

LEGITIMACY CONCERNS OF THE PROPOSED MULTILATERAL INVESTMENT COURT: IS DEMOCRACY POSSIBLE?

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Abstract: Growing concerns in Europe about international investment regimes and investor-state dispute settlement systems pushed the European Union into pursuing the creation of an investment court system and a multilateral investment court. The European Union started this reform through the Comprehensive Economic Trade Agreement, the Vietnam-EU Free Trade Agreement, and by direct persuasion of other countries to start negotiations at the United Nations Commission on International Trade Law. Visible reasons for the change include concerns over the perception of a lack of transparency, coherence, and arbitrators' partiality, all of which diminish the legitimacy of the multilateral investment court. Other reasons might be laid on the budgetary risks of more than 213 claims against EU countries. To address these legitimacy concerns, the EU wants to replace traditional party-appointed arbitrators with a two-tiered investment tribunal system comprised by a roster of members selected by the state parties on the treaty. This Essay argues that the creation of the multilateral investment court needs to follow democratic principles in order to be legitimate. History has shown us that the EU has abused its power in the past when implementing resolution systems. Foregoing negotiation, comment by member nations, and implementing a tribunal at its own behest has shown this. The EU multilateral investment court proposal has legitimacy deficiencies because the EU has relied on its power to impose its views so far, i.e. its proposal was not previously negotiated multilaterally amongst other member nations. It is thus possible that the appointment of the future judges to this court will likely be subject to the political constraints and veto that the International Court of Justice or World Trade Organization appointments suffer today. This could leave small economies at a disadvantage because they might be subject to permanent, politically biased judges. A superior solution would be to adopt better arbitrator disqualification rules, clear interpretation directives to avoid law creation, and stricter arbitrator qualifications.

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INTRODUCTION

Private investment is indispensable to the world's economic development and prosperity, and thus, it must come with means to be protected. When protecting threatened economic freedom and investments, democratic values must be preserved and pursued. Moreover, international economic institutions need to be legitimate. Thus, a question that the world faces within the discussion of a reform of the investor-state dispute settlement ("ISDS") system is how to achieve a democratic and legitimate ISDS framework. In theory, such a system would preserve equal sovereign space between all participant states, as well as safeguard each state's right to regulate in the public interest and to protect investors. The path to achieving this ideal system, however, would likely be contentious, even in the face of growing criticism about unequal treatment among member states, anti-democratic issues, and legitimacy problems.

Legitimacy concerns regarding the ISDS system, such as lack of coherence, predictability, and biased arbitrators, have been at the center of debates since cases were recorded under the Argentinian crisis in the early 2000s.¹ These concerns, however, were historically regarded as a problem from the global south,² and thus little attention was given to those countries who were criticizing ISDS,³ or to Third World Approaches to International Law scholars.⁴ These legitimacy concerns finally received the attention of the European Union (EU), and became a global problem when private companies began to file claims in EU's own backyard. From 1999 until May 18,

¹ See Lluís Paradell-Trius, *The Legitimacy of Investment Treaties: Between Exit, Voice, and James Crawford's Quest for a More Democratic International Law*, in SOVEREIGNTY, STATEHOOD, AND STATE RESPONSIBILITY: ESSAYS IN HONOUR OF JAMES CRAWFORD 90, 90 (Christine Chinkin & Freya Baetens eds., 2015) (describing the Argentinian Attorney General's complaints in 2003 surrounding investor claims); Horacio D. Rosatti, *Los Tratados Bilaterales de Inversión, El Arbitraje Internacional Obligatorio y el Sistema Constitucional Argentino*, at 1 (2003), <https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationlaw12arbitration.pdf> [<https://perma.cc/J63R-YD9J>].

² See Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 473 (2009) (describing the legitimacy crisis); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1523 (2005) (outlining the "looming legitimacy crisis").

³ In Venezuela, Hugo Chavez assumed his presidential seat in 1999. *Venezuela: Introduction*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ve.html> [<https://perma.cc/27LR-6NHB>]. In Argentina, Néstor Kirchner assumed his seat in 2003. *Argentina: Introduction*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ar.html> [<https://perma.cc/4G5T-E9LS>]. In Bolivia, Evo Morales assumed his seat in 2006. *Bolivia: Introduction*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/bl.html> [<https://perma.cc/D576-63NZ>].

⁴ M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 3–8 (3d ed. 2010).

2018, 213 claims were brought against EU states, amassing billions of dollars.⁵ These concerns festered when ISDS negotiations were launched between the EU, the United States of America,⁶ and Canada,⁷ and when the Australian Government decided to no longer include the ISDS in future international investment agreements (“IIAs”).⁸

In 2014, during ongoing trade and investment negotiations between the EU and the United States, the European Commission (EC) launched a public consultation on international investment and the ISDS.⁹ The results of the consultation and parliamentary debates, which considered criticisms from academia, human rights, consumer associations, and environmental organizations, gave the EU the tools to say that ISDS transformation was needed.¹⁰ The system was perceived as illegitimate,¹¹ partial, and opaque.¹² In fact, the EU concluded that the ISDS could not reliably be neutral and consistent.¹³ Most of the blame for the ISDS’s problems was put on the

⁵ See generally *Investment Dispute Settlement Navigator*, UNCTAD, <http://investmentpolicyhub.unctad.org/ISDS> [<https://perma.cc/Q7ZY-5DZ9>] (identifying international investor-state arbitrations).

⁶ In June, 2013 the governments of the EU member states gave the European Commission guidelines setting out what the negotiations should include, stating that the EU should seek to include provisions on investment protection and ISDS. See Ivana Kottasova, *America’s Free Trade Deal with Europe Is Dying*, CNN BUS. (May 4, 2016), <https://money.cnn.com/2016/05/04/news/economy/us-eu-trade-agreement-ttip-trump/index.html> [<https://perma.cc/C3WJ-75X9>]. Negotiations for an agreement—the Transatlantic Trade and Investment Partnership (TTIP)—started in July, 2013, but the process was abruptly stopped in 2017. See Federal Ministry for Econ. Affairs and Energy, *Transatlantic Trade and Investment Partnership (TTIP)*, BMWi, <https://www.bmw.de/Redaktion/EN/Dossier/ttip.html> [<https://perma.cc/N2VK-TGCJ>].

⁷ Negotiations concluded in August, 2014 and the treaty was signed in October, 2016. Comprehensive Economic & Trade Agreement, Can.-E.U., Oct. 30, 2016, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf [<https://perma.cc/P6QX-CJHL>].

⁸ Jürgen Kurtz, *Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW 257, 257–58 (Zachary Douglas et al. eds., 2014).

⁹ EUROPEAN COMM’N, COMMISSION STAFF WORKING DOCUMENT ON ONLINE PUBLIC CONSULTATION ON INVESTMENT PROTECTION AND INVESTOR-TO-STATE DISPUTE SETTLEMENT (ISDS) IN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AGREEMENT (TTIP), at 2 (Jan. 13, 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf [<https://perma.cc/HTK2-Q7H8>] [hereinafter EUROPEAN COMM’N, STAFF REPORT ON TTIP].

¹⁰ *Id.*

¹¹ See Brower & Schill, *supra* note 2, at 473 (outlining how the ISDS was seen as illegitimate). Commentators question the ISDS framework and ask whether there is a “[l]egitimacy Crisis” of investment law, and whether the investment protection is an obstacle to development. See *id.*

¹² EUROPEAN COMM’N, STAFF REPORT ON TTIP, *supra* note 9, at 14 (describing concerns about transparency in the public consultation).

¹³ Jean-Claude Juncker, President, European Commission, State of the Union (Sept. 13, 2017) [hereinafter Juncker State of the Union Address] (noting that the ISDS’s “ad hoc nature [could] not sufficiently guarantee impartiality and predictability”).

shoulders of the arbitrators themselves. To fix the problems with the ISDS, the EU proposed to replace the ISDS with a system that could guarantee transparency, consistency, predictability, and the possibility of appeal.¹⁴ Accordingly, in 2015, the EC proposed to include in future trade and investment negotiations an investment court system (“ICS”) such as the one negotiated with Canada and Vietnam.¹⁵ The ICS was announced as the blueprint for a proposed multilateral investment court (“MIC”).¹⁶ Under the EU’s proposal, ad hoc arbitrators would be replaced by permanent members of an ICS.

