to receive *amicus curiae* submissions.[50]

China's submission also only addresses transparency to a more limited extent. While acknowledging the importance of transparency in arbitrator selection and disqualification, and supporting transparency in respect of third-party-funding arrangements (UNCITRAL 2019c, 5), China is silent on the transparency of investment dispute settlement proceedings and third-party participation. At the same time, it expressly acknowledges the 'public-law nature of the ISDS mechanism' (UNCITRAL 2019c, 5), stresses the contribution an appellate mechanism could make in clarifying the law applicable to international investment relations (UNCITRAL 2019c, 4), and welcomes the participation of the public in the ISDS reform debates (UNCITRAL 2019c, 5). Without some form of transparency of ISDS procedures and openness to third-party participation, reaching the goals China stipulated for how an appellate mechanism could reform investment dispute settlement hardly seems possible. This suggests that, at least for ISDS proceedings, there is a reasonably broad agreement among states that investment dispute settlement should be transparent and open to third-party participation.

9.4.7 Treaty Organs to Control Dispute Resolvers

Some 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 vis-à-vis contracting states. Such mechanisms can be found in all main models for investment dispute settlement reform, with the exception of China's proposal, which does

[49] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), adopted 15 April 1994, entered into force 1 January 1995, 1869 UNTS 401, Art. 13.1.

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

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not address the issue, but stresses the importance of control over, and possibilities of correction of, decisions made by investment adjudicators (UNCITRAL 2019c, 2–4).

CETA, CPTPP/TPP, and USMCA each put in place treaty organs that can render authoritative interpretations of the respective investment chapter with binding effect on the ISDS mechanism.[51] 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 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.[52] This also ensures that parties can react to defects in the operation of dispute settlement that may become apparent over time. Under USMCA, the tripartite Free Trade Commission is not only empowered to issue interpretations that are binding for investment tribunals (USMCA, Arts 14.D.9(2), 30.2.2(f)), but is specifically called upon to determine whether a party's invocation of the USMCA's grandfather clause ('non-conforming measures') is justified (USMCA, Art. 14.D.10).

India's 2016 Model BIT also allows the parties to issue joint interpretations and decisions on the application of the treaty that are binding on tribunals 'upon issuance' (India Model BIT, Art. 24). The Indian Model BIT further specifies that other forms of subsequent

[51] 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).

[52] 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).

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agreement or practice between the parties may also constitute authoritative interpretations of the agreement that 'must be taken into account' by tribunals (India Model BIT, Art. 24.2). In Brazil's CFIAs, disputes must be submitted to the inter-party Joint Committee before a claim is brought to arbitration (Brazil–Chile CFIA, Annex I, Art. 24). 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 CPTPP/TPP/USMCA, CETA, India's 2016 Model BIT, Brazil's CFIAs, and China's submission to UNCITRAL Working Group III shows that there is considerable convergence on a number of features for the reform of investment dispute settlement that are independent of questions of institutional design. These models address the same types of problems that traditional investor–state arbitration has created from the perspective of the rule of law and democratic accountability, and employ similar tools to address these problems. This convergence, in our view, is encouraging when considering the prospects of states agreeing, in the context of the current UNCITRAL process, on a multilateral framework for the settlement of investment disputes that is acceptable to all states, independently of the preferences they have expressed in terms of institutional design.

Section 9.5 sketches out a framework that would allow states to preserve flexibility and accommodate diverging preferences in terms of institutional design, while creating a single multilateral institutional framework for investment dispute settlement.

9.5 Cutting the Gordian Knot: Dispute Settlement à la Carte

Despite considerable areas of convergence in reforming investment dispute settlement, CPTPP/TPP/USMCA, CETA, India's 2016 Model BIT, Brazil's CFIAs, and China's proposal differ fundamentally on questions of institutional design. It is, of course, possible that one of the proposed models will ultimately prevail and its proponents will persuade other states and organizations of its relative advantages (Puig and Shaffer 2018), in the same way that investor–state arbitration has proliferated as the dominant approach to investment dispute settlement, above all 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 mode of investment dispute settlement. 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 a common mode for ISDS in their recent economic partnership agreement, with the EU apparently insisting on the creation of a permanent investment tribunal and Japan insisting on the use of arbitration (IISD 2017). While India and Brazil have been able to agree on a CFIA by combining the two states' favoured instruments for state control over disputes (Brazil's state-to-state dispute settlement and India's self-judging security clause) (Brazil–India CFIA, Arts 19, 24), an agreement with either on a less state-controlled legal framework for investment dispute settlement seems unlikely. The same would hold true with respect to relations between the contracting parties to CPTPP and USMCA, on the one hand, and India or Brazil, on the other.

