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EU'S INTERNATIONAL RULEBOOK MONOPOLY: A TWAIL CRITIQUE OF MULTILATERAL INVESTMENT COURT REFORM AND BARRIERS FOR DEVELOPING ECONOMIES

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Surmounting criticism against the current state of investor-state dispute settlement (ISDS) resulted in the European Commission's proposal for the establishment of a two-tiered multilateral investment court (MIC) with state-appointed judges, aimed at facilitating transparency, consistency, impartiality and predictability within the international investment law regime. The United Nations Commission on International Trade Law Working Group III (UNCITRAL WG3) has led the quest for ISDS reform, with negotiations about the viability of the MIC underway since 2016. The bulk of existing scholarship on the MIC has focussed on its inability to satisfactorily address the most pressing issues plaguing ISDS. This paper aims to examine the proposal for an MIC from a different theoretical lens, inspired by Third World Approaches to International Law (TWAIL), locating it within the larger picture of what 'reform' as an exercise means to the geopolitical hegemony that marks transnationalism today. It contextualises a MIC within the European Union's (EU) increasingly bold attempts to engineer a trade and investment regime favourable to its interests regardless of what that may mean for developing economies, particularly through its promotion of preferential trade agreements (PTAs) which claim to prioritise non-trade policy objectives such as the rule of law among other EU fundamental values. This paper focuses on the contested legality of the standing investment courts envisioned under the European Union – Vietnam Free Trade Agreement (EU-Vietnam FTA) and the Comprehensive Economic and Trade Agreement (CETA), and the contents of the MIC proposal, this paper first positions its analysis within the observable convergence between the international trade and investment regulatory systems. It posits that any version of an MIC must be tested on the legal principles of the

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existing trade regime — and ultimately concludes that it fails this test, effectively constituting an inequitable trade barrier to developing economies.

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I. INTRODUCTION

It is no secret that ISDS has long since been embroiled in a legitimacy crisis, with reform taking centre-stage at multilateral institutions like the United Nations Commission on International Trade Law (UNCITRAL) and the International Centre for Settlement of Investment Disputes (ICSID).[1] ISDS clauses, incorporated in bilateral investment treaties (BITs), allow foreign investors to engage in arbitral proceedings against the host state for non-compliance with the overall BIT.[2] In the 1980s, ISDS provisions were initially lauded for their role in facilitating a rule-based approach to dispute settlement within international investment, a heavily politicised

[1] James T. Gathii & Harrison O. Mbori, *Reform and Retrenchment in International Investment Law: Introduction to a Special Issue*, 24(4) J. WORLD INV. & TRADE 535, 540 (2023).
[2] Julien Chaisse et al., *Investor-State Dispute Settlement (ISDS): An Introduction*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 605, 617 (Julien Chaisse et al. eds., 2021).

regime.[3] Notably, this was preceded by failed attempts to bring international investment law (IIL) under the same umbrella as international trade, which was confined to the General Agreement on Tariffs and Trade (GATT) and then the World Trade Organisation (WTO).

Before the commencement of the Second World War, states tended to engage in Treaties of Friendship, Commerce, and Navigation which aimed at regulating trade and investment through principles now typically associated with the trade regime alone: national treatment (NT), most favoured nation (MFN), fair and equitable treatment, and prohibitions on import/export restrictions. After World War II and the failure of the International Trade Organisation in 1947, there was significant reluctance to continue this unitary regulatory approach to trade and investment, and nations retreated from their previous multilateral approach to investment regulation in favour of BITs. This is no surprise — with colonialism's steady decline came the need to harness the productive potential of the newly post-colonial nation-states which remained dependent on colonial powers for further economic growth.

For this reason, the 1996 World Investment Report, released by the United Nations Conference on Trade and Development (UNCTAD), stated that foreign investment became the chosen tool to perpetuate colonialism through the expropriation of resources, which accompanied technical decolonisation.[4] This paper refers to this fragmentation of investment and trade law as 'anti-convergence'; the gradual diverging of these regulatory regimes that were ideally intended to be connected. It could be argued that in some ways, the international community prioritised the international trade law regime, leading to its more streamlined development.[5] In this vein, the investment law regime fell through the cracks, leading to the fragmented way in which investor claims were addressed in the wake of WWII. It was this fragmentation that ICSID sought to address.

As Ibrahim F. Shihata, erstwhile Secretary-General of ICSID, wrote in 1985, investment disputes between states and foreign investors were usually marked by the exercise of diplomatic protection and then occasionally followed by the use of force.[6] It was within this context that ICSID was born, its primary aim being to "promote a climate of mutual confidence between investors and states favourable to increasing

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[3] Ibrahim F. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1(1) ICSID REV. FOREIGN INV. L. J. 1, 5 (1986) [hereinafter Shihata].

[4] U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 1996, at 147-148, UNCTAD Doc. UNCTAD/DTCI/32, U.N. Sales No. E.96.II.A. (1996) [hereinafter UNCTAD Investment Report].

[5] Jürgen Kurtz, *Introduction*, *in* THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS 1, 22 (2016).

[6] Shihata, *supra* note 3, at 3.

the flow of resources to developing countries" via voluntary and flexible arbitration.[7] The goal was to introduce the rule of law into what seemed like a lawless system which allowed global heavyweights to take advantage of states with less economic power. The bilateral investment treaties of the mid-1990s reflected this optimistic approach, incorporating investment dispute settlement terms reliant on ad hoc arbitration and further separating the international trade and investment regimes.

However, this development was not as desirable as it may appear. These BITs were predicated on American and English policy initiatives in the late 1980s and 1990s, which maximised flexibility by prioritising treaty design as the best way to protect the interests of the parties via the substantive nature of a given International Investment Agreement's (IIA) text, rather than adopting a more centralised regime that would regulate how investment and dispute settlement options functioned.[8] This was at the cost of developing nations who attempted to question aspects of the international economic order in the 1970s through a coalition known as the New International Economic Order (NIEO) via legislative efforts at the United Nations General Assembly.[9] The NIEO advocated for a substantive reimagination of the underpinnings of several regimes, particularly international trade and investment law, citing colonial legacies of exploitation still implicit within these regimes. NIEO faced significant backlash from Western nations, especially the United States (US), and ultimately collapsed in 1992. This followed failed attempts to formulate a Code of Conduct that would streamline the regulation of foreign investors to address the power imbalances between the investor and the host state.[10] Notably, the US refused to engage with an agenda that attempted to address trade and investment as linked items.[11] The failure of the NIEO's attempt to encourage the international community to engage with the logic underlying the functioning of the systems reflects a wider tradition of dismissal of systemic reforms — a tradition that has also influenced modern efforts to address the shortcomings of ISDS.

Once sidelined as issues affecting the Global South, ISDS reform began gaining serious attention after ICSID-style ad hoc investment arbitration began to plague developed nations like the US and members of the European Union, who were once its greatest advocates.[12] These states critique ISDS on procedural grounds, such as

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[7] *Id.* 4.

[8] Doreen Lustig, *From the NIEO to the International Investment Law Regime: The Rise of the Multinational Corporation as a Subject of Regulatory Concern in International Law*, *in* VEILED POWER: INTERNATIONAL LAW AND THE PRIVATE CORPORATION 1886-1981 179, 214 (2020) [hereinafter Lustig].

[9] *Id.*

[10] *Id.* 216.

[11] *Id.*

[12] Jose M. Zarate, *Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?*, 59(8) BOS. COLL. L. REV. 2765, 2766 (2018) [hereinafter Zarate].

concerns over the lack of independence, impartiality of arbitrators and limited oversight over arbitral tribunals. Arbitral tribunals' also frequently disregard the host state's right to implement regulations and other policy measures, display interpretative bias in favour of foreign investors, function with a lack of transparency, and render inconsistent decisions. These issues contribute to a system that is generally criticised for lacking the reliability and predictability that should characterise a dispute settlement mechanism.[13]

To resolve the above problems, the European Commission (EC) proposed the establishment of an MIC in 2016. This would ideally facilitate consistency, predictability, and the option of appeal — essentially resolving the failings of the ISDS system. This proposal has since been adopted into the UNCITRAL agenda and is currently being negotiated within the framework of WG3.[14] The idea of an MIC is based on existing EU imaginations of standing investment courts that have been enshrined in recent PTAs, particularly the EU-Vietnam FTA and CETA, which have, in turn, been inspired by the two-tiered WTO Dispute Settlement Understanding (DSU).[15]

These developments in ISDS reform point to a re-convergence — the gradual reunion of the international trade and investment regimes. These regimes function as complementary systems of governance that frequently draw from each other to strengthen (or occasionally weaken) themselves. This paper drawing from the tenets of TWAIL scholarship, reflects on the positionality of the MIC proposal within this move towards re-convergence It contextualises the proposal within the larger strategy seemingly adopted by the EU since 2016 to shape the international trade and investment systems to align with its economic interests.