The EU has also managed to include its ICS and MIC proposals in the agenda of the United Nations Conference on Trade and Development (UNCTAD),¹⁷ the United Nations Commission on International Trade Law (UNCITRAL),¹⁸ and the Organization for Economic Co-operation and De-

¹⁴ See Directorate-General for Trade, *Inception Impact Assessment: Establishment of a Multilateral Investment Court for Investment Dispute Resolution*, EUROPEAN COMM’N, at 2 (Jan. 8, 2016), http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf [<https://perma.cc/ECS2-G75R>] [hereinafter *Inception Impact Assessment*] (noting that the EU proposed a system that provided “transparency, consistency, predictability and the possibility to appeal”).

¹⁵ According to the European Commission, CETA “is the EU’s most comprehensive FTA to date,” and future modernization of trade agreements with Mexico and Chile “should be comparable to, and compatible with, our FTA with Canada . . .” EUROPEAN COMM’N, *TRADE FOR ALL: TOWARDS A MORE RESPONSIBLE TRADE AND INVESTMENT POLICY* 30, 33 (2015), http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf [<https://perma.cc/DV4Z-W8DN>] [hereinafter EUROPEAN COMM’N, *TRADE FOR ALL*].

¹⁶ In the EU’s view, “a bilateral appellate mechanism should be included not only in TTIP, but should become a standard feature in all EU trade and investment agreements with other negotiating partners.” EUROPEAN COMM’N, *INVESTMENT IN TTIP AND BEYOND—THE PATH FOR REFORM: ENHANCING THE RIGHT TO REGULATE AND MOVING FROM CURRENT AD HOC ARBITRATION TOWARDS AN INVESTMENT COURT* 11 (2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF [<https://perma.cc/L4XJ-UH63>]. In the discussion paper from the expert meeting between Canada and the European Commission, however, it was stated that “it is not the intention of the European Commission nor of the Government of Canada to propose it as a model for the current discussions on the establishment of a permanent multilateral investment dispute settlement system.” EUROPEAN COMM’N, *DISCUSSION PAPER FOR EXPERT MEETING: ESTABLISHMENT OF A MULTILATERAL INVESTMENT DISPUTE SETTLEMENT SYSTEM* 1 (2016), http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf [<https://perma.cc/YUL6-AZ77>] [hereinafter *DISCUSSION PAPER FOR EXPERT MEETING*].

¹⁷ UNCTAD, *Improving Investment Dispute Settlement: UNCTAD Policy Tools*, IIA ISSUES NOTE, Nov. 2017, at 4–6, http://www.uncitral.org/pdf/english/workinggroups/wg_2/IIA_Issues_November_2017.pdf [<https://perma.cc/R8ES-G2VV>].

¹⁸ See U.N. General Assembly, *Possible Reform of Investor-State Dispute Settlement (ISDS)*, Note by the Secretariat, Comm’n on Int’l Trade Law, U.N. Doc. A/CN.9/WG.III/WP.142 (Sept. 18, 2017) (describing the ISDS reform proposal); see also U.N. General Assembly, *Possible Reform of Investor-State Dispute Settlement (ISDS)*, Submission from the European Union, Comm’n on Int’l Trade Law, U.N. Doc. A/CN.9/WG.III/WP.145 (Dec. 12, 2017) (same).

velopment (OECD).¹⁹ In 2017, the EC decided that UNCITRAL's forum was the prime forum to conduct further negotiations on the MIC.²⁰ Shortly thereafter, the EU began negotiations on ISDS reform in UNCITRAL.²¹

Although the imposition of a MIC has the potential to resolve some of the problems for certain exporting European countries and Canada, the Comprehensive Economic and Trade Agreement (CETA) blueprint does not. Should the CETA blueprint be the model implemented, it would not resolve questions concerning independence, impartiality, fragmentation, interpretive consistency, sovereign regulatory authority, or the risk of legislating from the bench, as its undertakings do not address such issues. These issues have a tendency to adversely affect small and medium economies ("SMEs") in Latin America, Africa, Asia, and eastern Europe, which despite being a majority of members in any international organization, neither have the means to influence multilateral negotiations nor appoint impartial members of the proposed MIC.

The political process of transformation of the ISDS employed in CETA has failed to show that MIC judges would be impartial, independent, and free of political or economic bias, or that the final treaty would not be interpreted adversely towards SMEs. To the contrary, knowing that a state's past behavior is the best predictor of its future behavior,²² one could predict that

¹⁹ See generally *Freedom of Investment Roundtables: Summary of Discussions*, OECD, <http://www.oecd.org/investment/investment-policy/oecdroundtablesonfreedomofinvestment.htm> [<https://perma.cc/3H69-CC68>] (collecting summary reports of OECD roundtables). For example, under the OECD's meetings, Canada and the EU prepared and chaired a discussion about the MIC in 2016. U.N. General Assembly, Settlement of Commercial Disputes, Investor-State Dispute Settlement Framework, Comments from International Intergovernmental Organizations, Addendum, Comm'n on Int'l Trade Law, at 3, U.N. Doc. A/CN.9/918/Add.7. (June 12, 2017). The issues of an ICS and the right to regulate were addressed during Roundtables 22, 23, 24, 25, and 26, between 2014 and 2017. *Id.* at 6–7.

²⁰ DISCUSSION PAPER FOR EXPERT MEETING, *supra* note 16, at 7–8; Juncker State of the Union Address, *supra* note 13.

²¹ On March 20, 2018, when the Council of the European Union declassified a document titled *Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes*, the strategy was clear. U.N. Secretariat, Note from the General Secretariat of the Council to Delegations, ¶ 4, U.N. Doc. 12981/17.ADD1.DCL1 (Mar. 20, 2018), <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf> [<https://perma.cc/RUV8-QUUE>]. The Press Release on March 20, 2018 was clear on this point, confirming that "[o]n the basis of the mandate provided by the Council, the Commission will start negotiations with its trading and investment partners in the framework of the United Nations Commission on International Trade Law (UNCITRAL)." Press Release, Council of the European Union, Multilateral Investment Court: Council Gives Mandate to the Commission to Open Negotiations (Mar. 20, 2018), <https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/pdf> [<https://perma.cc/28PZ-MFCD>].

²² See ZACHARY SHORE, A SENSE OF THE ENEMY: THE HIGH-STAKES HISTORY OF READING YOUR RIVAL'S MIND 149, 164 (2014) (describing the continuity heuristic, which describes how the best predictor of someone's behavior in the future is the person's behavior in the past).

future negotiations of a MIC would be tainted by illegitimate and anti-democratic means.²³

By reviewing the Hague and Paris Conferences and looking at the UNCITRAL agenda, one can see that the final result of the UNCITRAL negotiations might not sufficiently guarantee the impartiality, independence, and neutrality required for a legitimate world court, and the legitimacy concerns most likely will not vanish. Also, states from the global south and investors could be worse off with a MIC system because they will be deprived of the choice of who will decide their dispute. Moreover, there looms the danger that permanently appointed judges may not be as impartial as claimed by the EU.

Supporting commentary from the EU for changing the ISDS system includes implementing so called “modern provisions” in bilateral agreements—such as CETA and the EU-Vietnam Free Trade Agreement (FTA)—aimed at transforming the ISDS system to act like traditional courts, and by establishing a MIC.²⁴ It also notes that no agreement should limit the ability of the EU to take measures to achieve legitimate public policy objectives considered appropriate on consumer, environmental, social, and labor protection issues. The EU believes that the establishment of a multilaterally agreed-upon system for investment dispute resolution with a permanent body of judges could provide a significant degree of predictability and coherence. The EU criticizes the current ISDS framework for its lack of fairness and preservation of the right of public authorities to regulate.²⁵ This, together with the ISDS system’s criticized lack of neutrality and consistency, is a clear message about the lack of confidence in the arbitral college, and explains why the EU’s first step was to use its institutional power to remove the ISDS rulings from private hands to a public body.

