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Consistency and Correctness in Arbitral Decision-Making –

Is the UNCITRAL Reform Process Paving the Way for an Appellate Mechanism in ISDS?

Julian Scheu and Afolabi Adekemi

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Abstract

The lack of consistency and correctness in arbitral decision-making by international investment tribunals has been identified as one of the major concerns necessitating reform. Against this background, the present study provides an overview of the ongoing discussions held by State delegations in the UNCITRAL reform process on Investor-State Dispute Settlement (ISDS). The main reform options and challenges are explained and the different positions of States with respect to those options are outlined. In particular, the two most prominent reform options are addressed which consist in the establishment of either a stand-alone Multilateral Investment Appeals Mechanism (MIAM), or a two-tiered Multilateral Investment Court (MIC). No matter its form or scope, it is recalled that an appellate mechanism should strive towards universal coverage to promote correctness and consistency. At the same time, consistency should not be seen as a goal in itself as long as States opt for a fragmented legal framework in substance. An outlook on the next steps and open questions leads to the conclusion that despite further discussions being required, the reform process is indeed paving the way for the establishment of an appellate mechanism in ISDS.

Key words

ISDS – UNCITRAL – Arbitration – Investment Protection – Consistency – Correctness – Appellate Mechanism – MIAM – MIC

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Consistency and Correctness in Arbitral Decision-Making – Is the UNCITRAL Reform Process Paving the Way for an Appellate Mechanism in ISDS?

Julian Scheu and Afolabi Adekemi[*]

A. Introduction

The United Nations Commission on International Trade Law ("UNCITRAL") Working Group III ("WG III") has identified the lack of consistency in arbitral decision-making by international investment tribunals as one of the major concerns necessitating reform.[1] Today's international investment law regime is based on over three thousand international investment agreements ("IIAs"). Even though these IIAs are independent legal instruments, they often share significant similarities in their wordings with mostly non-material variations.[2] This is the case, especially for certain treaty rights common to IIAs, such as the provisions on expropriation, fair and equitable treatment, full protection and security, most favoured nation and national treatment, etc. Notably, in enforcing these commonly guaranteed treaty rights in case of a dispute, IIAs contain an Investor-State Dispute Settlement ("ISDS") clause which typically provides for investment arbitration. Each arbitration tribunal operates *ad hoc*, rendering its decision based on the facts and applicable IIA before it and without being bound to take prior decisions into account.[3] As noted in WG III, such a fragmented system may foster inconsistent outcomes.[4]

Today several ISDS decisions exist that have led to criticism of the current system based on conflicting outcomes.[5] The current situation creates a dilemma for ISDS actors, as it becomes

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1 *UNCITRAL*, Report of Working Group III (Investor-State Dispute Settlement Reform), A/CN.9/930/Add.1/Rev.1, 26 February 2018, paras. 9 ff; *UNCITRAL*, Report of Working Group III (Investor-State Dispute Settlement Reform), A/CN.9/935, 14 May 2018, paras. 20 ff.; *Kaufmann-Kohler/Potesta*, Reform of ISDS: Matching Concerns and Solutions, available at: https://www.ejiltalk.org/reform-of-isds-matching-concerns-and-solutions/ (08/12/2022).

2 *Diel-Gligor*, p. 141; See also, *UNCITRAL*, Report of Working Group III (Investor-State Dispute Settlement Reform), A/CN.9/930/Add.1/Rev.1, 26 February 2018, para. 27, (noting that "[…] differences in treaty language had been exaggerated and that the vast majority of investment treaties contained very similar if not identical language").

3 *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, A/CN.9/WG.III/WP.150, 28 August 2018, para. 37.

4 UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform), A/CN.9/930/Add.1/Rev.1, 26 February 2018, para. 13.

5 See, for example, tribunals reaching divergent conclusions on the content of FET, on one hand (interpreting FET broadly): *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015; on the other hand, (interpreting FET narrowly), see: *Waste Management Inc. v United Mexican States* ("Number 2"), ICSID Case No. ARB(AF)/00/3, Award 30 April 2004; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006; *Invesmart v. Czech Republic*, UNCITRAL, Award, 26 June 2009; or see regarding divergent interpretation on the "Umbrella Clause", on one hand (broad interpretation): *Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February

difficult for States to shape their investment policies in accordance with their international obligations based on a settled understanding of what this is.[6] For investors, it becomes difficult to ascertain whether they have been treated in conformity with the host States' international obligations. With an unpredictable legal regime induced by inconsistent decisions comes the inability to plan, resulting in a higher cost of doing business, which adversely affects the general investment climate and Foreign Direct Investment ("FDI") flows – a direct opposite of what ISDS is set out to achieve.[7]