This article argues that the EU has appropriated the workings of WG3 to its benefit and has used the MIC proposal to further its own position within the nexus of global investment. This paper argues that an MIC strengthens the terms and impacts of the existing and future PTAs far beyond fair and equitable under the WTO framework. First, the article establishes the relevance of TWAIL perspectives to this discourse. It then explores how the EU has promoted its economic priorities through the dual phenomena of 'treatification' and 'multilateralisation.' It goes on to use the EU's historical negligence of procedural rule of law as the context in which the WG3 has discussed the MIC. It also analyses how the envisioned MIC works to implicitly

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[13] Frank J. Garcia & Brooke S. Guven, *Designing a Multilateral Investment Court for Procedural Justice*, 24(3) J. WORLD INV. & TRADE 461, 472 (2023).

[14] European Union Press Release 144/18, Multilateral Investment Court: Council Gives Mandate to the Commission to Open Negotiations (Mar. 20, 2018).

[15] Jürgen Kurtz, *History*, *in* THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS 31, 42 (2016) [hereinafter Kurtz].

enact trade barriers against developing economies, especially considering the status of the standing investment courts established under the aforementioned PTAs and lack of democratic deliberation at WG3. Finally, the article proposes a more inclusive and fairer path forward.

II. THE RELEVANCE OF THE TWAIL VANTAGE POINT TO THE REFORM PROJECT

One issue that arises when attempting to develop an analysis of any contemporary legal regime within the TWAIL framework is the temptation to fall into the ease of the binary — between the developed and developing, the West and the Global South, the first world and the third world. Avoiding a definition of TWAIL as restricted to a fixed geographic space, this article refers to TWAIL as any perspective evaluating the liberal world order, questioning the imperialist, Eurocentric, and capitalist tenets that underpin the structure and practices of the current international law regime. The broader aim is to develop a methodology that suggests an alternative normative framework for international governance and regulation. The tenets of the TWAIL approach to international economic law, particularly ISDS, form the foundations of each following sub-parts. As such, they are explained here before being explored in practice.

A. *The Importance of New Normative Commitments*

At first glance, it may seem that TWAIL has little relevance to ISDS. The aim of investment arbitration, as stated by ICSID, is to develop a rule-based mechanism that depoliticises disputes and attempts to resolve them in a way that best balances the interests of the host state and the foreign investor.[16] However, this assumption is more complicated when we delve into the power dynamics that shape investment arbitration. In general, international economic law has been driven by the dominant positivist method, constantly seeking coherence within itself through a commitment to seemingly value-free norms. These norms dictate the transnational flow of the factors of production — capital and labour, and goods and services, particularly in the wake of World War II.[17] Evidently, this is not the case. As briefly introduced in Part I, the very divergence of trade and investment into two distinct areas, with the latter subject to far more fragmentation than the first, was no accident. It was the result of the internal conflict that post-colonial states experienced during this period, between a quest for economic independence and the inevitable truth that their productive potential was still tied to dominant nations and the Western neo-

[16] Shihata, *supra* note 3, at 5.

[17] BS. Chimni, *Critical Theory and International Economic Law: A Third World Approach to International Law (TWAIL) Perspective*, *in* RESEARCH HANDBOOK ON GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW 251, 260 (John Linarelli ed., 2013).

liberalism they had adopted. This solidified existing power imbalances between capital-exporting nations and these nascent economies, with the first class of countries rushing to enter into BITs at a neck-breaking pace, set off by the first BIT ever to be concluded, between Germany and Pakistan in 1959 with the aim of protecting their financial interests abroad.[18]

One common criticism of TWAIL is its focus on abstract theoretical discourse rather than pragmatic reforms.[19] This mirrors the common vilification of critical movements,[20] which are often criticised for their perceived lack of practical relevance. This critique boils down to accusations that such movements are the idle work of privileged scholars who undermine liberal legal bodies, uninterested in real-world change. This idea refers to left critiques of 'liberal legalism,' a concept which underpins the operations of many international organisations involved in international governance.[21]

However, international regulatory regimes do not merely comprise how their participants act, but of what these actors understand as acceptable within a common framework of meaning — what they say and do.[22] This notion led to what John Ruggie referred to as 'embedded liberalism', characterising the global economic system post-World War II — a classical free market but with democratic socio-political tenets, consisting of shared normative obligations achieved through rules and institutional mechanisms.[23] This shift towards embedded liberalism led to two significant processes observed in both private and public international law: the rise of treaties and conventions (referred to as 'treatification') and the expansion of international courts and tribunals.[24] Institutions like UNCITRAL and ICSID reflect this idea. UNCITRAL describes itself as "promoting the progressive harmonisation

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[18] Kurtz, *supra* note 15, at 43.

[19] Naz K. Modirzadeh*, "Let Us All Agree to Die a Little": TWAIL's Unfulfilled Promise*, 65(1) HARV. INT'L L.J. 79, 90-99 (2023).

[20] Wendy Brown & Janet Halley, *Introduction*, *in* LEFT LEGALISM/ LEFT CRITIQUE 1, 4 (Wendy Brown & Janet Halley eds., 2002) [hereinafter Brown & Halley].

[21] *Id.* 9.

[22] John G. Ruggie, *International regimes, transactions, and change: embedded liberalism in the postwar economic order*, 36(2) INT'L ORGANIZATION 379, 380 & 404 – 405 (1982) [hereinafter Ruggie].

[23] *Id.*

[24] Panos Merkouris et al., *Custom and its Interpretation in International Investment Law: Final Musings*, *in* CUSTOM AND ITS INTERPRETATION IN INTERNATIONAL INVESTMENT LAW 335, 339 (Panos Merkouris et al. eds., 2024).

and unification of the law of international trade",[25] while ICSID aims to "maintain a careful balance between the interests of investors and host states."[26]

Issues arise when this type of liberal legalism is accepted without debate. The ideas that underpin international regulatory regimes need to be subjected to theoretical discourse, as their foundational logic has historically gone unchallenged. As Brown and Halley observe, "law has a penchant for hiding itself in background rules so minute that they facilitate or activate regulatory regimes that seem immune from legalistic effects."[27] There is a reason why much of the ISDS reform debate centres on procedural changes rather than rethinking the substance of international investment law. When debates about reform are escalated to the degree ISDS has, they become subject to a legalistic analytical framework that cannot satisfactorily capture concerns over institutional legitimacy. This limits discourse about substantive elements of both IIL and international trade law. There is a need for critical frameworks such as TWAIL to entwine themselves with the project of reform, unpacking the hidden status quo. This perspective allows for the reformist project led by institutions like UNCITRAL and dominant regional blocs like the EU to be contextualised by a renewed set of normative commitments. The MIC proposal and its framing as the most ideal resolution is also rooted in the ignorance of this broader context.

This paper acknowledges that IIAs and a global commitment to free trade have encouraged capital flows into developing economies, enabling economic prosperity. However, these imbalances inherent to the system have allowed more powerful states, acting via their investors, to impose inequitable investment terms onto host states that have not enjoyed geopolitical power historically.[28] This internal logic guides IIL and international economic law more broadly but is excluded from discussion at the organisations that lead reform efforts as well as the negotiations that birth PTAs, regional trade blocs, and trade facilitation agreements. The institutions at the centre of IIL, by refraining from more radical approaches in favour of only adopting superficial, procedural changes such as the establishment of an MIC, further entrench these legacies resulting in trade obstacles that hamper the ability of developing economies to adequately participate in multilateral processes. This sidelining of marginalised interests has been nowhere more apparent than in

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[25] G.A. Res. 2205, Establishment of the United Nations Commission on International Trade Law (Dec. 17, 1966).