The discussions are relevant today because a group of 27 sovereign states represented by the EU, which among them account for more than

²³ Such means to garner the SME’s consensus would include direct or indirect political pressures, veiled threats of cutting economic cooperation in other areas, limiting or avoiding the discussion on SME’s interests during negotiations, or controlling the rules of the new institution, which puts the principle of the sovereign equality of a group of countries on others. For example, in the Novartis cancer drug (Glivec) case, Colombia was warned that if it moved forward with the patent compulsory license, it could jeopardize funds from the United States to help the peace process in Colombia as well as future membership in TTIP. Zoe Williams, *Investigation: As Colombia Pushes for Cancer Drug Price-Cut and Considers Compulsory Licensing, Novartis Responds with Quiet Filing of an Investment Treaty Notice*, *IA REP.* (Nov. 30, 2016), <https://www.iareporter.com/articles/investigation-as-colombia-pushes-for-cancer-drug-price-cut-and-considers-compulsory-licensing-novartis-responds-with-quiet-filing-of-an-investment-treaty-notice/> [https://perma.cc/KF2V-XVPS].

²⁴ EUROPEAN COMM’N, *TRADE FOR ALL*, *supra* note 15, at 21.

²⁵ *Id.* The EU also cites as problematic the “risk of the abuse of provisions common to many of those agreements, as well as lack of transparency and independence of the arbitrators.” *Id.*

1,400 IIAs, have officially accepted the criticisms from some scholars and countries that the ISDS framework has deficiencies in its legitimacy, neutrality, transparency, consistency, and costs, and that a policy will need to be undertaken in the near future to try to solve these deficiencies.²⁶

Three questions arise from the call to reform: (i) could the EU's sole criteria suffice to address all the concerns about ISDS, or is there a need to put in place other interests before establishing a MIC; (ii) what previous experiences has the world had with European proposals of world courts; (iii) were the previous outcomes fair, or did they only allow western economies to control the judges?

This Essay addresses three issues that are central to the legitimacy of a world court. First, this Essay addresses the importance of a real global consensus. This Essay aims to show how the EU's proposal to establish a permanent MIC does not have sufficient global legitimacy because its agenda, objectives, and proposed rules were not agreed upon globally through formal international means. If the final aim is to create a multilateral institution that will wield global public authority that claims to be globally legitimate, it will need to be devoid of political pressures and follow basic democratic principles throughout its creation.²⁷ This entails holding formal, transparent, and comprehensive multilateral discussions to establish an agenda, then follow previously designed procedures that guarantee that export and import capital countries will have equal sovereign rights during the negotiations. Undue pressures that favor large, exporting countries' interests to limit their duty to protect investments on their home soil should also be avoided. The means used by the EU to set the world agenda in the past have leaned toward the use of power to obtain a questionable global consensus, and it is not clear if this trend will cease during the UNCITRAL negotiation.

Second, this Essay aims to show that the current process for implementing a MIC echoes prior European behavior during the Hague and Paris Conventions. This Essay compares political and theoretical discussions that took place during the Hague's Second Conference of 1907,²⁸ when the Permanent Court of Arbitral Justice (PCAJ) was established, and in the Paris Conference of 1919 when the establishment of a Permanent Court of International Justice

²⁶ *Inception Impact Assessment*, *supra* note 14.

²⁷ See generally ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION (Thomas Dunlap trans., 2014) (discussing the public authority of courts). The approach of the proposed MIC is functional, and thus a prospective MIC will tend to unify criteria and universalize concepts under a fragmented notion.

²⁸ One of the aims of the conference was to create a binding international court for compulsory arbitration to settle international disputes, which was not accepted. Instead, a voluntary arbitration was approved.

(PCIJ) was discussed.²⁹ These two projects sought to solve Europe's persistent war problems. In both instances, European powers used their influence to multilateralize their own interests when sketching the proposals to establish a world court, without considering the interests of SMEs, which were not included in the text of the Conventions. The current MIC negotiations could repeat the same history, evidenced by the EU's behavior in other treaties and organizations, such as UNCITRAL, EU-Vietnam FTA, and the CETA blueprint. In other words, the EU's proposal would not change the treaties' asymmetric conditions, such as the provisions that allow developed countries to have control over the members of the court through their appointment and veto, which will endanger their independence and impartiality.³⁰

Third, this Essay tries to address concerns about the potential lack of independence and impartiality of the future MIC judges in light of the currently proposed appointment process. The EU has suggested following the World Trade Organization's (WTO) Appellate Body or the International Court of Justice's (ICJ) opaque and politicized appointment procedures that will likely give rise to biased, politically-pocketed judges. Accordingly, if the purpose for creating a MIC is to ameliorate issues relating to the lack of independence, impartiality, transparency, and neutrality of arbitrators, the lack of transparency as seen in CETA's blueprint will breed a lack of legitimacy if employed in a MIC's creation, as appointments are at risk of being influenced by the States that have the power to veto and impose the judges that follow their interests.

In sum, there is no need to completely discard the current ISDS system because the main concerns about the ISDS include fixable issues, like arbitrator independence, impartiality, and consistency. Before dismantling an institution that existed before Hugo Grotius,³¹ the EU should consider a few alternative solutions. First, unifying the language of substantive obligations in IIAs through a multilateral treaty to ensure consistency. Second, making changes regarding controlling arbitrators' powers and duties, such as clarifying that the creation of obligations are within states' power, and that arbitrators that are chosen for the appellate proceedings do not hear cases in the first-tier proceedings. Third, providing a clearer set of rules that guarantee the independence and impartiality of arbitrators, and adopt better rules for arbitra-

²⁹ Article 14 of the League of Nations gave the Council of the League the task for formulating plans for the establishment of a PCIJ. *History, INT'L COURT OF JUSTICE*, <http://www.icj-cij.org/en/history> [https://perma.cc/RCM7-5RBJ].

³⁰ Manfred Elsig & Mark A. Pollak, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUR. J. INT'L REL. 391, 398 (2014).

³¹ See HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 1123 (Richard Tuck & Jean Barbeyrac eds., Liberty Fund 2005) (noting that one way to prevent war is arbitration).

tor disqualification. Fourth, implementing clear interpretative directives to avoid legislation from the bench and stricter arbitrator's qualifications.

I. A DEMOCRATIC MULTILATERAL INVESTMENT COURT

The EU has limited the discussion of ISDS reform to implementing a judicial system that balances investors' rights while safeguarding the state's right to regulate.³² At the same time, the EU has expressed concerns about arbitrators' decisions and their independence and impartiality.³³ To ensure that the process of creating such a judicial system is fair and free from political pressure, the process must be based on democratic principles, or at the very least, providing all participating states an equal sovereign voice. Unfortunately, this did not occur: the EU did not include a discussion on how an ISDS system should be democratically constructed, nor did it follow democratic principles during discussions for the creation of the proposed MIC.

It is important that international institutions be democratically constructed because institutional legitimacy is a byproduct of the usage of democratic procedures throughout their creation. An international institution created through formal consensus might be legal and binding, but might have legitimacy deficits if certain affected states are not allowed to voice their interests, causing those interests to be neither discussed nor considered. In the absence of a democratic process, certain states (particularly smaller states without much bargaining power) may be subjugated and taken advantage of to obtain their consensus. Legitimacy would entail that an international court be built through democratic procedures and rules, open to the deliberation of all affected subjects, with the discussion of the initial agenda to the final approval of it devoid of political pressures to obtain the consensus. I do not claim here that there is a problem with the efficacy, or the fairness, of judicial decisions.³⁴ Collaborative, deliberative policy and global communicative procedures are necessary, however, to create a system imbued with fidelity.³⁵

³² *Freedom of Investment Roundtables: Summary of Discussions*, *supra* note 19, at 6–7.

³³ See *Inception Impact Assessment*, *supra* note 14 (describing identified problems in the ISDS system).

³⁴ See Mortimer N.S. Sellers, *Democracy, Justice, and Legitimacy of International Courts*, in *LEGITIMACY AND INTERNATIONAL COURTS* 338, 338–40 (N. Grossman et al. eds., 2018) (discussing the difference between a court being effective at advancing justice and a court being legitimate).