Another important interest to be considered in the current ISDS system is the need to guarantee the quality of ISDS decisions in terms of **"correctness"**. While consistency is desired, WG III generally agrees that the correctness (i.e. accuracy) of ISDS decisions to the applicable law and facts to a dispute should be the ultimate objective.[8] Different IIAs may warrant different outcomes notwithstanding their similarities.[9] It has been argued that the main concern is not inconsistent decisions, but arbitral tribunals that interpret treaty provisions incorrectly by sometimes disregarding the treaty parties' intention.[10] As noted in WG III, a proper distinction must be made between a divergent decision **"justified"** by the relevant rules of treaty interpretation, or different facts and evidence before a tribunal, as opposed to a divergent decision that is **"unjustified"**.[11] Such is the case where the same treaty standard or same rule of customary international law is interpreted differently with no justifiable ground.[12]

Consequently, WG III is considering potential solutions to the issue of unjustified inconsistency and incorrectness of ISDS decision-making. At the centre of the reform debate is the **introduction of an appellate mechanism**. This is primarily meant to ensure the correctness of ISDS awards but may also serve as a corrective mechanism for unjustified inconsistency in the system.

B. Reform Options Discussed at UNCITRAL

In the quest for consistency and correctness in ISDS decision-making, there has been general support in WG III for the introduction of a **standing appellate mechanism**, amongst other

2012; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. The Republic of Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012; on the other hand, interpreting the umbrella clause narrowly, see: *SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003; *SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004; *Bureau Veritas, Inspection, Valuation, Assessment and Control*, *BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009; See further on this, *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, A/CN.9/WG.III/WP.150, 28 August 2018, paras. 15 ff.

6 *Montineri*, in: Hobe/Scheu (eds.), p. 157, 165 (stating: "Any lack of consistence would have a financial and political impact on States as they rely on a coherent and predictable framework when developing their investment policies").

7 *Arato/Banifetemi/Brown/Desierto/Gelinas/Nagy/Ortino*, Lack of Consistency and Coherence in the Interpretation of Legal Issues, para. 4, available at: https://www.cids.ch (28/12/2022).

8 *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, A/CN.9/WG.III/WP.150, 28 August 2018, para. 8.

9 *Alschner*, Ensuring Correctness or Promoting Consistency? Tracking Policy Priorities in Investment Arbitration Through Largescale Citation Analysis, p. 2, available at: https://papers.ssrn.com/ (17/12/2022).

10 *Montineri* (fn. 6), p. 166.

11 *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, A/CN.9/WG.III/WP.150, 28 August 2018, para. 7.

12 *UNCITRAL*, Report of Working Group III (Investor-State Dispute Settlement Reform), A/CN.9/935, 14 May 2018, para. 21; *Montineri* (fn. 6), p. 167.

possible reform options identified by the UNCITRAL Secretariat ("Secretariat"). The introduction of a standing appellate mechanism is meant to fill the gap in the current system lacking the existence of an adequate review mechanism. Existing review mechanisms such as the ICSID annulment or UNCITRAL set aside proceedings are only designed to rectify a limited number of fundamental procedural deficiencies that do not necessarily address concerns arising from incorrect ISDS decisions.[13] Furthermore, inspired by experience made at the World Trade Organization ("WTO"), it is argued that a review instance with a standing body of adjudicators is better positioned to ensure consistent jurisprudence.[14] While this argument might be countered on the ground that WTO disputes are based on few multilateral agreements and not on thousands of bilateral investment treaties (BITs) as in ISDS,[15] it is also noteworthy that most IIAs contain very similar if not identical language.[16] Thus, the argument against the harmonious development of investment law under the different IIAs may be unjustified since most of the treaties do raise similar interpretative questions.[17]

So far, the ongoing discussions in WG III have revealed two possible pathways State delegates are now considering for the realisation of a standing appellate mechanism for ISDS decisions. Namely through the establishment of a stand-alone Multilateral Investment Appeals Mechanism ("MIAM"), or the establishment of a two-tiered Multilateral Investment Court ("MIC") – comprising a first and second instance (appellate) court. These two options are now examined below, including "other possible reform options" identified by the Secretariat.[18]

I. Stand-alone Multilateral Investment Appeals Mechanism (MIAM)

The proposal for the establishment of a MIAM is a reform idea shared by multiple States in WG III. The MIAM is proposed "stand-alone" in the sense that it is not linked to any other body but constituted as an independent higher judicial authority set up to oversee the decisions of the decentralised ISDS tribunals at a centralised appellate level.

To enrich the discussion, the Secretariat has published an **"initial draft"** on an appellate mechanism suggesting the "grounds for appeal" and "standard of review" of a possible future MIAM.[19] According to draft provision 2 (two) and the most recent note of the Secretariat at the time of this study, the grounds for an appeal may be limited to:[20]

(a) an error in the application or interpretation of the law; or

[13] *Montineri* (fn. 6), p. 166.