[26] *About ICSID*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/About/ICSID.

[27] Brown & Halley, *supra* note 20, at 11.

[28] M. Sornarajah, *Mutations of Neo-Liberalism in International Investment Law*, 3(1) TRADE L. & DEV. 203, 216 (2011).

the most radical attempt to translate third-world interests into a dominant language – the NIEO.

B. *Past Institutional Failures to Accommodate Postcolonial Interest*

There have been attempts in the past to push third-world interests at global reform initiatives. In 1973, the NIEO was established as a coalition of developing states hoping to reform various economic and trade regulatory systems, such as IIL, through legislative efforts at the United Nations General Assembly.[29] The NIEO story illustrates how institutions aimed at depoliticising international regulatory initiatives are not immune to inter-state politics, influenced by postcolonial power dynamics, which shape discourse within international economic reform.

The NIEO was subject to immense blowback from Western states.[30] In 1975, the UN Commission on Transnational Corporations released a draft Code of Conduct on Transnational Corporations, which attempted to translate NIEO concerns into workable regulations constraining the actions of foreign investors. However, negotiations on the Code reached a stalemate. In particular, the US argued for an approach prioritising bilateral agreements and flexible rules and insisted that negotiations handle each item on the NIEO Programme of Action individually. This eventually undermined the underlying rationale for the initiative and led to a fragmented negotiation process. The coalition fell apart, and the Code was abandoned in 1992. Simultaneously, the 1980s and early 1990s witnessed a rise of IIAs based on American and English policy initiatives, and ad hoc dispute resolution via a common arbitration regime (such as ICSID) was crystalised over a nexus of almost indistinguishable BITs. This further destabilised hopes for the representation of postcolonial interests.[31]

Some have argued that the response to the NIEO resulted in the cynicism observed in more nascent TWAIL scholarship[32] with M. Sornarajah arguing that any attempt to influence reform efforts from a third-world perspective in areas like trade and investment would be in vain.[33] The NIEO was a notable attempt to encourage discourse about reform in the context of the colonial legacies embedded in the liberal

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[29] G.A. Res. 3281, Charter of Economic Rights and Duties of States (Dec. 14, 1974).
[30] Andrea Bianchi, *Third World Approaches*, *in* INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING 205, 213 (2016).
[31] Lustig, *supra* note 8, at 214 - 216.
[32] Nina Mileva, *A TWAIL Engagement with Customary International Investment Law*, *in* CUSTOM AND ITS INTERPRETATION IN INTERNATIONAL INVESTMENT LAW 307 (Panos Merkouris et al. eds., 2024).
[33] JOHN LINARELLI ET AL., THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY 228 & 264 (2018).

world order, as opposed to the policy-centred arguments proposed by capital-exporting states,[34] but is a pertinent example of how such attempts are implicitly discouraged by a network of factors within international, institutional reform.

This pattern continues to inform the efforts of UNCITRAL WG3 and allows dominant forces like the EC to promote initiatives that further their interests alone, often to the detriment of the developing world or nations that have been historically excluded from blossoming economic activity. This emerging pattern of behaviour will now be further explored.

III. MULTILATERALISATION: THE BIRTH OF THE EU INVESTMENT COURT SYSTEM

This paper works on the premise that IIL and international trade law are inherently intertwined — an analysis of reform in one area cannot be discussed without considering the other. Increasingly, the two systems have grown to share features, both in terms of design and function. For the purposes of this paper, the most evident example of convergence is the inclusion of the EU Investment Court System (ICS) in all investment agreements post-introduction of the Treaty of Lisbon, which consolidated and enshrined a commitment to the rule of law as a guiding principle across the EU legal system — while also facilitating the EU's commitment to formulating a multilateral resolution to the issues plaguing ISDS.[35] This includes the EU-US Transatlantic Trade and Investment Partnership Agreement (TTIP), the EU-Singapore Investment Protection Agreement (EU-Singapore IPA), CETA and the EU-Vietnam Investment Protection Agreement (EU-Vietnam IPA). It is well-known that the ICS is modelled after the WTO DSU — specifically the Appellate Body, which has been embroiled in a crisis of its own since 2019.[36] The MIC, inspired by the ICS,[37] naturally shares these similarities.

While the official establishment of an MIC remains to be seen the ICS will likely continue to feature in the EU's future PTAs. In light of this, it may be useful to consider the versions of a standing investment court that have presented themselves within the realm of PTAs, especially in light of the immense criticism it received

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[34] *Id.* 192.

[35] Urszula Jaremba, *Non-Economic Values and Objectives in EU Trade Policy: Different Models of Externalization and Enforcement*, *in* GLOBAL POLITICS AND EU TRADE POLICY 163 (Wolfgang Weiß & Cornelia Furculita eds., 2020).

[36] European Commission Press Release IP/15/5651, Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations (Sept. 16, 2015) [hereinafter EC Press Release].

[37] Elsa Sardinha, *Towards a New Horizon in Investor-State Dispute Settlement? Reflections on the Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA)*, 54 CAN. Y.B. INT'L L. 311, 326 (2017) [hereinafter Sardinha].

upon its introduction. This discussion leads into a detailed problematisation of these agreements themselves. This analysis then lays the groundwork for evaluating the less than democratic inner workings of WG3 — and the MIC proposal's place in the EU's chequered history of engineering economic conditions best suited to its own interests.

A. *A Lesson in Convergence: Where Investment Courts Find Their Homes in PTAs*

Indeed, the inclusion of ICS and other provisions directly addressing investment terms and dispute settlement in PTAs may point to regime convergence in a particularly evident way — but this is not to claim that the ICS system under these agreements perfectly mimics dispute settlement mechanisms associated with the WTO, which, to some degree, appears to be what the EC wants observers to accept without question. Since 2016, the EU has participated in a global push towards a multilateral answer to the legitimacy crisis plaguing the ISDS system — expressing this commitment through public policy statements,[38] its active participation in WG3,[39] and its participation at the UNCTAD World Investment Forum and World Economic Forum in recent years.[40] Some scholars have interpreted the EU's reform approach as advocating for a gradual shift to an MIC based on the notion of a successful ICS as enshrined in these agreements.[41] It is noteworthy that the EU would likely benefit from the uncritical acceptance of the idea that their version of a standing investment court resembles the WTO DSU, because this allows it to benefit from the legitimacy the DSU system has enjoyed over the decades (notwithstanding the Appellate Body crisis plaguing the system since 2019).[42] However, a comparison between the standing courts drafted under CETA, the EU-Vietnam FTA/IPA and the EU-Singapore IPA reveals that the EU's standing courts themselves are quite fragmented. This draws into question the EC's implicit claim that the ICS structure under these PTAs naturally leads to an institutional MIC, gaining its promise of legitimacy from its claimed similarities to the WTO DSU — especially considering how, as established below, these purported similarities are also quite superficial.

It would be helpful to first briefly outline the structure of the ICS. The ICS, under all three agreements, consists of a first-instance Tribunal and an Appeal Tribunal,

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[38] EC Press Release, *supra* note 36.

[39] U.N. Commission on International Trade Law: Working Group III, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union, UNCITRAL Doc. A/CN.9/WG.III/WP.145 (2018).

[40] European Commission Press Release IP/16/4349, European Commission and Canadian Government co-host discussions on a multilateral investment court (Jan. 20, 2017).

[41] Sardinha, *supra* note 37, at 325-327.

[42] Matteo Fiorini et al., *WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences*, 54(5) J. WORLD TRADE 667, 668 (2020).

the constitution of which differs depending on a given treaty. The CETA, EU-Singapore IPA, and EU-Vietnam IPA all disregard the importance of nationality when considering the appointment criteria but do differ in the extent to which parties to the agreement exert their power over the composition of the Tribunal. In the EU-Singapore IPA, the EU and Singapore each exert influence over panel appointment,[43] while CETA and the EU-Vietnam IPA only allow parties to suggest the appointment of members affiliated with them.[44] Notably, across these three agreements, two out of the three tribunal members (either directly, as is the case under the EU-Singapore IPA or indirectly, as is the case with the latter two) are affiliated in some way with the parties to the agreement.