³⁵ JOSÉ M. ALVAREZ, *EL INTERÉS NACIONAL EN COLOMBIA* 200–01 (Universidad Externado de Colombia ed. 2003). See generally JURGEN HABERMAS, *BETWEEN FACTS AND NORMS, CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 287–328 (William Rehg trans., 1996) (discussing the procedural deliberative process).

To proceed with a change to the ISDS system, the democratically obtained consent of all parties is needed. In an effort to sway votes in its favor, and conscious of the power that can be displayed over less-developed economies to change the ISDS framework, the EU has behaved questionably when it informed Asian, African, and Latin American countries of its plan for reform, noting that it intended to cause a “transformation” of the ISDS system and taking for granted that everyone will comply with its proposal.³⁶

Despite the *prima facie* consensus obtained by the EU to start discussions about the establishment of a permanent MIC, legitimacy deficiencies still exist. The EU did not use a multilateral process of formal, transparent, and comprehensive discussions with other states to set up the agenda where the ISDS system and the IIAs regime could be transformed. Considering that there are more than 3,300 IIAs signed by approximately 180 countries, formal discussions could occur before launching negotiations in UNCITRAL with a pre-established agenda. Moreover, the basic democratic principle of equal sovereign participation was not followed. The few EU internal consultations, UNCITRAL and OECD discussions, and informal consultations with some countries do not provide the necessary legitimacy to say that the agenda had a global consensus.³⁷

This process is wrought with the same political deficiencies that have led to the creation of the International Center for Settlement of Investment Disputes (ICSID). As in the ICSID, the informal opinions of some developing countries are heard, but are not truly taken into account. The means used by the EU to propose a MIC has shown an inclination towards the use of power to obtain a questionable global consensus even from the beginning of its proposal.³⁸ It is not clear that this trend would be stopped during the UNCITRAL negotiation.

On the future of the MIC, should an investment court, with the support of the United States, succeed in future trade and investment agreement, the global agenda for ISDS would be settled along with the whole content of

³⁶ See EUROPEAN COMM’N, TRADE FOR ALL, *supra* note 15 (proposing a “transformation” of the ISDS framework). The EU announced that Mexico and Chile’s agreements will be changed according to its blueprint. EUROPEAN COMM’N, INCEPTION IMPACT ASSESSMENT: ESTABLISHMENT OF A MULTILATERAL INVESTMENT COURT FOR INVESTMENT DISPUTE SETTLEMENT 1 (2016), http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf [<https://perma.cc/Z9LW-KEP6>].

³⁷ See generally *Freedom of Investment Roundtables: Summary of Discussions*, *supra* note 19 (summarizing OECD discussions); Note from the General Secretariat of the Council to Delegations, *supra* note 21 (identifying the directives prioritized by the EU).

³⁸ See VON BOGDANDY & VENZKE, *supra* note 27, at 156 (discussing the importance of obtaining meaningful consensus when seeking to build legitimate international courts).

the changes, leaving no space for the rest of the world to influence the agenda or its contents.

II. LEARNING FROM HISTORY

The EU initiative for the establishment of a MIC is not the first attempt to create an international court for the protection of foreign property and business. In the Hague's First and Second Conferences of 1899³⁹ and 1907,⁴⁰ the inviolability of private property at sea in time of war was discussed, and it was decided that arbitration was the proper mechanism to resolve disputes between states regarding these issues.⁴¹ In 1907, the creation of PCAJ was discussed.⁴² In 1919, the creation of another court was discussed in the Paris Peace Conference, where the Covenant of the League of Nations was presented by western powers. During this twenty-year period, these three international conferences shared four common features: (i) how, and by whom, would disputes be resolved between countries; (ii) the incapacity of non-western states to influence in the outcome of the conferences; (iii) the discussions between western states—some Europeans and the United States—with peripheral ones on the principle of equal sovereignty of States, which transcended to the court composition; and (iv) the disturbing questions of racial equality and the standard of civilization. Now, in a similar substratum as one hundred years ago, the interests of SMEs interests do not have equal voice and participation in the creation of the proposed MIC, nor do they have equal international sovereignty rights in practice.

³⁹ MINISTRY FOR FOREIGN AFFAIRS, THE INTERNATIONAL PEACE CONFERENCE: THE HAGUE, MAY 18–JULY, 29, 1899, at 46, 114, 411, *translated in* THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES (1920) [hereinafter 1899 HAGUE CONFERENCE].

⁴⁰ MINISTRY FOR FOREIGN AFFAIRS, THE SECOND INTERNATIONAL PEACE CONFERENCE: THE HAGUE, JUNE 15–OCTOBER 18, 1907, at 350, *translated in* 1 THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES (1920) [hereinafter PROCEEDINGS OF 1907 HAGUE CONFERENCE VOL. I]. Article 1 of the "Project for the Establishment of a Court of Arbitral Justice" stated:

With a view to promoting the cause of arbitration, the contracting Powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Court of Arbitral Justice, of free and easy access, composed of judges representing the various juridical systems of the world, and capable of ensuring continuity in arbitral jurisprudence.

Id. See generally Arnulf Becker Lorca, *Sovereignty Beyond the West: The End of Classical International Law*, 13 J. HIST. INT'L L. 7 (2011) (discussing the proceedings at the Hague conferences); Liliana Obregón, *The Third World Judges: Neutrality, Bias, or Activism at the Permanent Court of International Justice and International Court of Justice?* in RESEARCH HANDBOOK ON INTERNATIONAL COURTS AND TRIBUNALS 181, 182–84 (William A. Schabas & Shannonbrooke Murphy eds., 2017) (same).

⁴¹ PROCEEDINGS OF 1907 HAGUE CONFERENCE VOL. I, *supra* note 40, at 350.

⁴² *Id.*

At the dawn of the twentieth century, European powers and the United States used their power to control discussions in the Hague and Paris Conferences. They wanted to secure the outcome of the rules, to get the consent of the invited countries, to have the text of the agreements signed, and to secure a favorable interpretation of the agreed texts by securing the appointment of the judges.⁴³ Also, during the conferences, non-western states' proposals, which looked for the recognition of equal sovereignty among states and sought equal right to appoint non-western judges, were systematically rejected.⁴⁴

In the first peace conference of 1899 at the Hague, only a few countries had the chance to participate. The invitation of the Queen of the Netherlands was limited to the European powers, the United States, China, Mexico, Persia, and Turkey, to discuss the proposal of the Russian Emperor.⁴⁵ Thus, as recognized at the beginning of the meeting, discussions were held with the aim of solving the persistent European war problem within this region for more than twenty-four centuries.⁴⁶ Despite this aim, however, there was not much discussion on how to prevent future wars. On the contrary, the invited participants instead devoted time to discuss how they should act during their wars.⁴⁷

The 1899 Convention for the Pacific Settlement of International Disputes was open to the participation of other states, but those new adherents would not have the same rights as the attendees to the conference, and would be subject to conditions to become members.⁴⁸ The agenda and committees were managed by Russia, France, England, Germany, and the United States, and the voices of Mexico, Siam, and China were only heard at the time of voting or adhering to propositions.

⁴³ See generally 1899 HAGUE CONFERENCE, *supra* note 39; PROCEEDINGS OF 1907 HAGUE CONFERENCE VOL. I, *supra* note 40; DAVID HUNTER MILLER, THE DRAFTING OF THE COVENANT 621–22 (1928) (summarizing the Hague conferences).

⁴⁴ See Becker Lorca, *supra* note 40, at 45 (describing the rejection of Japan's racial equality proposal); PROCEEDINGS OF THE 1907 HAGUE CONFERENCE VOL. I, *supra* note 40, at 330–32 (describing calls by non-western states for equality).

⁴⁵ See 1899 HAGUE CONFERENCE, *supra* note 39, at 9 (noting the states present at the conference).

⁴⁶ *Id.* at 14.