[14] *Landmann*, in: Scheu (ed.), p. 109.

[15] Ibid., p. 110.

[16] *UNCITRAL*, Report of Working Group III (Investor-State Dispute Settlement Reform), A/CN.9/930/Add.1/Rev.1, 26 February 2018, para. 27.

[17] *Diel-Gligor* (fn. 2), p. 141; *Schill*, pp. 362 ff. (Arguing that the existing network of similar BITs in fact leads to a multilateralization of investment law).

[18] *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, A/CN.9/WG.III/WP.150, 28 August 2018, paras. 37 ff. (identifying possible reform options on a multilateral basis to enhance consistency).

[19] See *UNCITRAL*, Initial Draft on Appellate Mechanism, para. 12, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_wp_-_appeal_14_december_for_the_website.pdf (28/12/2022).

[20] *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Appellate Mechanism, A/CN.9/WG.III/WP.224, 17 November 2022, pp. 3 f.

(b) a manifest error in the appreciation of the facts, including the appreciation of relevant domestic legislation and the assessment of damages.

According to the Secretariat, the reference to the term "law" means the law applied by the first instance tribunal in its decision, which could be the applicable IIA, domestic legislation, or the law governing an investment contract.[21] Hence, unlike the current practice where ICSID or UNICITRAL-based reviews are limited to certain procedural deficiencies, draft provision 2 (two) contemplates a MIAM empowered to review the merits (*révision au fond*) of a first instance decision under the applicable substantive law to the dispute. Furthermore, the draft includes the limited grounds for annulment pursuant to Art. 52 of the ICSID Convention or, in case of non-ICSID arbitrations, the grounds relevant in most setting aside procedures before national courts. Such relevant grounds are defined by the national arbitration law at the seat (lex arbitri). In most jurisdictions, the lex arbitri is inspired by Art. 34 of the UNCITRAL Model Law on International Commercial Arbitration (1985) and Art. V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

Notably, the possibility for a MIAM to scrutinise the first-instance decision for both procedural and substantive accuracy raises concerns about the significant delay and cost that could be associated with such an expansive scope of review. For this reason, it has been suggested that the scope of legal or factual review be restricted to cases of "clear, serious or manifest errors".[22] If draft provision 2 (two), specifically paragraph (a) is adopted by States as it currently is – without being qualified by any of the aforementioned adjectives – then a MIAM will secure extensive powers in the legal review of first-instance decisions for correctness, with a similar capacity to forestall unjustified inconsistency in the interpretation or application of the law.

However, as for factual reviews, draft provision 2 (two) paragraph (b) indicates a scope of review limited to "manifest error". Arbitral jurisprudence confirms the term "manifest" is equivalent to the word "obvious" or "clearly revealed to the eye, mind or judgement".[23] This creates a very high threshold, making a factual appreciation that does not reveal a prima-facie error on the part of the first-instance tribunal outside the MIAM scope of review. The narrow scope of factual review is arguably justified on the basis that factual unlike legal errors can be more time-consuming to assess.[24] For this reason, it appears pragmatic to limit the scope of factual review to manifest errors, thereby curtailing the significant cost and delay that may emanate from an unrestricted review, which may later end up unwarranted. As noted by the Secretariat, the "manifest error" standard of review may also apply to the appreciation of relevant domestic legislation and the assessment of damages.[25]

Ultimately, a MIAM will still owe a substantial degree of deference to the *ad hoc* arbitral tribunal and its award rendered as the first-instance decision in the appeal process. This approach can be

[21] Ibid., p. 4. Identifying the applicable law to the investment dispute can be a complex operation. See, i.a., *Schreuer*, McGill J. Disp. Resol., 2014/1, pp. 1-25; *Bjorklund/Vanhonnaeker*, in: Lim (ed.), pp. 225-243.

[22] *Landmann* (fn. 14), p. 130.

[23] PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea, ICSID Case No. ARB/13/33, Decision on Respondent Article 41(5) Objections, 28 October 2014, para. 88; Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, paras. 86 ff.

[24] *Landmann* (fn. 14), p. 129.

[25] *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Appellate Mechanism, A/CN.9/WG.III/WP.224, 17 November 2022, para. 13.

deemed as a way of balancing the cost of ensuring consistency and correctness of ISDS decisions vis-à-vis ensuring that litigants are not subjected to undue delays and cost in reaping the benefits of an award.