Despite resembling a judicial body, tribunal proceedings are still subject to the same arbitration rules that guide ad hoc investment arbitration, namely ICSID and the UNCITRAL arbitration rules, causing a degree of upheaval, which shall be addressed in the following sub-part. The most critical innovation the ICS inculcates is an appeal mechanism, with both parties awarded the right to appeal Tribunal awards on issues of law or manifest error. However, even the appeal mechanisms envisioned under these standing courts are different. For example, there exist numerous differences concerning the ability to remand proceedings back to the Tribunal — with this being the most difficult to do under the EU-Vietnam IPA.[45] Additionally, the Appellate Tribunals under CETA and the EU-Singapore IPA are not permanent bodies and there remains confusion over whether awards alone (or separate decisions on other issues say, jurisdiction) can be appealed.[46]

Naturally, the existence of an Appellate Body has been cited as inspiration for the ICS appeals mechanism, and this parallel has been relied on to state that the resemblance between the ICS and the WTO dispute settlement mechanism is uncanny.[47] However, it must be kept in mind that the very aim and functioning of the WTO DSU stands distinct from the ICS. The aim of the DSU structure was always to centralise and integrate compliance with various WTO agreements,[48] and

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[43] Investment Protection Agreement, E.U.-Sing., arts. 3.9(2), 3.10(2), Oct. 19, 2018, 2018 O.J. L 279/1 [hereinafter EU-Singapore IPA].

[44] Comprehensive Economic and Trade Agreement, Can.-E.U., art. 8.27(2), Oct. 30, 2016, 2017 O.J. L 11/23 [hereinafter CETA]; Investment Protection Agreement, E.U.-Viet., art. 3.38(2), June 30, 2019, 2020 O.J. L 186/3 [hereinafter EU-Vietnam IPA].

[45] Hannes Lenk, *The EU Investment Court System and Its Resemblance to the WTO Appellate Body in* ADJUDICATING TRADE AND INVESTMENT DISPUTES: CONVERGENCE OR DIVERGENCE? 62, 75 (S. Gáspár-Szilágyi, D. Behn, and M. Langford eds., 2020).

[46] Sardinha, *supra* note 37, at 326.

[47] EC Press Release, *supra* note 36.

[48] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

is a compulsory, exclusive mode of dispute resolution applicable to all WTO member states.[49] The ICS, however, is a treaty-based system dependent on the terms of multiple bilateral IIAs between a host of states that are not party to a single forum they all believe is legitimate. It necessarily belies the possibility of a singular, unified, multilateral system for dispute resolution. It may be an unrealistic ask to expect states or investors to submit to any kind of compulsory or exclusive jurisdiction and, as will be further argued in later parts of this paper, unacceptable.

In this sense, basic similarities between the two systems cannot be denied, particularly if the ICS is, in fact, successfully transformed into a single, institutionalised quasi-judicial system dedicated solely to investor-state disputes, as the EC has made clear as its goal. However, as even the qualities of the ICS proposed under each agreement remain significantly different, one must ask whether this is a realistic prospect — especially considering the piecemeal way in which the MIC proposal has been handled at WG3 (which shall be discussed further in Part IV). A natural question arises: if the ICS coexists with a potential MIC, modelled after the WTO Appellate Body, would this not simply lead to further fragmentation? This inherent conflict in how the EC has presented the relationship between treaty-specific ICS and its proposed vision for an MIC — the first naturally leading into the establishment of the next — has peculiarly gone utterly unaddressed, and begs the question of whether the EC's main objective through the MIC is indeed to restore legitimacy to a struggling ISDS or to instead restore legitimacy to the ICS structures it has inculcated in its own PTAs to aid its trade and investment objectives — the validity of which has been struggling for quite some time.

B. *CETA and the EU-Vietnam FTA: Rule of Law Failures and Inequitable Outcomes for Developing Economies*

ICS, particularly as envisioned in CETA, drew the ire of several observers, particularly Belgium, which in 2017, requested the Court of Justice of the European Union (CJEU) to render an opinion on its compatibility with EU law.[50] In a surprising decision that departed from the previous jurisprudence on similar matters,[51] the CJEU found that the establishment of such a court, empowered to render binding decisions, is not 'in principle' incompatible with EU law so long as the EU's autonomy is respected. Essentially, CETA's envisioned system is compliant with EU law so long as it functions as a complementary mechanism within the

[49] *Id.*, art. 23.1.
[50] Opinion 1/17: Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU 2017 OJ C 369.
[51] Case C-284/16, Slovak Republic v. Achmea BV, ECLI:EU:C:2018:158 (Mar. 6, 2018).

overall framework of the EU legal order and does not engage in activity that would result in violations of the EU fundamental values.[52]

The Court's reference to these 'fundamental values' is relatively self-contained but warrants further consideration, specifically in relation to how post the conclusion of the Lisbon Treaty, there has been a push to imbibe the 'rule of law,' conceptualised as a fundamental value, in all future PTAs — particularly those entered into with developing countries. In general, based on the 2016 Venice Commission Rule of Law Checklist, three tenets emerge: the substantive features of a given law; institutional compliance with the law; and procedural commitments generally described as a respect for transparency, consistency, and certainty.[53] This is to be accompanied by the principle of judicial protection, or effective judicial protection, with respect to the various subject matters constituting EU law.[54] The rule of law, as defined in these terms, has become increasingly recognised as a non-trade policy objective within PTAs, aimed at proliferating the nexus of EU trade agreements and the facilitation of trade, in consideration of the EU's historical tendency of using PTAs as instruments to further geopolitical interests and gain deeper access to the economies of the 'Global South.'[55]

On paper, a commitment to ensuring the rule of law in all elements of a given PTA, particularly those involving a 'third world' contracting party, sounds ideal. When applied to the ICS envisioned under a given agreement, this commitment to the rule of law implies that the establishment of an investment court would necessarily need to occur through democratic processes that attempt to balance the bargaining power and interests of both contracting parties. However, this has not been the case. In reality, the EU has used the rule of law in an anachronistic fashion, usually seeing it as a way to advance its political interests by defining it in terms associated with security and justice — not with substantive or procedural due process. For example, within the scope of the EU-Vietnam IPA, the agreement refers to the 2012 Framework Agreement on Comprehensive Partnership and Cooperation between the EU and Vietnam, which posits that democratic tenets and the rule of law are 'essential elements' under the FTA.[56] However, the agreement does not refer to this as applicable to the provisions of the treaty, but rather to Vietnam's domestic

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[52] Opinion 1/17, ECLI:EU:C:2019:341.

[53] European Commission For Democracy Through Law (Venice Commission), *Rule Of Law Checklist*, COUNCIL OF EUR' (2017) https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e.

[54] Case 294/83, "Les Verts" v. European Parliament, 1986 E.C.R. 1339.

[55] BILLY A. ARAUJO, THE EU DEEP TRADE AGENDA: LAW AND POLICY 23 (2016).

[56] Framework Agreement on Comprehensive Partnership and Cooperation, E.U.-Viet., June 27, 2012, 2016 O.J. L 329/8 [hereinafter EU-Vietnam PCA].

compliance with the UN's human rights framework, while the rule of law is restricted to discussions concerning issues such as data protection and organised crime.[57] It does not extend to cooperation between the contracting parties with the conjoint aim of advancing trade and investment. In this way, the EU's apparent commitment to the rule of law as guiding the substantive provisions of PTAs, in the realms of both trade and investment, is misleading — it is relegated to the EU's security agenda, and not in bolstering equitable trade and investment relations with its trading partners. This brand of good-faith posturing to advance the EU's parochial interests at the expense of its less powerful contemporaries is a trend that precedes these PTA negotiations — and follows them.[58]

IV. ILLEGITIMATE NEGOTIATIONS: OBSERVABLE SIDELINING OF THIRD WORLD INTERESTS AT UNCITRAL WG3

Some argue that ISDS reform began to be taken seriously on a global scale after ICSID-style ad hoc investment arbitration began to plague developed nations, which were once its greatest proponents.[59] Between 1999 and 2018, EU states faced 213 claims; while ISDS proceedings were also initiated between the USA, EU and Canada. These developments prompted the EC to hold a public consultation on IIL and ISDS in 2014, which subsequently became the foundation for the West's issues with ISDS.[60] This would go on to describe the typical pro-reformist view of ISDS — as opaque, partial, and wracked with procedural inadequacy.