⁴⁷ A number of declarations about the regulation of war were signed by the majority of participants, including the adaptation to maritime warfare of the principles of the Geneva Convention, the regulation of the laws and customs of war on land (such as the rights and duties of neutrals, the bombardment of undefended ports, the inviolability of private property in time of naval war, etc.), the prohibitions of throwing projectiles from balloons, the prohibition of asphyxiating gas, and the prohibition of expanding bullets, among others. See *id.* at 247–66 (outlining the declarations signed by the participants at the conference).

⁴⁸ See *id.* at 215–18 (summarizing the meeting which gave other states rights, but not to the degree of the Great Powers).

At the 1907 Convention for the Pacific Settlement of International Disputes, the second such peace conference, the invitation was extended to forty-four states, including eighteen from Latin America and three from Asia. Irrespective of the bigger participation of non-western states, the agenda was again set by large, economically influential powers, and was predominantly carried out to discuss the regulation of war.⁴⁹ The Commission appointed at the Conference to discuss dispute settlement began its work by revising the convention of 1899. The United States presented a project for the establishment of a tribunal, open to all signatory powers, but Belgium opposed this because permanent adjudicators would abolish the freedoms enjoyed by states to choose their own arbitrators.⁵⁰ England replied by stating that the question was not to supplant the Permanent Court, but to create a new court in addition where the choice would be free to the nations.⁵¹

When voting upon the draft Convention respecting the limitation of the employment of force for the recovery of public contract debts, at the Hague Peace Conference of 1907, Argentina, followed by other Latin American states, had reservations about debt arising from ordinary contracts, where arbitration could be used in instances of denial of justice by the courts of the debtor country and that national debt, would not give rise to military aggression or the material occupation of the soil of American nations in any case.⁵² Peru, Colombia, and El Salvador all voted for the United States' proposal concerning contract debts, but under a specific reservation.⁵³

At the Paris Peace Conference of 1919, neutral states were invited, but again with limited capacities to intervene. England pointed this out in an unofficial meeting, where it advised them that Great Powers simply wanted

⁴⁹ Of the thirteen conventions finally agreed upon, only one was about a subject other than war. See PROCEEDINGS OF THE 1907 HAGUE CONFERENCE VOL. I, *supra* note 40, at 599–696 (identifying the agreed-upon conventions).

⁵⁰ *Id.* at 348.

⁵¹ *Id.* at 348–49. Arbitration would be mandatory for the recovery of contract debts to limit the use of force to collect them from non-western States. *Id.* at 616. Scholars provide a decent account of the discussions given to the U.S. proposal, and how James Brown Scott “juggled” in explaining that the court’s judgments would respect the independence and equality of states. Becker Lorca, *supra* note 40, at 27–28.

⁵² PROCEEDINGS OF THE 1907 HAGUE CONFERENCE VOL. I, *supra* note 40, at 330–31. Paraguay, Nicaragua, and Guatemala adhered to the reservations of Argentina, but Ecuador and Uruguay made reservations in the First Commission. *Id.* at 331–32. Forty-four delegations took part in the voting and five abstained. *Id.* at 332.

⁵³ See *id.* at 331 (agreeing with the reservation that “the principles established in this proposition cannot be applied to claims or controversies arising out of contracts made by the Government of a country with foreign subjects, when in these contracts it is expressly stipulated that these claims or controversies should be submitted to the judges of the tribunals of the country”).

to have them consider the project, but not to actually have any meaningful impact.⁵⁴

Another example of how power was used by western states is the discussion about the composition of the League of Nations Executive Council. The Great Powers gave themselves a permanent seat each as well as the power to appoint the remaining members. Chile indicated that it should not only be the five Great Powers who chose which four would represent the smaller states.⁵⁵ England, however, responded that the original proposal did not provide for representation on the Executive Council of the smaller powers.⁵⁶

Another important aim of the Great Powers was securing the status quo on controlling the sources of international law through jurisprudence. Thus, the reasons given for creating a permanent international court were that judges would not only develop but, in the course of time, create a system of international jurisprudence. The new arbitral court would not likely stray from previous decisions, unless there was a very strong reason to do so. Moreover, because their decisions would be precedent for future decisions, the arbiters would take time and effort in the opinions they crafted.⁵⁷

As for the neutrality of the court, some countries doubted its impartiality, such as Japan after PCAJ decided a case against it in 1903. This experience taught Japan that international law as it was, dominated by European Powers, worked against their interest, and that there was an inherent prejudice against them, so they saw international law as a set of technical tools to be manipulated by the Great Powers.⁵⁸

Non-western states' proposals were rejected. The demand for legal equality by non-European countries was opposed, because in the opinions of the Europe and the United States, these states did not pass the test of civilization to enjoy legal equality. The test of civilization refers to the alleged

⁵⁴ MILLER, *supra* note 43, at 621–22. Lord Cecil, the English delegate, said the other states were there “not to discuss at that meeting the general principles which should underlie the League, but to hear what particular alterations or amendments the neutral States desired to see in the Covenant.” *Id.* Argentina, Chile, Colombia, Denmark, Holland, Norway, Paraguay, Persia, Salvador, Sweden, Switzerland, and Venezuela were the neutral states. *Id.*

⁵⁵ *Id.* at 624, 634. Denmark proposed that the Executive Council be composed of two representatives from each of the Great Powers, the United States, Britain, France, Italy and Japan, and eight from the other members of the League, “at the meeting of the Body of Delegates in accordance with such principles and conditions as it shall deem fit.” *Id.* at 634.

⁵⁶ *See id.* at 624.

⁵⁷ PROCEEDINGS OF THE 1907 HAGUE CONFERENCE VOL. I, *supra* note 40, at 351.

⁵⁸ *See* Hisashi Owanda, *Japan, International Law, and the International Community*, in JAPAN AND INTERNATIONAL LAW: PAST, PRESENT, AND FUTURE 347, 355–56 (Nisuke Ando ed., 1999) (describing Japan’s discontent after the Yokohama House Tax Case); *see also* Becker Lorca, *supra* note 40, at 40 (describing how Owanda believes Japan was disillusioned with the international court after this decision).

superiority of Europe by scholars such as T.J. Lawrence who argued that international law was not limited to Christian states, but also applied to non-Christian states that are civilized and have adopted the “European international code.”⁵⁹ For Lawrence, recognizing a greater number of sovereign states did not mean that all of them would necessarily be considered equal. This is because westerners were thought to be able to speak for everyone, as opposed to the claim of non-westerners that deducted from sovereignty the principle of absolute equality in the configuration of the new court and in the treatment and application of the law.⁶⁰

Some western European delegates showed their power when they affirmed they would not need non-western states’ consent to approve a convention. Should strict equality be recognized in international agreements, too much power would be given to weak states,⁶¹ which would threaten the privileges of western countries, and could pose future problems.⁶² Western jurists used the doctrine of the “standard of civilization” to justify the exclusion of non-western claims for equal sovereignty.⁶³ As Becker Lorca described, “ideas supported by semi-peripheral authors are ‘old,’ too formalistic in their attachment to the principle of sovereignty, whereas ideas advanced by Western authors at the center are ‘modern,’ attuned with the imperatives of time and closer to the real nature (anarchic) and needs (interdependence) of the international community.”⁶⁴

When core states were confronted with well-reasoned arguments regarding the right to equality, however, they moved forward to create theories and justifications to impede absolute equality for semi-peripheral states from Latin America, Asia, and the Middle-East, coming from general rules

⁵⁹ Becker Lorca, *supra* note 40, at 51–52.

⁶⁰ T.J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 4–5, 65–67 (1895); Becker Lorca, *supra* note 40, at 51–52; see JAMES LORIMER, *THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES* 170–72 (1883) (describing how equality among states was a fiction).

⁶¹ See Becker Lorca, *supra* note 40, at 56 (noting concerns of western countries regarding the policy of equality among all nations). Frederick Charles Hicks noted that “the doctrine of equality was untrue in its origin, was preserved in international law by a verbal consent which is not followed by performance.” Frederick Charles Hicks, *The Equality of States and the Hague Conferences*, 2 AM. J. INT’L L. 530, 535 (1908). And that “in the absence of international organizations, states have no rights but powers. Thus there no need to premise rights of states to be equal.” *Id.* at 534.