II. A Two-tiered Multilateral Investment Court (MIC)

The idea of establishing an MIC also includes an appellate mechanism with an extended scope of review just like the MIAM. Thus the above submissions on how a MIAM will help foster consistency and correctness of ISDS decisions equally apply to the appellate instance of a future MIC. However, the distinction between a two-tiered MIC and a MIAM is important to stress. Unlike the proposed MIAM, where first-instance decisions on appeal will still emanate from the current decentralised *ad hoc* arbitration system, in contrast, a MIC would encompass a standing first and a second instance (appellate) court, thus foreseeing a fully centralised ISDS system.[26]

For its proponents, a centralised MIC will eliminate one major root cause of inconsistent outcomes: ISDS procedures before multiple arbitration forums set up under different institutional and non-institutional (*ad-hoc*) bodies that are independent of one another.[27] Arguably, a centralised court system with a small group of judges as well as an appeal mechanism is better positioned to facilitate consistent outcomes than a decentralised system.[28] Systemically, the collegiality that forms the MIC bench would promote consistency in judicial reasoning amongst the judges.[29] This is inherently necessitated by their shared responsibility to preserve the court's legitimacy, by offering legal certainty and predictability of the court's jurisprudence to its members.

Furthermore, draft provision 11 of the "initial draft on a multilateral mechanism" released by the Secretariat foresees the possibility of a future MIC President to "assign two or more cases to the same chamber if the preliminary or main issues in two or more cases before different chambers are similar"[30]. Such a provision would curtail the risk of inconsistent outcomes from different chambers right from the first instance. Additionally, with a MIC in place, there is the possibility of integrating an effective consultation mechanism between judges of the different chambers which can also help forestall contradictory decisions.[31] These possibilities would not be feasible in the current *ad hoc* arbitration system.

Another opportunity an MIC presents is the possibility to have a matter decided by a grand chamber, i.e. all the judges of the court of first instance may sit as a plenary to decide on disputes of substantial importance.[32] An example would be a dispute with a serious risk of departing from the court's previous decisions.[33] For these advantages, a two-tiered MIC may be considered as better positioned to promote consistent and correct outcomes in ISDS.

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26 *Bungenberg/Reinisch*, paras. 64 ff. (citing the advantages of a MIC over a MIAM).

27 *Schefer*, pp. 371 ff., (detailing the ICSID and Non-ICSID forums available for investor-State arbitration).

28 *Bungenberg/Reinisch*, para. 52.

29 *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, 24 January 2019, para. 41.

30 See, *UNCITRAL*, Initial Draft on Standing Multilateral Mechanism, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents (17/12/2022), para. 55.

31 *Bungenberg/Reinisch*, para. 53.

32 *Bungenberg/Reinisch*, Draft Statute of a Multilateral Investment Court, Art. 17(5), p. 58.

33 See, *Switzerland Delegation*, Comments on UNCITRAL's Initial Draft on Standing Multilateral Mechanism, para. 47, available at https://uncitral.un.org/sites/uncitral.un.org/ (17/12/2022).

III. Other Possible Reform Options

Besides the creation of a MIAM or MIC, there are other procedural reform options identified by the Secretariat that can be considered as possible solutions to ensure consistency and correctness in ISDS decision-making. Although the WG III deliberations are so far silent on these other options, it is still possible to adopt some of them as a complement to an established MIAM or MIC.

1. Introducing a System of Precedent

This reform option is particularly relevant for consistency. As noted by the Secretariat, consistency requires that decision-makers take into account precedent, i.e. pre-existing case law, and conform to this to the extent possible, without departing absent a well-reasoned justification.[34] Despite their case-specific mandate, many tribunals do acknowledge their systemic function in the development of the law. In this sense, the tribunal in *Duke Energy v. Ecuador* recalled even without being formally bound by previous decisions that

> *"[…] it must pay due consideration to earlier decisions made by other international tribunals. […] Subject to the specifics of a given treaty and of the circumstances of the case under review, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards establishing certainty in the rule of law."*[35]

Although the use of *de facto* precedent is already common in ISDS practice,[36] the lack of formal *de jure* recognition yet allows inconsistent decisions to thrive, as some tribunals have maintained their autonomy to decide a case without considering the past decisions on a related matter.[37] A formal introduction of precedent would ensure that tribunals are duty-bound to take into account precedent. However, this duty should not be equated with the common law rule of *stare decisis* (binding precedent) which does not exist under international law. What is already existing in ISDS practice, which can be formally entrenched in ISDS is the civil law doctrine of *jurisprudence constante*.[38] This civil law doctrine requires a court to take past decisions into account in a matter where there exists sufficient uniformity in the previous case laws.[39] An example of how *jurisprudence constante* can be formally entrenched in ISDS is already conceived in Art. 28(1)(d) of the "Draft Statute of the MIC" proposed by *Marc Bungenberg* and *August Reinisch*:

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34 *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, A/CN.9/WG.III/WP.150, 28 August 2018, paras. 37 ff.

35 *Duke Energy v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 117.