Mainstream criticism of ISDS is rooted in its perceived lack of legitimacy, reflected as follows. Firstly, different tribunals tend to render contradictory interpretations of treaty provisions and general principles of IIL. This is chalked up to the broad interpretive mandate that IIAs grant to tribunals and the lack of an oversight mechanism, contributing to unpredictability and the further fragmentation of investment law. Tribunals also fail to pay sufficient attention to host states' legitimate policy and regulatory aims. They also neglect broader principles that guide investment arbitration such as confidentiality, independence and impartiality of arbitrators, and the centrality of party interests (even third parties with a vested interest) to the dispute settlement process under IAAs.[61]

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[57] *Id.*, art. 2.

[58] Zarate, *supra* note 12, at 2789.

[59] Charles N. Brower and & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?* 9(2) CHI. J. INT'L L. 471, 474 (2009).

[60] Zarate, *supra* note 12, at 2767.

[61] Stephan W. Schill, *Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework*, 20(3) J. INT'L. ECON. L. 649, 653–654 (2017).

The above grounds of criticism all have something in common — they neither concern themselves with the outcome of specific ISDS awards or the substantive contents of BITs nor do they attempt to encourage any further empirical analysis into, for example, the way ad hoc arbitral tribunals consider the interests of foreign investors from powerful states versus less powerful ones or their failure to satisfactorily weigh the impact of irresponsible foreign investment on the institutional structure of the host state's government in their deliberations. Rather, they each evaluate ISDS as a procedural institution, focusing on the function that arbitral tribunals have — to further develop IIL within a system that allows them to review the conduct of governments. In this way, tribunals exercise a public function wherein they sit in the judgement of host states (much like any domestic court might) but without the checks and balances that normally accompany institutions empowered to do so, such as a multi-tiered hierarchy of courts with the option of appeal. Tribunals operate within public law, but they remain subject to the standards associated with private dispute settlement mechanisms. It is, hence, unsurprising that ISDS as an institutional framework is often critiqued for disregarding the democratic rule of law.[62] While these terms are difficult to define, the rule of law adopted within the UN framework calls for predictability and legal certainty, demanding that all actors respect and abide by their legal obligations.[63]

This implicit prioritisation of procedural due process within the UN framework is reflected in the approach to reform adopted by WG3, empowered with a broad mandate of restoring legitimacy to the system. In 2018, based on several scoping studies conducted by the Secretariat, WG3 announced that it would be focusing on six key issues: the length of proceedings, cost, inconsistency, incorrect decision-making, arbitral impartiality and independence, and arbitral diversity.[64] These identified concerns highlight the central problem with WG3's mandate — it is limited to procedural reform. Notably, this was partly because the reform process was already subject to appreciable resistance from states such as the US and Russia.[65] By adopting this procedure-heavy perspective on ISDS, UNCITRAL, as the international institution leading ISDS reform, established the contours of the reform debate and implicitly legitimised concerns that were, coincidentally, primarily

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[62] Ivana Damjanovic, *The Reform of International Investment Law: Whose Rule of Law?*, 15(3) EUR. J. RISK REGUL. 1, 2 (2024).
[63] Joseph Raz, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 220 (1979).
[64] Malcolm Langford et al., *UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions*, 21(2–3) J. WORLD INV. & TRADE 167, 171 (2020).
[65] *Id.* at 173.

critiques lodged by the West, South Africa,[66] Thailand,[67] and Indonesia.[68] For example, each disagreed with the adoption of this interpretation of the WG3 mandate, arguing that if the Working Group chose to focus solely on procedural law, it would fail to effectively discharge its aim of restoring legitimacy to the system. They contended that the Working Group should, at the very least, attempt to negotiate model substantive provisions that states could adopt into their BITs. WG3 sets the rules of the reformist tent and limits admission.

Indeed, South Africa proposed major shifts in investment reform, suggesting that WG3 should instead consider proposals based on six tenets that each serve to challenge the ideological underpinnings of IIL and ISDS — protection of fundamental/human rights, regulatory freedom of host states, balancing rights and duties, upholding the rule of law, and promotion of responsible investment.[69] Indonesia, echoing this approach, called for the further inclusion of IIL stakeholders in the ISDS reform process, including those with business and non-business interests that may be affected by any changes in the regime.[70] Morocco's submissions in this regard are particularly notable, as they are among the most vocal in calling for holistic IIL reform aimed directly at achieving the Sustainable Development Goals and resolving the disproportionate effects the current ISDS system has had on developing countries.[71]

Despite these voices at WG3, the process itself tends to marginalise voices of smaller/developing economies within the negotiation process, especially considering the principle that usually drives trade and investment negotiations —that of the

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[66] U.N. Commission on International Trade Law: Working Group III, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of South Africa, at ¶ 19–20, UNCITRAL Doc. A/CN.9/WG.III/WP.176 (2020).

[67] U.N. Commission on International Trade Law: Working Group III, Possible Reform of Investor-State Dispute Settlement: Submission from the Government of Thailand, at ¶ 28, UNCITRAL Doc. A/CN.9/WG.III/WP.162 (2020).

[68] U.N. Commission on International Trade Law: Working Group III, Possible Reform of Investor-State Dispute Settlement (ISDS): Comments by the Government of Indonesia, at ¶ 15, UNCITRAL Doc. A/CN.9/WG.III/WP.156 (2020) [hereinafter Comments by Government of Indonesia].

[69] U.N. Commission on International Trade Law: Working Group III, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of South Africa, at ¶ 29–33, UNCITRAL Doc. A/CN.9/WG.III/WP.176 (2020).

[70] Comments by the Government of Indonesia, *supra* note 68, ¶ 5-6.

[71] U.N. Commission on International Trade Law: Working Group III, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Morocco, at ¶ 14, UNCITRAL Doc. A/CN.9/WG.III/ WP.161 (2020).

'single undertaking.'[72] Single undertaking refers to the idea that any undertaking proposed at a multilateral forum, such as WG3, must be considered as a whole, not as consisting of individual items that can each be debated upon individually, with some being adopted and some being left behind. Essentially, "nothing is agreed until everything is agreed."[73] This principle featured heavily in most negotiations driven by the WTO, reflected in, for example, the 2001 Doha Ministerial Declaration.[74] Developed countries have a history of taking advantage of this approach, taking the opportunity to push issues around services, investment, and intellectual property into the GATT during the Uruguay Round, defeating the expectation that nations had the option to opt out of various constituting agreements. India, during the Round, expressed issues with Trade-Related Aspects of Intellectual Property (TRIPS) and discontentment at the later obligation to either ratify TRIPS or opt out of the international trade regime entirely.[75] Within the processes adopted at WG3, this implicit pressuring of developing countries to agree to entire reform packages without the option of in-principle or item-specific opt-ins appears to be happening again, with major capital exporters such as the US, Australia, the EU and Japan arguing against more gradual, piecemeal approaches to ISDS reform and encouraging rapid procedural overhaul.[76]

Within this context, the most popular idea for what a reformed system should look like is unsurprising — the establishment of an MIC, heralded by the EC. The aim was to centralise ISDS, transforming it into a two-tiered court system consisting of a first-instance and appellate court, accompanied by a permanent judicial body. The EC argued that an MIC, based on the blueprint provided by CETA and the EU-Vietnam FTA, would resolve concerns over impartiality, unpredictability, and consistency.[77]

Importantly, the EC's vision of an MIC preserves significant elements of the current ISDS system, permitting claims from foreign investors against the host state