⁶² See Becker Lorca, *supra* note 40, at 56 n.137 (noting that “[t]he British Bluebook” on the Hague Conference stated that “[t]he claim of many smaller states to equality as regards not only their independence, but their share in all international institutions . . . is one which may produce great difficulties, and may perhaps drive the greater Powers to act in many cases by themselves”).

⁶³ Becker Lorca, *supra* note 40, at 57.

⁶⁴ *Id.* at 51.

of nature as the Swiss delegate, Max Huber, noted at the 1907 Hague Conference.⁶⁵

The controversy that emerged between powerful and less powerful states regarded the scope of intervention by Great Powers in small nations' internal policies and world affairs. Powerful states advocated to maintain their power to decide on the substance of the law, on its scope, on the category of rights that can be given to less powerful countries, and on the judges that can resolve the differences between the states. Less powerful states struggled to be taken into account on the construction of the international rule of law, and to be judged on the same grounds as powerful states.

At the Second Hague Conference, Latin American states affirmed their membership in the world of civilized nations to claim their sovereign status, although some powerful countries tried to deny this status. On equal sovereignty, Brazil opined that everyone's sovereignty should be respected by virtue of having been invited.⁶⁶ Some countries justified a court based on unequal power over the conformation of the court by claiming that the Great Powers were not willing to subject their claims to judges from other nations.⁶⁷ Smaller states, however, resisted this claim.

The proposal of appointing rotating judges, giving preference to those from Germany, France, the United States, and the United Kingdom, generated great disagreement among Western powers and Latin American states. James Brown Scott, as Reporter of the Commission on the Court of Arbitral Justice, recognized the equality of every state, and that any distinction between large and small states was not proper to international law. He also said, however, that an "abstract right to equality" would not allow the court to have a representative from all nations sitting on it.⁶⁸

Scott tried to convince smaller nations that there was a method independent of the question of power, which did not give priority to the relative

⁶⁵ *Id.* at 62–63. Huber noted "States other than great powers, which invoked state equality, have neither given reasons for the necessity of legal equality nor distinguished the meaning. They started out assuming this proposition to be at the basis of international law and to stand as a matter of principle beyond discussion." *See id.*

⁶⁶ MINISTRY FOR FOREIGN AFFAIRS, THE SECOND INTERNATIONAL PEACE CONFERENCE: THE HAGUE, JUNE 15–OCTOBER 18, 1907, *translated in* 2 THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES 620 (1921) [hereinafter PROCEEDINGS OF THE 1907 HAGUE CONFERENCE VOL. II] (arguing "if States excluded from the First Peace Conference have been invited to the Second, it is not with a view to having them solemnly sign an act derogatory of their sovereignty by reducing them to a scale of classification which the more powerful nations would like to have recognized"); Becker Lorca, *supra* note 40, at 32 n.66.

⁶⁷ Becker Lorca, *supra* note 40, at 33 n.67; *see* PROCEEDINGS OF THE 1907 HAGUE CONFERENCE VOL. II, *supra* note 66, at 150 (referring to such judges from these countries as "the most corrupt and most backward States of Asia and of South America").

⁶⁸ Becker Lorca, *supra* note 40, at 28.

strength and weakness of nations, to appoint a smaller number of judges without violating the sovereign equality of states. He referred to this as the “material interests” of the state.⁶⁹ A state’s material interest would depend on the frequency of its interactions with other states. This implied that an analysis of a state’s population, commerce, and industry would become a way to determine the composition of the court. Therefore, a nation with a large population, along with commercial and industrial interests, would need “to have a constant representation in the court, in order that its interests may be protected and safeguarded by a judge of its own choice.”⁷⁰

Scott also argued to less powerful countries that the joint proposal presented by the United States, Germany, and Great Britain did not violate the principle of sovereign equality. Under this proposal, every state would appoint a judge, thus permitting equality of representation, but judges would rotate, serving for lengths of time that would depend on a state’s ranking.⁷¹ The countries’ classification based upon population, commerce, and industry always placed Germany, the United States, Austria-Hungary, France, Great Britain, Japan, and Russia on the top of the list, who would serve for the full period of twelve years; Spain, the Netherlands, and Turkey would serve for ten years; China, four Latin American States, and other small European countries for four years; Persia, and the other sixteen Latin American states for one year.⁷² Scott went on to suggest to peripheral states to move beyond formalisms because international law had moved in a new direction based on the solidarity of interests and the needs of the people.⁷³ Brazil opposed the proposal and proposed a new project, which was not discussed at all

⁶⁹ *Id.*

⁷⁰ PROCEEDINGS OF THE 1907 HAGUE CONFERENCE VOL. II, *supra* note 66, at 610 (noting that “industry and commerce give rise to conflicts, and that it may well be that a nation with a very numerous population, and with large commercial and industrial interest, feels it necessary to have a constant representation in the court, in order that its interests may be protected and safeguarded by a judge of its own choice”). Scott also recognized that the “systems of law. . . existing in the civilized world should be considered . . .” *Id.*

⁷¹ Becker Lorca, *supra* note 40, at 29.

⁷² PROCEEDINGS OF THE 1907 HAGUE CONFERENCE VOL. II, *supra* note 66, at 612–13 (showing the entire chart).

⁷³ Becker Lorca, *supra* note 40, at 59. Becker Lorca summarizes Scott’s view:

[T]he system of rotating judges . . . limits a small state’s exercise of the right to equality, but it does so based on the needs and the nature of the international community. If the international community is not perfectly homogeneous, its institutions cannot mirror absolute equality . . . [i]n Scott’s view, the method he proposed to select judges did not reflect power equations, but a state’s different levels of international interaction and commerce, its experience and legal traditions.

Id. at 60.

because the committee was not competent to examine an entirely new project.⁷⁴

The proposal of appointing the judges by rotation, giving preference to Great Powers, was ultimately defeated. To avoid a failure of the Second Hague Conference, Great Britain "proposed a diluted *voeu*, a recommendation for signatory states to adopt the project, and a recommendation to put the convention into force as soon as agreement had been reached in relation to the selection of judges."⁷⁵ Most of the committee that examined the proposals for the pacific settlement of international disputes approved the project and the *voeu* with declarations and reservations. The project then went to the First Commission of the Hague's Peace Conference of 1907, where other semi-peripheral states voiced their views opposing to the principle of inequality. For example, Mexico declared that its vote was conditioned on the equality of states being recognized in future negotiations, the principle of equality of states not being violated, and that it had to be "respected and maintained as the basis of the election of the judges and the organization of the Court."⁷⁶ Other Latin American countries, such as Colombia, El Salvador, and Guatemala, adhered to the reservations and declarations made by Brazil, which similarly recommended the new court of arbitration respect equal sovereignty.⁷⁷ Haiti declared it would accept the principle of establishing a court under similar conditions,⁷⁸ as did Venezuela.⁷⁹

In 1919, at the Paris Peace Conference, the discussion about the principle of equality of all states arose again. Japan proposed to include in the Covenant of the League of Nations a clause recognizing the principle of racial equality to reassure equal treatment by western powers. This clause declared equality between races, and entitled participation in the regime of

⁷⁴ See PROCEEDINGS OF THE 1907 HAGUE CONFERENCE VOL. II, *supra* note 66, at 624; Becker Lorca, *supra* note 40, at 31.

⁷⁵ Becker Lorca, *supra* note 40, at 33.

⁷⁶ PROCEEDINGS OF THE 1907 HAGUE CONFERENCE VOL. I, *supra* note 40, at 327 (stating their vote "is cast under condition that, in future negotiations between Governments, the principle of equality of states shall not be violated and that, on the contrary, it shall be respected and maintained as the basis of the election of the judges and the organization of the Court").

⁷⁷ *Id.* at 327–28 (noting "under the absolute condition that the actual observation of the principle of the equality of sovereign States be understood, as it was defined by . . . the subcommittee, which rejected the system of rotation and that of the choice of judges by foreign electors").

⁷⁸ *Id.* at 328 (saying they supported it "under the formal condition that the constitution thereof be based upon the legal equality of States").