36 See, *Reed*, ICSID Rev. – FIL J. 2010/25(1), pp. 95 ff.

37 See in this regard, *Muhammet Çap v. Turkmenistan*, ICSID Case No. ARB/12/6, Decision on Respondent's Objection to Jurisdiction under Article VII(2), 13 February 2015, para. 275; Also see, *Eskosol v. Italy*, ICSID Case No. ARB/15/50, Award, 4 September 2020, para 278; *Kilic v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, para. 7.1.3; *Teinver v. Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, para. 167.

38 On ISDS tribunals that has acknowledged the duty to adopt principles established in a series of consistent cases, see: *Iberdrola Energía, S.A. v. Republic of Guatemala (II)*, PCA Case No. 2017-41, Final Award, 24 Aug 2020, para. 229; *Griffin Group v. Poland*, SCC Case No. 2014/168, Final Award, 29 April 2020, para. 214; *AES Solar and others (PV Investors) v. Spain*, PCA Case No. 2012-14, Concurring and Dissenting Opinion of Charles N. Brower, 28 February 2020, para. 16; *Swissbourgh and others v. Lesotho*, PCA Case No. 2013-29, Judgment of the High Court of Singapore on the Set Aside Application [2017] SGHC 195, 14 Aug 2017, para. 103.

39 *Fon/Parisi*, Int'l Rev. of law and Eco. 2006/26(4), pp. 519, 522.

> "[…] By performing their duties, the judges of the MIC shall…
>
> (d) secure uniform and consistent interpretation of the law, taking into consideration previous decisions without establishing a doctrine of precedent, particularly where there exists sufficient uniformity in previous case law".[40]

Such provision will ensure that adjudicators are obliged to consider interpreting the law consistently with an existing line of case law "when it fits". Such a possibility can thus be a game-changer from the status quo whereby adjudicators have no formal duty to take past decisions into account. This will further improve the quality of reasoning in ISDS awards, as adjudicators will have to provide a well-reasoned justification for either following or departing from an existing line of consistent jurisprudence, with an appellate mechanism positioned to check for this accuracy.

2. Prior Scrutiny Mechanism

Establishing a Scrutiny Mechanism prior to the rendering of the award may improve both consistency and correctness of ISDS decisions.[41] The option foresees the prior scrutiny by a review panel (different and independent of the deciding tribunal) of ISDS awards before they are released as final and binding on the parties. Before final release, the draft award is given to the parties, who may be allowed to submit written comments on any aspects of the award, and on that note draw the attention of the review panel to any issue that justifiably questions the award on correctness or consistency. It is suggested that this scrutiny mechanism could be modelled after that of the International Court of Arbitration of the International Chamber of Commerce.

3. Guidance Regarding Multiple Proceedings

Another reform option foresees the adoption of specific provisions that will guide tribunals when dealing with similar disputes, e.g. procedural guidance on when to order a stay of proceedings, dismissing a claim for abuse of process in the context of concurrent proceedings, or ordering the consolidation of claims in related matters.[42] These options can be used to complement the existing ISDS system through express treaty provisions like those already found in Article 14 Belarus-India BIT (2018), Article 14.D.12 CUSMA, or Article 8.24 CETA, and are also implementable in the procedural rules of a possible future MIC.

4. Introducing a System of Preliminary Ruling

Establishing a preliminary ruling procedure may enable ISDS tribunals to refer any question concerning the application and interpretation of a legal matter to a specific body.[43] This idea is inspired by the preliminary ruling procedure of the Court of Justice of the European Union. Comparable to the procedure under EU law, tribunals could refer disputes to a designated court.[44] Upon referral, the main dispute is suspended until the designated court for the preliminary ruling returns with an answer. The decision of this specific body on the preliminary question is then binding on the referring tribunal. The preliminary ruling procedure addresses problems of inconsistent decisions *ex ante*, i.e., before they arise rather than wait and attempt to correct them *ex*

40 *Bungenberg/Reinisch*, Draft Statute of the Multilateral Investment Court, p. 62.

41 *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, A/CN.9/WG.III/WP.150, 28 August 2018, para. 43.

42 Ibid., para. 42.

43 Ibid., para. 46.

44 Article 267 Treaty on the Functioning of the European Union (TFEU).

post. Given that a future MIAM could serve as such a specific body, the preliminary ruling procedure could also serve as a complement to other reform options.

C. Stakeholders and their Position

In considering the establishment of a MIAM, the Secretariat has published two initial drafts[45] with stakeholders' comments on the first[46] and second[47] initial drafts also released. Generally, a considerable number of States favour the establishment of a stand-alone MIAM. Some notable proponents of this reform option include the governments of Morocco, Chile, Israel, Japan, Ecuador, and China.[48] These States commonly share the view that the limited review currently available in the existing system does little or nothing to promote consistency, thus calling for a much more standardised approach.