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[72] Bernard Hoekman, *Developing Countries and the WTO Doha Round: Market Access, Rules and Differential Treatment*, 19(2) J. ECON. INTEGRATION 205, 206 (2004) [hereinafter Hoekman].
[73] *How the Negotiations are Organised*, WORLD TRADE ORGANISATION, https://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm.
[74] Karthik Nachiappan, *India and the Uruguay Round Trade Agreement*, *in* DOES INDIA NEGOTIATE? 142, 145 (2019).
[75] Hoekman, *supra* note 72, at 205.
[76] Lorenzo Cotula et al., *UNCITRAL Working Group III on ISDS Reform: How Cross-Cutting Issues Reshape Reform Options*, COLUMBIA CTR. ON SUSTAINABLE INV. (July 15, 2019), https://www.iisd.org/sites/default/files/uploads/uncitral-submission-cross-cutting-issues-en.pdf.
[77] Zarate, *supra* note 12, at 2270.

regarding policy measures that may affect their interests under an associated BIT.[78] While it permits the participation of third parties with a vested interest, it does not clarify the question of standing further, and remains silent on the issue of asymmetry within the ISDS system — namely, that the host states cannot bring a claim against an investor. The MIC would also consist of full-time, state-appointed judges for long, non-renewable terms via a 'transparent appointment process,'[79] accompanied by an enforcement system within its establishing instrument. The EC has not furnished any additional material addressing the other structural elements of the proposal. Instead, a major issue with the way MIC has been discussed at WG3 is that the idea seems to have become the underlying proposal behind various deliberations — such as a code of conduct for arbitrators or an appeal process — without being thoroughly debated during sessions dedicated specifically to it. This approach has naturally eroded space for participating states to express their input.[80] When the Code of Judges was submitted for Commission deliberation, several participants pointed out that there was no agreement on whether the MIC was a feasible or desirable solution in the first place.[81]

In fact, the EC seems to have pursued multilateral consent wholly beyond the confines of the WG3. As aforementioned, the EU negotiated bilateral agreements that already featured the foundational features of an ICS, with CETA providing for the nomination of judges (serving five-year terms, renewable once) to the standing and appellate court consisting of 15 individuals appointed by the EU and Canada.[82] The EU-Vietnam FTA and IPA also strengthen the EU's power when pursuing the MIC agenda with other states, considering that the existence of an investment court under these agreements, as agreed to by another nation, implies that a multilateral adjudicatory mechanism is possible and desirable An MIC was primarily discussed at informal gatherings and meetings held between official Working Group sessions, which resulted in the UNCITRAL Secretariat preparing a 'draft statute of a standing mechanism' and potential financing options, alongside others regarding the formation of an appellate mechanism. None of these documents have been discussed at WG3 sessions.[83]

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[78] AUGUST REINISCH & MARC BUNGENBERG, *Jurisdiction,* in DRAFT STATUTE OF THE MULTILATERAL INVESTMENT COURT (2020) (Marc Bungenberg et al. eds., 2021).

[79] U.N. Commission on International Trade Law: Working Group III, Possible Reform of Investor-State Dispute Settlement: Submission from the EU and its Member States, at ¶ 19, UNCITRAL Doc. A/CN.9/WG.III/WP. 159/Add.1 (2020).

[80] Fahira Brodlija, *The Multilateral Investment Court: Necessary ISDS Reform or Self-Fulfilling Prophecy?*, 15 Arb. L. Rev. 1, 11 (2024) [hereinafter Brodlija].

[81] *Id.* 12.

[82] CETA, *supra* note 44.

[83] Brodlija, *supra* note 80, at 12.

Considering that it was the official mandate of WG3 to effectively restore legitimacy to the ISDS system, it is absurd that its flagship proposal for reform has seemingly solidified through wholly illegitimate processes that do not allow for official, centralised deliberation. Regardless of the merits of the proposal itself, which have been extensively discussed, these inadequacies violate the tenets of democratic decision-making, ironically transgressing the commitment to fair and equitable procedure. Beyond this, the MIC as a solution to the many issues with ISDS, is merely a drop in the pond, addressing none of the concerns raised regarding more substantive issues with the ISDS system.

V. VIOLATING WTO PRINCIPLES: THE EU'S DE FACTO EXCLUSIVE PREFERENTIAL TRADE AGREEMENT & EMERGING BARRIERS FOR NON-EU MEMBERS

This paper has attempted to highlight the glaring power imbalance between (primarily) developing nations and EU member states. It maps out a vision of the MIC that is inevitably rooted in this power imbalance. This premise foregrounds the meat of the matter — that the EU's version of the MIC, as it stands, has the potential to function as a *de facto* PTA by creating an exclusive investment regime. As illustrated below, if the existence of a PTA is proven, such an institution would risk breaching key principles of GATT, such as the non-discrimination principles of MFN[84] and NT.[85]

Emerging from the inner processes of WG3 and the inspiration behind the MIC is the suggestion that the MIC is the sole way to 'fix' the current state of ISDS, with any other approach to reform either going too far or not far enough. WG3 became the EC's chosen platform to legitimise an initiative it has long since attempted to enforce between EU member states and their investment partners, on an international scale, presenting it as the only viable path forward for all nations and not just for its constituent members.

While the EU's decision to take its idea of an investment court to the multilateral arena is welcome, the proposal's narrow focus on institutionalising dispute resolution burdens non-EU countries by effectively imposing obligations to subscribe to the system, requiring them to enforce the court's rulings domestically,

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[84] General Agreement on Tariffs and Trade art. 1, April 15,1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A,1867 U.N.T.S. 190 [hereinafter GATT].
[85] *Id.*, art. III.

often superseding their national legal systems.[86] This is further evidenced by the asymmetry in access within the CETA as well as the EU-Vietnam FTA.

Firstly*,* one of the key features, as mentioned earlier, is the ICS, which has been portrayed as a multilateral reform for the ISDS infrastructure. However, its application is restricted to EU and Canadian investors. CETA establishes a preferential legal and dispute resolution mechanism for EU and Canadian investors, which can be interpreted as a *de facto* PTA, as these mechanisms are not offered to third-world countries outside the EU-Canada pact. Secondly*,* the EU-Vietnam FTA also incorporates the ICS, similar to the one in CETA, but again its application is restricted to the EU and Vietnam. While, in the strictest sense, the agreement might not constitute a PTA, the application of the dispute resolution and investment protection mechanism offers more protection to European markets compared to Vietnamese companies. The ICS in the FTA only allows EU investors to bypass local courts and directly challenge the Vietnamese government at an international level, while the same advantage is not extended to Vietnam. For instance, Article 3.22 of the FTA provides EU investors the right to initiate claims against Vietnam if they believe their investments are threatened by the Vietnamese government's actions or policies. On the other hand, the FTA does not provide Vietnam the right to counterclaim or initiate a dispute in the ICS if an investor from the EU engages in actions which harm Vietnam's interests. This exhibits the EU's constant superpower stranglehold over third-world countries.

When considered alongside the less-than-democratic negotiation processes the MIC proposal has been funnelled through at WG3, this becomes an obvious concern for developing economies, whose concerns have been systematically sidelined. Since such impositions require non-EU member countries to adjust their legal frameworks to accommodate the MIC's proposal, this would also include a duty to recognise MIC judgements without appeal in local courts to ensure compliance with international investment treaties as per the MIC's adopted interpretation. However, this design leverages the interests of foreign investors over the interests of the host states to the detriment of non-EU states with limited legal infrastructure or resources. This asymmetry[87] may inhibit these developing countries from fully leveraging the dispute mechanism at all, ultimately leading to the creation of a quasi-multilateral network of treaty-centred investment courts. Simply put, the EC's vision

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[86] UNCTAD Investment Report, *supra* note 4, at 148–149; Jin Woo Kim & Lucy M. Winnington-Ingram, *Investment Court System Under EU Trade and Investment Agreements: Enforcement Issues,* REGULATING FOR GLOBALIZATION (WOLTERS KLUWER) (Mar. 29, 2021), https://regulatingforglobalization.com/2021/03/29/investment-court-system-under-eu-trade-and-investment-agreements-enforcement-issues/.

[87] Open Letter from Erasmus Univ. Rotterdam to Shane Spelliscy, Chair of UNCITRAL Working Group III & All Participating States (Feb. 13, 2019).

of an MIC could potentially operate as a PTA by creating a preferential legal environment for EU member states, fostering a more stable and investor-favourable regime only restricted to EU members.