⁷⁹ *Id.* (voting "in favor of the British *voeu* provided it be understood that the principle of legal equality of States is to be recognized in all cases in the constitution of the court and in the choice of judges"). Uruguay abstained from voting, but declared that "international justice may not be established except upon the basis of the legal equality of States." *Id.*

equality reserved to civilized nations. This proposal was ultimately defeated, despite the support of Brazil, China, and Romania.⁸⁰

At the final meeting of the Commission on the League of Nations, Japan presented a second proposal to include in the Covenant's Preamble of the League of Nations, endorsing the principle of equality of nations and the just treatment of their nationals. Britain opposed the proposal, however, arguing that the racial question encroached on the sovereignty of League members. Japan then asked the Commission to put the amendment to a vote, and it obtained a majority of votes, but the United States rejected the amendment because it had not received unanimous approval.⁸¹

Switzerland, Denmark, Norway, and Sweden proposed amendments objecting to compulsory arbitration but not to the creation of a judicial court. On the composition of the court, Denmark declared that the equality of states was crucial.⁸²

To conclude, between 1907 and 1919, international courts' composition by western judges was secured through power in the treaties that created them. Internationalists in the late nineteenth century and early twentieth century interpreted international law on the basis of assumptions that larger, more economically powerful countries knew best, giving different applications to the state's sovereign equality, depending on whether a country was sufficiently economically robust. This shifted the influence from a truly fair and unbiased court to one that entrenched large countries' power. This could be perpetuated today with biased investment judges deciding according to similar political considerations on the state's sovereign space of developed and developing states, hence breaking sovereign regulatory equality once again. Furthermore, this is a concern that has not been even arisen in the ICS, which if not addressed properly, could arise in the proposed MIC, where the appointment of judges could be highly politicized.

⁸⁰ Becker Lorca, *supra* note 40, at 42–43. Japan's proposal stated:

The equality of nations being a basic principle of the League of Nations, the High Contracting Parties agree to accord, as soon as possible, to all alien nationals of States members of the League, equal and just treatment in every respect, making no distinction, either in law or fact, on account of their race or nationality.

Id. at 43.

⁸¹ MILLER, *supra* note 43, at 389–92; Becker Lorca, *supra* note 40, at 44–45.

⁸² MILLER, *supra* note 43, at 628. Spain, Switzerland, and Sweden were also concerned about the “juridical equality of States,” and commented that this principle should be taken into account. *Id.* at 629. Moreover, “the representative of Colombia said that his government assented in principle to the Covenant, which ought to be based on the juridical equality of States.” *Id.* at 632.

III. THE CASE OF THE INTERNATIONAL COURT OF JUSTICE AND THE WORLD TRADE ORGANIZATION APPELLATE BODY

The EU has shown that it has the power to lead the ISDS reform. It has legitimized itself, stating that the need for reform has been recognized globally and that no country is satisfied with how it is working.⁸³ As support for this statement, the EU references UNCTAD's works, the internal EU consultation, and some consultations with other unknown countries as a reference of the world's discontent. The EU believes that it is in the best position to foster reform and has the responsibility to lead the reform as the founder and the main actor.⁸⁴ The EU's concerns over the legitimacy of the ISDS due to the lack of arbitrators' accountability, however, will not likely be solved by having permanent judges or by a formal public character of the MIC. This is because, should those judges be appointed in the same manner as the WTO appellate body or ICJ judges, they will not likely be independent because their appointment and performance may be subject to political pressures from some states that have more capacity to influence in the construction and control of the international institution.⁸⁵

Judicial independence is an important prerequisite for the credibility and legitimacy of international courts and tribunals. This merits a close review of standards of judicial independence and impartiality, to avoid any kind of bias by possible MIC judges and to ensure their independence from political organs,⁸⁶ states, or investors.

The EU posits that judges that are appointed in advance of any particular dispute and serve fixed terms would be independent, and thus more effective at resolving disputes than ad hoc arbitrators. But independent tribunals may pose a danger because they can render decisions that conflict with the interests of state parties, so states will be reluctant to use international tribunals unless they have degree of control over the outcome.⁸⁷ Commentators have noted, however, that ad hoc arbitrators would be more successful,

⁸³ EUROPEAN COMM'N, *TRADE FOR ALL*, *supra* note 15, at 21

⁸⁴ *Id.*; UNCTAD, *WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE* (2015), http://unctad.org/en/PublicationsLibrary/wir2015_overview_en.pdf [<https://perma.cc/T4DA-2PBQ>].

⁸⁵ In the case of Chile and Mexico, the EU has announced these countries will take a second step in the near future to "modernise" and make compatible their FTAs (Free Trade Agreements) with the "FTA with Canada and the future agreement with the United States." EUROPEAN COMM'N, *TRADE FOR ALL*, *supra* note 15, at 33.

⁸⁶ Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271, 283–84 (2003).

⁸⁷ Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 7 (2005).

in terms of independence, because they do not bend to the interests of states.⁸⁸ Nevertheless, experience has shown differently.

Investment arbitrators are currently chosen by the parties to a dispute. The reasons to appoint an individual may vary, yet each party expects that its nominee shares the same or similar values, or is at least closer to its interests.⁸⁹ Similarly, it would be expected that when states nominate or appoint a judge for the ICS or MIC, they will know that the judge may be involved in deciding a case that has an impact on its budget and public policies, or even having sovereignty costs by the judicial decisions which states seek to diminish.⁹⁰ Thus, States most likely want to ensure the nomination of someone who they can trust.⁹¹

Judicial nominations are formal acts by a state, typically made by proposing to an international body the name of its candidate, followed by the appointment of the individual at the plenary power of the institution. On the other hand, the process of selecting national nominees is an informal one, not requiring any sort of formal announcement, and is sometimes driven by political decisions or a local lobby. Thus, for the international court, states will further attempt to appoint judges whose preferences are relatively similar to their own.⁹²

In the case of a MIC, it is foreseeable that there will only be a few seats for judges. This will result in a competition among the different interests from the states, in which political power will play an important role to control the court. That power would need to be shaped by clear and transparent rules to avoid inequality and biased judges.

In selective representation courts, for example, the nomination of candidates is the first stage at which nominees are weighed.⁹³ A selection is made from a number of candidates by either a voting rule of majorities, or consensus among the states-parties, the former which requires a significantly higher threshold and provides member states a de facto veto over other states' candidates.⁹⁴ Such veto power is now being used by larger, more powerful states. It is also clear that not all states enjoy equal influence to negotiate the seats, so they are constrained to accept formal or informal rules of geographic distribution of seats. This means guaranteed or perma-

⁸⁸ *Id.* at 6–7.

⁸⁹ Mackenzie & Sands, *supra* note 86, at 278.

⁹⁰ Elsig & Pollak, *supra* note 30, at 397.

⁹¹ See Mackenzie & Sands, *supra* note 86, at 278 (describing how states likely only put forward candidates who share similar sentiments on issues as the state itself).

⁹² Elsig & Pollak, *supra* note 30, at 398.

⁹³ *Id.*

⁹⁴ *Id.*

nent seats for certain countries or regions, and a significant amount of political jockeying for smaller states to get their candidates nominated. Consequently, although countries with guaranteed seats are in a strong agenda-setting position, other members are subject to the reception of their nomination among the electorate. "In the ensuing elections, member states typically engage in extensive lobbying, bargaining, and 'horse-trading' on behalf of their national candidates, and final appointments are often the result of messy compromises among the members."⁹⁵

The EU proposed that the ICJ and WTO would be the models to mold the MIC, even though their appointment procedures are highly politicized and unbalanced against SMEs.