As noted by the Secretariat, efforts to achieve this level of ISDS reform are already visible in some IIAs foreseeing a future appellate mechanism either at a multilateral or bilateral level.[49] However, for consistency, a multilateral approach should be preferred over implementing an appellate mechanism on a bilateral basis. As observed by Switzerland in its comments to the first initial draft on an appellate mechanism, multiple *ad hoc* or BIT-based appellate mechanisms are unlikely to make any significant contribution to achieving consistency in ISDS jurisprudence.[50] Taking a similar position, the government of Singapore stated that an appellate mechanism should strive towards universal coverage, as this will better promote the objectives of correctness and consistency.[51]

Prominent on the other side of the discussion is the EU strongly advocating for the establishment of an MIC.[52] For the EU and its Member States, a stand-alone MIAM may not be sufficient to fully resolve the identified concerns of the current ISDS regime, including the lack of consistency. Alternatively, a multilateral appellate body should be established as a second instance court in a two-tiered MIC, staffed by tenured, full-time judges and supported by a permanent secretariat. This

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45 *UNCITRAL*, Initial Draft on Appellate Mechanism and Enforcement Issues (first draft), available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/appellate_mechanism_and_enforcement_issues.docx (28/12/2022); *UNCITRAL*, Initial Draft on Appellate Mechanism (second draft), available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_wp_-_appeal_14_december_for_the_website.pdf (28/12/2022).

46 *UNCITRAL*, Initial Draft on Appellate Mechanism and Enforcement Issues (first draft – comments received), available at: https://uncitral.un.org/en/appellatemechanism (17/12/2022).

47 *UNCITRAL*, Initial Draft on Appellate Mechanism (second draft – compilation of comments), available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_0.pdf (28/12/2022).

48 See in this regard, *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Appellate and Multilateral Court Mechanisms, A/CN.9/WG.III/WP.185, 29 November 2019, para. 6.

49 *UNCITRAL*, Initial Draft on Appellate Mechanism and Enforcement Issues (first draft), para. 64: available at: https://uncitral.un.org/sites/uncitral.un.org/files/media (28/12/2022).

50 *Switzerland Delegation*, Comments on UNCITRAL's Initial Draft on Appellate Mechanism and Enforcement Issues (first draft), para 27, available at: https://uncitral.un.org/sites/uncitral.un.org/ (17/12/2022).

51 *Singapore Delegation*, Comments on UNCITRAL's Initial Draft on Appellate Mechanism (second draft), p. 66, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_0.pdf (17/12/2022).

52 *EU and its Member States Delegation*, Comments on UNCITRAL's Initial Draft on Appellate Mechanism (second draft), para. 75, p. 35, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_0.pdf (17/12/2022); See also in general, *EU and its Member States Delegation*, Comments on UNCITRAL's Initial Draft on Standing Multilateral Mechanism, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20211125_wp_selection_eums_comments.pdf (28/12/2022).

option for the EU presents the best solution to address all the concerns about ISDS that have been identified by WG III.[53] Canada equally shares the same position with the EU.[54] Besides Canada, States such as Vietnam,[55] Singapore,[56] Mexico,[57] and Chile[58] appear to have endorsed the new EU approach, by committing to a similar model in the form of an "Investment Court System" in recent investment agreements with the EU. Also, these States have committed to pursuing with other trading partners the establishment of an MIC mechanism for investment dispute settlement in the future.[59]

Notably, the MIC system does not appear to be as popular as the stand-alone MIAM amongst States in WG III. For example, South Africa has expressed strong criticism towards the EU approach, emphasising that the extent to which a court can guarantee consistency is dependent on the applicable law.[60] Given the plurality in the substantive law of investment, achieving consistency within the fragmented legal framework will remain a challenge. Moreover, it is feared that a standing MIC poses a higher risk of expanding the scope of investor guarantees in a more permanent way to the displeasure of States in its quest for consistency than the current *ad hoc* arbitration system.[61]

The decisions of an MIC will remain based on the diverse treaties, and notwithstanding treaty similarity, it should not be a surprise when different treaties lead to different outcomes when subjected to the customary rules of treaty interpretation under Article 31-33 of the Vienna Convention on the Law of Treaties. Also, as opined by *August Reinisch*, while certainly helpful, an MIC may not fully eliminate inconsistent ISDS jurisprudence.[62] Further, in the pursuit of improving the quality of decision-making, there is no guarantee based on any objective indication that an appellate decision would be of any better quality than a first-instance decision.[63]

Regardless of the pros and cons, support and opposition, no option is off the table yet. States' delegations in WG III continue to deliberate on both options of realising an appellate mechanism in ISDS either through the MIAM or the MIC.