Meanwhile, CETA applies in parts provisionally since September 2017 (its provisions on ISDS, however, will only become effective after ratification of the agreement by all EU Members States); Brazil's CFIAs with Angola, Mexico, and (in the relations between Argentina, Brazil, and Uruguay) Mercosur have already entered into force. CPTPP likewise entered into force in December 2018, and USMCA entered into force on 1 July 2020. In such a scenario, a likely possibility for the future of investment dispute settlement is increased fragmentation. Contrary to the predominance of arbitration that exists today, adjudication of disputes between investors and states under the EU's MIC could coexist with reformed investor–state arbitration inspired by CPTPP/TPP/USMCA, while Brazil retains CFIA-inspired inter-state arbitration, India and other actors reintroduce the exhaustion of local remedies, and China pushes for the creation of an appellate mechanism for investment disputes. Other actors may find inspiration from any of these five competing models, resulting in an institutionally fragmented landscape. Rather than addressing the challenges investment arbitration currently faces, such enhanced 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 respect to increasing consistency, coherence, and predictability in investment dispute settlement. Reaching these key objectives of the current ISDS reform process can, in our view, be achieved properly only through multilateral solutions.

The question that arises then is whether and how it is possible to cut the Gordian Knot and bridge the gap between these five main models for investment dispute settlement and find a multilateral solution. In our view, rather than engaging in a debate about which of the four dispute settlement models would be preferable as a model for all states, our proposal seeks to combine the different dispute settlement options currently floated under one common institutional structure. This institutional structure would consist of the establishment of a new multilateral organization – which we call the Multilateral Institution on Dispute Settlement for Investment (MIDSI) – that would be able to offer and administer different modes of settling investment disputes under the umbrella of a single institutional framework. The creation of MIDSI would allow combining the interest of states in convergence in adapting investment dispute settlement to address the concerns with present-day investor–state arbitration with their entrenched preferences for certain modes of dispute settlement, be it arbitration, the use of a permanent, two-tiered international court, inter-state dispute resolution, the strengthening of domestic courts, or the creation of an appellate mechanism.

Inspiration for this idea can be drawn from the structure of dispute settlement under the United Nations Convention on the Law of the Sea (UNCLOS).[53] While UNCLOS establishes an International Tribunal for the Law of the Sea (ITLOS),[54] the Convention in fact features what one may call 'dispute settlement à la carte'.[55] Parties to UNCLOS must make a 'choice of procedure' for settling disputes under UNCLOS among the possibilities provided for in UNCLOS, Article 287: ITLOS itself, the ICJ, or arbitration under UNCLOS Annex VII.[56] 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

[53] United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397. For more in-depth discussion on the underlying method of developing our proposal for the reform of investment dispute settlement based on comparative institutional design analysis, see Schill and Vidigal (2019).

[54] See UNCLOS, Annex VI, Art. 1. See also Kaufmann-Kohler and Potestà (2016).

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

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

parties has not made any choice, the default procedure is arbitration under UNCLOS Annex VII.

The same idea, to offer a choice among different modes 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 modes of investment dispute settlement under one uniform institutional umbrella. One could thus imagine the creation of MIDSI, which would integrate all aspects of dispute settlement reform on which the main models converge, while allowing parties a choice among different modes of dispute settlement. Thus, one pillar of MIDSI could operate as a fully fledged two-tier MIC, allowing the EU and its Member States to put their ideas for reforming investment dispute settlement into practice. For China, the MIC could function as an appellate mechanism reviewing first-instance investor–state arbitral awards only. Another pillar of MIDSI could administer inter-state arbitrations, allowing Brazil and its followers to participate in the creation of MIDSI, and yet another pillar of MIDSI could administer investor–state arbitrations, allowing those states that reject the idea of a standing court to participate. Access to international dispute settlement administered by MIDSI could also be conditioned on the prior use of domestic remedies, allowing India and others to accept MIDSI's jurisdiction.

The idea of seeking a combination of different modes 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 of international courts and tribunals generally. The ICJ, for example, may be called upon to decide in chambers, and has done so in the *ELSI* case (incidentally, an investment dispute).[57] WTO panels may be composed of three or five persons and, in fact, consenting parties may refer a dispute to arbitration under the WTO DSU itself.[58] 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

57 ICJ, *Elettronica Sicula SpA (ELSI) (United States v Italy)*, Judgment, 20 July 1989, ICJ Reports 1989, 15.

58 DSU, Arts 8.5, 25. See WTO, *United States–Section 110(5) of the US Copyright Act*, Award of the Arbitrator, WT/DS160/ARB25/1, 9 November 2011.

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states and individuals, but it also has jurisdiction over, and has adjudicated, inter-state disputes.[59]

The greatest challenge in this regard will be to determine what role the MIC pillar could have in an à la carte system under the auspices of MIDSI.[60] 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 functions also to states not willing to submit fully to its jurisdiction. For example, the MIC could, building on China's proposal, 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 specialized court in the host state for foreign investment disputes with experienced and specialized judges), with the MIC's appellate division acting as an appeals body against the resulting domestic court judgment.[61] If it were to act exclusively as an appeals court, the MIC's would allow flexibility for states to structure the first instance of investment dispute settlement freely, while providing for a centralized 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 competence to settle investor–state disputes at the first instance. The MIC could also have jurisdiction to issue advisory opinions concerning specific points of interpretation of norms that are common to IIAs, for example 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, or identical norms in different IIAs, are handed down and coexist with equal authority. One could also consider, in certain circumstances, allowing arbitral tribunals and domestic courts, serving as adjudicators

[59] See e.g. 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.