IV. THE APPOINTMENT OF JUDGES IN THE ICJ

The United Nations (U.N.) General Assembly and Security Council elects fifteen judges to the ICJ for renewable nine-year terms. No two judges may have the same nationality, and the entire bench must represent the "main forms of civilization" and "principal legal systems of the world."⁹⁶ The five permanent members of the Security Council (China, France, Russia, the United Kingdom, and the United States) always have a judge from their own state—a practice that may raise issues about judicial independence. The other ten judges are allocated amongst the five regional groupings in the U.N. system, with each grouping receiving two judges. Elections for the remaining ten judges to the ICJ are subject to political competition among smaller states to obtain the support of powerful countries. Without the support of any powerful states, to avoid their vetoing, the electoral prospects for any candidate would be minimal. Also, this process involves both formal and informal meetings between the candidates and diplomatic representatives of U.N. members, which may compromise candidate's independence.⁹⁷

If the appointment of judges in the MIC is similar to that of the ICJ, then unequal treatment will most likely prevail. The appointment process for the ICJ has long been criticized as obscure, open to political interference, and

⁹⁵ *Id.* As Elsig and Pollak note, "[i]n such cases, countries with guaranteed seats are in a particularly strong agenda-setting position, with their candidates virtually guaranteed acceptance, while other members must consider the likely reception of their nomination among the electorate." *Id.*

⁹⁶ Statute of the International Court of Justice art. 9, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

⁹⁷ Mackenzie & Sands, *supra* note 86, at 278 (describing how powerful nations can influence the election of judges from other countries).

lacking transparency.⁹⁸ There is a risk of “vote trading,” where states lend their support to nominees from other countries based on political considerations, and veto by powerful countries that do not like certain appointments.⁹⁹

V. APPOINTMENTS IN THE WTO

The WTO Appellate Body (AB)¹⁰⁰ nomination process has become more and more politicized over time. Some states are now seeking to influence WTO rulings to protect their own interests by nominating and appointing AB members whose nationality, judicial philosophy, and views on specific issues are close to their own interests. States are also using their powers of judicial nomination and appointment to influence the preferences of AB members, which could potentially affect their independence and impartiality.¹⁰¹

As in CETA and the EU-Vietnam FTA, the WTO did not clearly provide a procedure to appoint its judges beyond that the AB “shall be broadly representative of membership.”¹⁰² In 1994, for the first appointment, a committee appointed to provide guidance for the notion of what was meant by “broadly representative,” interpreted that “factors such as different geographical areas, levels of development, and legal systems shall be duly taken into account.”¹⁰³ The EU demanded that two seats should go to citizens from its countries to “reflect its economic importance” and, the United States also wanted two seats, given its importance in world trade.¹⁰⁴ Most states opposed, and the United States and EU eventually accepted one seat each. Many delegations expressed frustration because their candidates were not appointed.¹⁰⁵ Without a rule of law, it was accepted that the EU, the United States, and Japan each would get a seat, so for the remaining ones, the WTO turned to regional representation, from countries in Asia, Africa, and South America.

⁹⁸ See RUTH MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS 173 (2010) (summarizing the results of a study on the ICJ appointment process).

⁹⁹ *Id.* at 122.

¹⁰⁰ The Appellate Body hears the appeals from reports issued by panels in trade disputes brought by WTO Members. The AB is appointed by the Dispute Settlement Body to serve four-year terms. See *Understanding on Rules and Procedures Governing the Settlement of Disputes: Annex 2 of the WTO Agreement*, WORLD TRADE ORG., art. 17.3, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#17 [<https://perma.cc/P3CH-Y5VL>] [hereinafter *Annex 2 of the WTO Agreement*].

¹⁰¹ Elsig & Pollack, *supra* note 30, at 393.

¹⁰² *Id.* at 403; *Annex 2 of the WTO Agreement*, *supra* note 100.

¹⁰³ Elsig & Pollack, *supra* note 30, at 403.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

In initial appointments of AB members, the Great Powers wanted to appoint judges from their own states without considering that the appointed judges could adopt controversial decisions with implications for states' sovereignty and economic interests. Now, WTO members are examining the substantive opinions of AB candidates and systematically supporting the ones whose views conformed with their own, while simultaneously opposing those whose views conflicted.¹⁰⁶

At the second appointments, some candidates faced a veto from the United States for their prior decisions that went against U. S. interests. This is presumably what happened with Merit Janow, who did not seek reappointment, because the United States Trade Representative (USTR) expressed concerns with his past decisions.¹⁰⁷ As a former USTR official mentioned, they were not fond that judges from their own country were ruling against their interests.¹⁰⁸

The politicization of the process has gone even further because candidates are pushed to meet as many WTO members as possible and to plan visits to Washington and Brussels. Some of the concerns expressed by some WTO members to the nominees are "about filling gaps and the AB making law."¹⁰⁹

WTO's short history on appointing AB members shows that the same political considerations from 1899-1919 have not changed, and that power is still being deployed to safeguard exporting capital countries interests.

CONCLUSION

The discussions in 1899-1919 were in essence similar to those of today. Europe presented a project for the establishment of a court of law, and the rest had to follow. Back then, the proposed court aimed to solve the European recurring problem of war; today, it is the risk of losing claims and regulatory power. What is interesting is that sovereignty and equality were, and still are, underlying the debate. Semi-peripheral states are invited to negotiate, but with little chance to discuss nor change what previously was agreed among European States from the EU.

Past behavior between 1907-1919 leads to the conclusion that the proposed MIC will not likely be neutral and independent as is being claimed by

¹⁰⁶ *Id.* at 397.

¹⁰⁷ *Id.* at 406.

¹⁰⁸ *Id.* The USTR noted that among "the eight or nine candidates, we were looking for someone who had strong understanding of WTO law, ideally worked for USTR and understood our positions, knew the role of the AB and had good persuasive skills to influence the AB decisions; . . . we needed someone who could sensitize others." *Id.* at 408.

¹⁰⁹ *Id.* at 407.

the EU. This will again raise questions about its legitimacy. As it is now, the EU MIC proposal based on the CETA blueprint does not seem to be an impartial dispenser of justice which could provide democratic rule-based decisions. On the contrary, because the proposal was launched with state appointed judges to replace ad hoc arbitrators and no written rules on how MIC judges would be appointed, it looks to be merely another manifestation of state power and influence in international relations that seeks to promote the EU's own interests. Should rules governing the nomination and election of MIC judges that guarantee independence, impartiality, and equality not be implemented, such process will still be politicized and opaque, as the ICJ and WTO's appointment processes already are. It is questionable to keep ICJ's and WTO's practice to give geographic distribution of members and de facto permanent seats for the EU and the United States because this is far equality. Conversely, keeping the current practice of appointment for the MIC will provide these countries with greater agenda-setting power to influence on the election of all the judges and to control over the proposed court judges compared to SMEs lack of decision and control on who will decide their cases.

Permanent investment judges will make decisions that will affect the lives of people. Any jurisprudence that considers differences between SMEs and developed ones, or that is biased on the assumption that the rule of law does not operate on such states, could create serious problems for the former. The legitimacy problems of the arbitrators' work that are being questioned today will not be able to be solved by the new ICS, because the judges appointed might be biased in favor of the states that have the power to appoint or to veto them in the future. Thus, the proposed reform does not seem good for SMEs.

Although a MIC might be desirable, the current political and international conditions are not appropriate to trust the state policy space and to protect legitimate public interest concerns of every country to a few judges. The former could be politically influenced by the powerful states, or may have negative incentives that prevent them from having the required neutrality and independence to impartially solve the cases presented before them.

The ISDS framework as it is today—with many of its own problems and criticisms that are widely agreed upon—still might be better for SMEs and investors than a multilateral system. This is because a bad precedent in the interpretation of a case can profoundly affect policy space or investor rights in some jurisdictions forever. As it is, the current system at least allows the parties to continue to have the chance to intervene in the appointment of arbitrators in every case, without the burden of blockings and/or

veto to a judge by powerful countries, as could be the case in the proposed court system.

The establishment of a MIC may be a good solution to increase the predictability, transparency, coherence, and independence of arbitrators, but would depend heavily on whether there is a multilateral substantive investment tool in place, and if the selection process to appoint the judges is transparent, detached from political motivations, and substantially considers the interests of SMEs.

Similarly, as the United States suggested in the WTO for the reform of the Dispute Settlement Understanding (DSU), the ISDS needs more guidance as to the rules of interpretation, the prevention of gap filling, fragmentation, and “restrictions on addressing constructive ambiguity,” so the MIC should not engage in making law.¹¹⁰

¹¹⁰ *Id.* The DSU are the rules and procedures that govern the settlement of disputes at the WTO. *Annex 2 of the WTO Agreement*, *supra* note 100.