Building on the premise of the above argument — that the EU MIC is a potential avenue for the creation of a PTA — the MIC's double standards, coupled with the EC's bargaining power, could pressure developing countries to make legal concessions that may not align with their economic priorities or regulatory autonomy. Burgeoning compliance pressure upon developing countries would likely lead to forum shopping by investors seeking jurisdictions with the most favourable legal infrastructure, especially because the MIC does not require investors to exhaust domestic legal remedies before escalating disputes at a multilateral level. It will become increasingly challenging for developing nations to enforce policies which are in their public interest, particularly for those with limited legal resources. This handicap would restrict their ability to regulate foreign investment in ways that prioritise public health, labour standards, or environmental protection, as local governments would be deterred from implementing policies which might trigger expensive legal disputes.[88] This challenge to a developing nation's sovereignty leads to a regulatory chill. Evidence of this can be found in many ISDS cases such as *Azurix Corp. v. Argentina*,[89] *CMS Gas Transmission Co. v. Argentina*,[90] and *Suez v. Argentina*,[91] which each exacerbated Argentina's economic crisis. The culmination of these unfavourable ISDS rulings, despite Argentina's legitimate concerns, has led to a 'regulatory chill'[92] where the Argentinian government limited policy changes to avoid disadvantaging foreign investors.

In short, the fear of developing member states is that investor companies might structure their operations in a manner that places them under the jurisdiction of the EU MIC's investor-biased regulations. This fear is well-founded as evidenced by the *travaux preparatoires* of the ICSID Convention; what most states reasonably consented

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[88] Freya Baetens, *The European Union's Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration While Raising New Challenges*, 43(4) LEGAL ISSUES ECON. INTEGRATION 367, 380 (2016).

[89] Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12 (July 14, 2006),

[90] CMS Gas Transmission Co. v. The Republic of Arg., ICSID Case No. ARB/01/8 (May 12, 2005).

[91] Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (May 5, 2017).

[92] Yuwen Li, *The Notion and Development of International Investment Court*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 1685, 1690–1692 (Julien Chaisse et al. eds., 2021); Alessandra Arcuri & Federica Violi, *Human Rights and Investor-State Dispute Settlement: Changing (Almost) Everything, so that Everything Stays the Same*, 7(3) DIRITTI UMANI E DIRITTO INTERNAZIONALE 579, 584–587 (2019).

to while joining ICISD is a far cry from what this convention became in practice.[93] The pro-investor and anti-developing state spirit within the ICSID convention resonates in various ISDS decisions, notably the *Tecmed* case,[94] which interprets the 'fair and equitable treatment'(FET) obligation as an avenue for companies to be granted a high degree of foreseeability, without any reasoning as to why it would be wise to grant it from a societal standpoint. The *Tecmed* case in the guise of an investor-friendly understanding of the FET standard transfers the risk of doing business from the investor to the state; it allows the investor to pressurise state authorities to refrain from regulating in a manner that might impact the investor's business. The MIC project seems to follow a similar strategy to the ICSID Convention wherein the first step was to provide the procedural avenue and then, add on substantive rules later. By creating a new framework for the enforcement of investor rights, the MIC leaves lots of room for interpretation with respect to the legal substance.

The question remains whether these countries would have joined the ICSID Convention in the first place if they were able to foresee these later developments. In a similar vein, countries including Brazil,[95] India,[96] and South Africa have voiced their concerns about the EU's multilateralism initiatives and have actively redesigned their investment protection policies. For instance, the South African delegation has heavily critiqued the MIC proposal stating that although it was possible for such an institution to address the correctness of decisions, it would likely fail to meet the goal of producing coherence, which is to contribute to the predictability and legal

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[93] Love Rönnelid, *An Evaluation of the Proposed Multilateral Investment Court System*, EUROPEAN UNITED LEFT/NORDIC GREEN LEFT 1, 41 (2019), https://left.eu/app/uploads/2019/03/MIC_vRET_web_FINAL2.pdf [hereinafter Rönnelid].

[94] Técnicas Medioambientales Tecmed S.A. v. United Mexican States ICSID Case No. ARB (AF)/00/2 (May 29, 2003).

[95] Stephan W. Schill & Geraldo Vidigal, *Designing Investment Dispute Settlement a la Carte: Insights from Comparative Institutional Design Analysis*, 18 L. PRAC. INT'L CT. TRIB. 311, 320 (2019) [hereinafter Schill & Vidigal]; U.N. Commission on International Trade Law: Working Group III, Possible Reform of Investor-State Dispute Settlement: Submission from the Government of Brazil, UNCITRAL Doc. A/CN.9/WG.III/WP. 171 (2020).

[96] *India rejects attempts by EU, Canada for global investment agreement*, THE HINDU (Jan. 24, 2017), https://www.thehindu.com/business/India-rejects-attempts-by-EU-Canada-for-global-investment agreement/article17083034.ece; Trisha Menon & Gladwin Issac, *Developing Country Opposition to an Investment Court: Could State-State Dispute Settlement be an Alternative?*, KLUWER ARB. BLOG (Feb. 17, 2018), https://arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/?utm_source=chatgpt.com; Schill & Vidigal, *supra* note 96, at 320.

certainty of an emergent jurisprudence.[97] The critique heavily relies on the assumption that the MIC proposal would likely keep many key features intact (effectively locking in ISDS), and amount to only cosmetic reforms. This assumption stands up to scrutiny – while the EU claims that the MIC aims to tackle 'perceived limitations' of investment arbitration, such as concerns over legitimacy and legal accuracy, the proposal is narrowly focused on institutional aspects.[98] The Commission assumes that the presence of highly qualified, full-time adjudicators within a permanent multilateral framework would resolve these concerns. However, this narrow approach as evidenced in the Inception Impact Assessment,[99] fails to address the substantive obligations embedded in existing investment-protection standards. The Inception Impact Assessment explicitly states that the substantive provisions of international trade and investment agreements will remain unaffected by the MIC negotiations. Consequently, the proposal defeats its entire purpose. South Africa's concerns stem largely from the extensive rights granted to investors, such as the fair and equitable treatment standard, and the absence of binding obligations with respect to human rights, labour standards, or environmental regulatory standards. With over 200 ongoing investor-state arbitration cases, more than half involving energy and natural resources, these proceedings often threaten the state's public welfare legislation[100]. Subsequently, South Africa called for the WG's dialogues to move beyond ISDS and address substantive concerns about investment rules within a broader context and explore alternatives. These criticisms indicate that some of the strongest opposition to the EU's multilateral efforts is likely to come from the Global South.

By setting up the MIC as a one-stop shop, the EU could be seen as creating a preferential investment framework for its members, effectively bypassing GATT principles of MFN and NT. For instance, Article I of the GATT mandates that any favourable treatment given to one member country's products must be extended to all other WTO members. Since the MIC would not cover all WTO members but

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[97] U.N. Commission on International Trade Law: Working Group III, Possible Reform of Investor-State Dispute Settlement: Submission from the Government of South Africa, at ¶ 77, UNCITRAL Doc. A/CN.9/WG.III/WP. 176 (2020).

[98] *Public Consultation on a Multilateral Reform of Investment Dispute Settlement*, COLUMBIA CTR. ON SUSTAINABLE INV. (Mar. 2017), https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/100 (2017); *Reply to the European Commission's public consultation on a multilateral reform of investment dispute resolution*, IISD INV. PROGRAM (Mar. 16, 2017), https://www.iisd.org/articles/policy-analysis/reply-european-commissions-public-consultation-multilateral-reform.

[99] *Establishment of a Multilateral Investment Court for investment dispute resolution*, EUROPEAN COMMISSION INCEPTION IMPACT ASSESSMENT (Aug. 1, 2016), https://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf.

[100] *Case Studies: Investor-State Attacks on Public Interest Policies*, PUB. CITIZEN (Mar. 6, 2015), http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf.

instead only the selected group of countries that choose to buy into the MIC, it would provide EU investors and companies with dispute resolution and investment protections that are not equally available to investors from developing nations, who are unlikely to willingly participate in this approach to ISDS considering the scepticism already expressed during WG3 sessions. By implicitly creating preferential protection mechanisms for EU investors and host states only, the scope of EC's MIC proposal would be incompatible with MFN principles as non-EU countries without access to the MIC would need to contend with unequal regulatory compliances.