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53 *EU and its Member States Delegation*, Comments on UNCITRAL's Initial Draft on Appellate Mechanism and Enforcement Issues (first draft), comment 26, p. 23, available at: https://uncitral.un.org/sites/uncitral.un.org/files/ (17/12/2022).

54 *Canada Delegation*, Comments on UNCITRAL's Initial Draft on Appellate Mechanism and Enforcement Issues (first draft), comment 23, p. 10, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/appellate_mechanism_and_enforcement_issues_canada.pdf (17/12/2022).

55 Article 3.38 and 3.39 EU-Vietnam Investment Protection Agreement.

56 Article 3.9 and 3.10 EU-Singapore Investment Protection Agreement.

57 Article 11 and 12 EU-Mexico Global Agreement (agreement in principle).

58 Article 10.33 and 10.34 EU-Chile Advanced Framework Agreement (agreement in principle).

59 Article 3.41 EU-Vietnam IPA; Article 3.12 EU-Singapore Investment Protection Agreement; Article 14 EU Mexico Global Agreement (agreement in principle); Article 10.36 EU-Chile Advanced Framework Agreement (agreement in principle).

60 *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of South Africa, A/CN.9/WG.III/WP.176, 17 July 2019, para. 81.

61 Ibid.; See, in this sense, for a critical approach from a developing countries' perspective to the reform process that recalls the risk of entrenchment of existing systemic deficits: *Gathii*, Reform and Retrenchment in International Investment Law, available at: https://ssrn.com/abstract=3765169 (28/12/2022); See also for a critical approach from a practitioners' perspective regarding the idea of achieving consistency in a fragmented legal landscape: *Keller/Kittelmann*, in: Scheu (ed.), p. 328 f.

62 *Reinisch,* in: Hobe/Scheu (eds.), p.173 f.

63 *Keller/Kittelmann* (fn. 61), p. 329.

D. Next Steps and Open Questions

At its forty-fourth session coming up between 23-27 January 2023, WG III is expected to resume its deliberations on an appellate mechanism. Further deliberations on an appellate mechanism will be based on the Secretariat's latest note on the subject, released on 17 November 2022.[64] When it comes to the question of correctness and consistency of ISDS decisions that the appellate mechanism is primarily meant to address, the extent to which that function is satisfied will depend on the scope of review granted to the appellate court either as an MIAM or MIC. For instance, from the initial draft on an appellate mechanism released by the Secretariat, it appears that the option to limit the scope of review to certain errors of law, such as on expropriation, fair and equitable treatment, and non-discrimination, is at least possible.[65] Although this reference is omitted from the second released version by the Secretariat, it is conceivably a right call, as such a narrow scope may allow incorrect decisions or unjustified inconsistencies to remain unchecked in other investment protection standards not covered by the scope of review.

Further, while it is certain that appealable decisions are those from a first instance tribunal in an investor-State dispute, it is not clear from the initial drafts nor in the most recent note of the Secretariat for deliberations in January 2023 whether decisions of a first instance tribunal in a State-to-State dispute would be likewise appealable before the court. As noted by the government of Canada, State-to-State disputes may also involve similar issues of treaty interpretation, therefore it is desirous to include such investment disputes within the jurisdiction of the appellate court in the interest of overall consistency and coherence.[66] Not limiting the scope of appealable decisions to investor-State disputes is also a position shared by the EU and its Member States.[67] Hence, a clarification on this point may need to be offered in the future.

Another notable question to be settled is how an appellate body would function if it has to co-exist with other pre-existing appellate regimes in the form of annulment and set-aside procedures. Any possibility for disputing parties to pursue an appeal before the different available fora either at a time or simultaneously could negatively affect the entrenchment of consistency in the ISDS regime and should, thus, be avoided.

Furthermore, where States prefer the establishment of an MIC, another open question is whether the appellate mandate of the second instance court would be limited to appeals arising from the first instance court, or may extend to decisions by regional investment courts, international commercial courts, and domestic courts in case of denial of justice. Such a possibility may further extend the capacity of the court to foster the harmonious development of investment law and enhance legal certainty for both States and investors across jurisdictions.

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64 *UNCITRAL*, Possible Reform of Investor-State Dispute Settlement (ISDS): Appellate Mechanism, A/CN.9/WG.III/WP.224, 17 November 2022, pp. 3 f.

65 *UNCITRAL*, Initial Draft on Appellate Mechanism and Enforcement Issues (first draft), para. 4, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/appellate_mechanism_and_enforcement_issues.docx (28/12/2022).

66 *Canada Delegation*, Comments on UNCITRAL's Initial Draft on Appellate Mechanism and Enforcement Issues (first draft), comment 17, p. 8, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/appellate_mechanism_and_enforcement_issues_canada.pdf (17/12/2022).