[60] For further elaboration on the different features the MIC could be given, see Schill and Vidigal (2019, 330–337)

[61] See Schill (2017, 664–5) for details on how to better integrate dispute settlement before domestic courts and international instances.

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of first instance in investment dispute settlement, to submit requests for a preliminary ruling on questions of international investment law to the MIC in order to ensure consistent interpretations of common norms (cf. Schreuer 2008).

Independently of a state's choice for investment dispute settlement, one could also consider providing the MIC with certain system-wide competences in investment dispute settlement, in a way similar to the specific competences ITLOS has under UNCLOS. ITLOS, after all, has a broader role than only constituting 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 also retains a number of competences, including jurisdiction to award provisional measures and to hear requests for the prompt release of vessels.[62] Similarly, the MIC could be empowered to decide issues that require a speedy resolution (e.g. challenges to arbitrators or the issuance of provisional measures), independently of the mode of investment dispute settlement that states have chosen otherwise under MIDSI.

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 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 investment regulation, 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 investment tribunals. Nomination to the roster could be organized in a similar fashion to what is currently the case with the ICSID List of Arbitrators, the List of Members of the PCA, or the Indicative List of Governmental and Non-Governmental Panelists of the WTO.

62 See UNCLOS, Art. 290 ('Provisional measures') and Art. 292 ('Prompt release of vessels and crews').

While many details will necessarily remain to be resolved for the proposed MIDSI to be workable, including its relationship to existing institutions administering investor–state arbitrations, such as ICSID and the PCA, and existing IIAs providing for arbitration under existing rules,[63] 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, India's 2016 Model BIT, Brazil's CFIAs, and China's proposal, and to see them as mutually exclusive alternatives. Instead, we believe it is necessary to direct the debate towards exploring possibilities to combine the different models in a way that permits states to achieve their core preferences, while creating a multilateral framework that can ensure sufficient consistency and uniformity across different dispute settlement options.

What is more, MIDSI would not need to be limited to performing functions in the field of investor–state dispute settlement. Instead, it could be set up so as to perform much broader role in the regulation of international investment.[64] Thus, MIDSI could be created to include a multilateral body that has competence to initiate negotiations on substantive investment rules, not merely for the protection of foreign investors but also for safeguarding competing concerns or developing binding obligations for foreign investors. Similarly, MIDSI could be given administrative competences, for example, to help countries implement investment disciplines and avoid conduct that will likely result in breaching investment treaty commitments or in implementing dispute prevention and management systems that could avoid problems in investor–state relations from escalating into full-blown and costly disputes.

9.6 Conclusion

The days of investor–state arbitration as the 'only game in town' for the settlement of investment disputes appear to be numbered. Although the inertia of the current system, survival clauses in BITs, and the almost

[63] For a proposal on how to integrate existing treaties into a new multilateral system based on the approach taken by the Mauritius Convention, see Kaufmann-Kohler and Potestà (2016).

[64] For further details on the possible design of MIDSI in respect of functions beyond adjudication, see Schill and Vidigal (2019, 337–42).

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unsurmountable difficulty of amending the ICSID Convention,[65] 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 ISDS system can no longer be dismissed as attacks by populist governments unhappy with having to consider rights of foreign investors in their actions, or positions by non-governmental organizations with little regard for the incentive structures that underpin economic development. Calls for reform of ISDS have become mainstream, with even traditionally capital-exporting countries having faced the prospect of being on the receiving side of investment arbitrations and being required to address tensions between investor–state arbitration and their constitutional principles, such as the rule of law and democracy.

States and regional organizations, 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 dispute settlement; one-off arbitration and institutionalized dispute settlement) would provide the first step in building the institutional foundations of a truly multilateral investment system.

For this purpose, we propose that the creation of MIDSI, which allows states to pursue different forms of dispute settlement under one institutional umbrella, is added to the discussions in the current UNCITRAL proposal as a means to systemically reform investment dispute settlement. Considering the significant degree of convergence that we have shown to exist on the objectives of investment dispute settlement reform and on a range of procedural and other issues, we are hopeful that the creation of MIDSI is a feasible option for the future of investment dispute settlement. Whether it is picked up in the current UNCITRAL process, and the extent to which ideas presented here will finally be cast into the form of binding reform instruments, is a matter for the political process, which is government-led, both in respect of the current UNCITRAL

[65] See ICSID Convention, Art. 66(1) (requiring all Contracting States to the ICSID Convention to ratify, accept, or adopt an amendment in order for it to enter into force).

process of reforming investment dispute settlement and in light of the need for states later to adhere to any possible outcome of that process. As scholars, we see our role in developing what some may view as far-fetched ideas for the future of international investment relations. We are convinced, however, that all bright futures in the field should start with a bold vision on how international investment relations can be cast in order to conform both to the ideal of the rule of law and to democratic accountability.

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