Moreover, Article III of the GATT mandates that foreign and domestic products should be treated equally once they enter the host state's market. The EU MIC proposal should ideally involve formal, transparent, and comprehensive multilateral discussions to establish an agenda, followed by procedures guaranteeing that export and import capital countries have equal sovereign rights during the negotiations. As established, this has not occurred. Undue pressure on exporting countries to limit their duty to protect investments on their home soil breaches the mandate of Article III. To explore this claim further, in *Japan — Taxes on Alcoholic Beverages*, the Appellate Body strictly interpreted the NT principle under Article III, highlighting that member states cannot use regulatory distinctions to discriminate against imports in favour of domestic industries.[101] Similar reasoning, if applied to the EC's MIC Proposal, would reveal potential conflicts. For example, Article 8 (Activation of the Market Instrument) of the proposal could disadvantage non-EU suppliers, as it allows the EU to activate MIC proceedings in cases where dependency on third-country suppliers is perceived as a threat to the EU strategic sectors, thereby prioritising domestic production.

Additionally, in the *United States — Taxes on Automobiles*,[102] the Panel's ruling underscored that regulatory concessions favouring domestic industries are investigated under Article III. If similar incentives in the form of relaxed regulations were extended to encourage foreign investment at the cost of discriminating against imports, this could constitute a breach of Article III. The EU MIC contains provisions that pressure non-EU countries to relax domestic regulations in favour of foreign investments, which might indirectly disadvantage foreign goods in violation of the National Treatment principle.[103]

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[101] Appellate Body Report*, Japan — Taxes on Alcoholic Beverages*, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996).

[102] Panel Report, *United States — Taxes on Automobiles*, WTO Doc. DS31/R (adopted Oct. 16, 1996).

[103] *Opinion of the European Economic and Social Committee on "Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of*

The aforementioned argument in Part IV establishes how the ISDS reform process within the UNCITRAL WG3 has systematically sidelined the voices of developing economies. It is essential to frame the reform debate through a procedural lens that prioritises the concerns of developing nations, who have had no meaningful dialogue. This skewed approach to reform perpetuates a system that marginalises the regulatory autonomy and developmental objectives of third-world countries. The claim in Part V builds upon this critique by illustrating how the EU's MIC proposal exacerbates these inherent design flaws, operating as a *de facto* PTA that pressurises third-world countries by imposing disproportionate regulatory compliances. The MIC has been designed to establish the EU's procedural dominance in WG3, effectively creating an exclusive investment regime that favours EU investors. This undue preference subsequently violates GATT principles of MFN and NT. Together, these sections expose the hidden agenda of MIC's reformist agenda, undermining the sovereignty and developmental aspirations of non-EU states while privileging EU-centric economic interests.

VI. THE QUEST FOR ALTERNATIVES: RESOLVING LATENT INEQUITY WITHIN NEW GENERATION EU PTAS AND A NEW VISION FOR AN MIC

One possible solution to the restricted application of the MIC is to follow suit with the WTO, which prohibits its members from bringing actions alleging the violation of a WTO agreement before any judicial body outside the WTO system.[104] This would essentially release the burden of mandatorily signing and ratifying the MIC and reduce the chances of forum shopping. Second, provisions like the Agreement on Safeguards (SA) could be incorporated to explicitly affirm the right of host states to regulate in cases of public policy concerns,[105] especially in strategic sectors such as environment, health, and labour. The criteria set out in the SA, particularly in relation to economic emergencies,[106] establish key requirements for proving the existence of serious injury in the importing country. For example, to justify the implementation of domestic measures restricting imports, there must be a clear demonstration of a causal link[107] between the surge of imports and the resulting

investment disputes, 2019 OJ C 110/145 ; Zarate, *supra* note 12, at 2785; Rönnelid, *supra* note 94, at 41-42.

[104] DSU, *supra* note 48, art. 23.1.

[105] Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 [hereinafter Safeguard Agreement].

[106] GATT, *supra* note 85, art. XIX; Safeguard Agreement *supra* note 106, art. 4.

[107] Appellate Body Report, *United States — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, WTO Doc. WT/DS177/AB/R, WT/DS178/R (adopted May 16, 2001); Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WTO Doc. WT/DS166/AB/R (adopted Jan. 19, 2001).

serious injury.[108] This framework not only provides a legal basis for economic safeguards but also serves as a critical tool for protecting the interests of developing nations, ensuring that they are not subjected to undue economic strong-arming by economically powerful trading partners, such as the EU. By adhering to these rigorous requirements, third-world countries can effectively defend their economic sovereignty and prevent exploitative tactics which could potentially undermine their domestic industries.

Despite the main argument this paper presents, it does not deny the importance of procedural reform or the idea of the MIC — it disagrees with the sole focus it has been given within the reformist camp and the simultaneous sidelining of developing nations alongside the underlying ideological presumptions of IIL. This paper argues for an expanded WG3 mandate and extended discussions about how the underpinnings of ISDS specifically disadvantage some countries more than others while prioritising the interests of selected capital exporters. It recommends that developing countries within WG3 coordinate amongst themselves and present a unanimous submission on how the current ISDS regime affects their interests. This is especially critical at this juncture, considering the marginalisation of ongoing efforts to establish an Advisory Centre for International Investment Law aimed at supporting negotiation strategies for developing states and modern BITs, and the dismissive grouping of issues pertaining to developing nations into a category titled "Procedural and Cross-Cutting Issues", which were barely discussed during the WG3's sessions held till date.[109] A consensus among developing countries is essential in gaining the leverage needed to ensure that these items are given due consideration during the 50th and 51st sessions (scheduled for January and April 2025, respectively).[110] These actions can co-exist with the establishment of an MIC in hopes of resolving the legitimacy crisis plaguing ad hoc investment arbitration which, if done right, can help restore impartiality and legal consistency to ISDS. However, this can only be done if the MIC's structural and functional aspects emerge from equitable negotiations facilitated by formal, fair procedures at WG3 that prioritise representation and the production of flexible options for reform tailored for states of differing development that have faced historical disadvantages in the global economic order. The formation of the Advisory Centre is of utmost priority because it would further streamline deliberations on what the MIC should look like, fleshing out its features in consideration of all interested parties — not just the EC's.

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[108] Panel Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products*, WTO Doc. WT/DS98/R (adopted Jan. 12, 2000).

[109] Brodlija, *supra* note 80, at 18.

[110] *Working Group III: Investor-State Dispute Settlement Reform*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, https://uncitral.un.org/en/working_groups/3/investor-state.

VII. CONCLUSION

Ultimately, ISDS reform efforts must be carried out in good faith, in acknowledging how the fundamentals of IIL are rooted in the historical subjugation and exploitation of the postcolonial world. Institutions that claim a space within global governance, such as UNCITRAL, either intentionally or unintentionally solidify and exacerbate the continued exclusion of developing voices from the international economic order. Considering their role in platforming discourse that impacts the affairs of such nations, distilling the question of reform to purely procedural issues at the cost of more substantive issues raised by the Global South is unacceptable. This is particularly true when it results in resolutions presented as 'solve-all' answers to the many concerns expressed about ISDS, such as the MIC, which has embedded itself in the reformist project despite insufficient deliberation on its essentials within the WG3. This paper does not disagree with the premise of the MIC but rather with its framing. The inherent flaws in the design of MIC reveal the stark power imbalance which favours EU member states and investors. The structure and restricted scope of the MIC risk establishing *de facto* PTAs, while sidelining the interests of developing countries. The infrastructure of the MIC undermines key principles of non-discrimination enshrined in GATT. To ensure a truly practicable multilateral and equitable investment regime, the EU must revise the approach to the MIC as well as its overall policy approach to promoting its economic interests on a multilateral (and bilateral) scale with its trading partners. This could involve incorporating more inclusive provisions, such as those found in the SA, to allow (third-world country) host states to leverage equal bargaining power as the EU investors and prevent any prejudices stemming from forum shopping. Only through such revisions can the MIC become truly 'multilateral' and respect the sovereignty and regulatory autonomy of all nations, particularly the Global South. Lastly, it is hoped that going forward, especially as WG3 wraps up its mandate in September 2025, the voices of the 'third world' will be given the platform and consideration they are owed, as the world hopes for a reimagined rendition of the investor-state dispute settlement.