67 *EU and its Member States Delegation*, Comments on UNCITRAL's Initial Draft on Appellate Mechanism (second draft), para. 11, p. 6, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_0.pdf (17/12/2022).

Concerning the judges to sit at an MIC mechanism, the initial draft for a standing multilateral mechanism suggests the consideration of full-time or part-time judges. So far, most delegates that have commented on the initial draft (including the EU, Canada, Colombia, Singapore, and Uganda) have all expressed to be in favour of full-time judges. However, depending on the number of cases before the court, Mali appears to consider a part-time appointment to be more appropriate.[68] As noted by the EU and its Member States in its comments on the initial draft to a standing multilateral mechanism, full-time judges appointed for long and staggered terms "contribute to the creation of the continuous collegiality and institutional memory necessary to retain expertise and develop a more consistent case law"[69]. In contrast, part-time judges may not offer the same effect. Also, whether the MIC will seek to integrate other procedural reform options that foster consistency, such as the use of precedent, the power to order the consolidation of identical claims, or joint interpretation mechanisms is to be revealed in the future.

Another open question is the issue of enforcement. Certainly, the finality and enforceability of an investment court's decision must not be in doubt to ensure consistency across the regime. Any possibility for a MIAM or MIC decision to be subject to further review in State courts would undermine this goal.

E. Outlook

In the quest towards enhancing consistency and quality in ISDS decision-making, State delegates in WG III continue to explore the possibilities for the realisation of an appellate mechanism either as a MIAM or one integrated into a two-tiered MIC. Whichever option is finally preferred by States, no doubt that consistent and correct ISDS decisions must primarily be decided under the applicable substantive law to each dispute which may call for divergent outcomes. The divergence in ISDS outcomes today is a reflection of the different approaches and the peculiarities of investment protection as adopted by States which should not be overridden in the pursuit of consistency. Indeed, States intended to create a fragmented substantive law regime that makes room for case-specific investment protection policies and takes into consideration the foreign, economic, and trade policy, as well as development strategies of each concerned State.[70] Notably, even the investment protection policies adopted by States in their different IIAs are not uniform. Investment treaties keep being redrafted and new-generation treaties are emerging.[71] This reveals how States continue to re-evaluate and adapt their investment protection policies in line with their new socio-economic and developmental agenda. Based on this reality and the exclusion of substantive law reform from the WG III ISDS reform mandate, one may conclude that the harmonised development of investment law by ensuring consistent ISDS outcomes is merely wishful thinking.

However, while undeniable that the fragmented body of substantive laws is a major cause of inconsistent ISDS decisions, the introduction of an appellate mechanism, especially one in a two-

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[68] *Mali Delegation*, Comments on UNCITRAL's Initial Draft on Standing Multilateral Mechanism, p. 2, available at: https://uncitral.un.org/sites/uncitral.un.org/files/mali.pdf (28/12/2022).

[69] *EU and its Member States Delegation*, Comments on UNCITRAL's Initial Draft on Standing Multilateral Mechanism, p. 19, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20211125_wp_selection_eums_comments.pdf (28/12/2022).

[70] See *UNCITRAL*, Report of Working Group III (Investor-State Dispute Settlement Reform), A/CN.9/930/Add.1/Rev.1, 26 February 2018, para. 18.

[71] See for example for innovations in treaty drafting with respect to the inclusion of human rights: *Choudhury*, in: Scheu/Hofmann/Schill/Tams (eds.), pp. 97 ff.

tiered MIC could ensure that one fraction of the cause of inconsistent ISDS decisions (the decentralised procedure) is addressed. A standing centralised court at a multilateral level is arguably better positioned to promote greater uniformity in judicial reasoning than the current one-off tribunals.[72] Further, while consistent ISDS decisions may not fully materialize until a multilateralization of the substantive laws on which the decisions are based,[73] the harmonised development of investment law even within the different treaties may not be an illegitimate call since it has been acknowledged that the majority of the IIAs in force today raises similar if not identical interpretative questions. It is based on this recognition that State delegates in WG III consider the adoption of an appellate mechanism yet desirable in the pursuit of consistent and quality decision-making in ISDS.

While the State delegates continue to engage on the proposed drafts by the Secretariat, more compromise and political will is needed to achieve the consensus necessary to bring either a MIAM or an MIC into reality. Despite differences and open questions remain, the general trend of the discussions suggests that States are willing and able to caryy out a systemic and multilateral reform of *ad hoc* investment arbitration. Against this background and even though its concrete form and scope remain to be developed, the UNCITRAL reform process is indeed paving the way for an appellate mechanism in ISDS.

72 *International Bar Association (IBA)*, Consistency, Efficiency and Transparency in Investment Treaty Arbitration, p. 32, available at: https://uncitral.un.org/sites/uncitral (28/12/2022), p. 32.

73 Bungenberg/Reinisch, para. 53.

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