
FAIR AND EQUITABLE TREATMENT AND CLIMATE LEGISLATION: A COMPARATIVE REVIEW OF REFORM PROPOSALS IN MULTILATERAL INVESTMENT COURT

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ABSTRACT

This paper examines critically the standards in international Investment Law through Fair and Equitable Treatment (FET), focusing on the importance of the implications towards climate change. Fair and equitable treatment was introduced with the purpose of protecting international investors from unfair and discriminatory treatment, which has now evolved into an unfair and inconsistent standard that gives the tribunal excessive discretion. This ambiguity has created issues related to the interest of international investors and has resulted in the phenomenon of regulatory chill, in which countries fear implementing regulations and losing related to the environment and climate change, which results in a lack of societal regulation due to the fear of being sued by investors.

This paper also explores various important cases related to the conflict between the state and international investors like *Eiser v. Spain*, *Vattenfall v. Germany* and *Eco Oro v. Colombia*. This paper also highlights the theoretical criticisms from TWAIL, GAL, which emphasises the structural bias and the fragmentation of the investment treaty framework.

While the proposed multilateral Investment Court (MIC) has a potential ground to create an impact with regards to consistency, fairness, and judicial independence, however, it has yet to address the deeper substantive imbalance happening in the existing treaties.

FAIR AND EQUITABLE TREATMENT: CONCEPTUAL OVERVIEW

The Fair and Equitable Treatment (FET) standard represents a fundamental principle in bilateral investment treaties (BITs) and in international investment agreements (IIAs), with over 2500 BITs currently in existence, designed to provide protection and assurance to international investors from arbitrary, unethical treatment, and discrimination towards the investors by the host states.

Over time, FET has grown as a minimum standard of treatment under customary international law, in the case of *Neer v Mexico (1926)*¹. FET is now developed into a multifaceted doctrine that includes various elements such as coherence and transparency, investors, protection, and safety from unethical procedure² and protection from biased court proceedings, rightful or legitimate expectations and Logical Reliance, regulatory changes.

The FET standard aims to provide safety to international investors. However, gradually, it is becoming controversial as this meaning has become indefinite and cloudy. Arbitrators get freedom during investment disputes to decide whether the investor was treated ethically and fairly, including new laws or policies that the government tries to make because of public interest. For this reason, the FET standards have become a vital part of discussions and debates. The question here is how much time and liberty does the decision maker need to decide towards an investor, and are foreign investors protected, especially in vital and important areas like public well-being, environment, protection, or climate change?³.

This essay argues that the FET standard, due to its inherent lack of transparency and clarity, has engendered contentious debates and has hindered states from implementing necessary laws related to climate and environmental concerns. Historically, the FET standard has predominantly favoured investors, even amidst ongoing reform efforts.

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FET EVOLUTION AND RELEVANCE FOR CLIMATE ACTION

Whether between two countries (bilateral) or many countries (multilateral), the Fair and Equitable Treatment standard is present in most investment treaties. Yet, the meaning of FET is not well-defined.

Decisions made by tribunals are sometimes arbitrary, which is why countries hesitate when it comes to introducing laws for climate change.

During *post-World War II*, the appearance of FET was displayed in United States treaties (also in the draft treaty by OECD)⁴. From then, tribunals have encouraged to structure of the actual meaning of FET in practice. However, this is not the case as the practice is not headed in the same way; for this reason, there has been confusion and inconsistency, which has led to a lot of academic debates.

F.A. Mann said that “FET envisages conduct which goes far beyond the minimum standard and efforts protection to a greater extent, and according to a much more objective standard than any previously employed form of words”⁵. Prominently, FET goes beyond customary international law as it is treated in an autonomous standard, i.e. independent standard, and it can stand on its own. This lacks clarity and even though it’s textual flexibility, most tribunals agrees that there are three staple elements: Biased legal proceeding and unfair or denial of justice (when an investor does not get a fair trial), Blocking or prevention of reasonable expectations (investor investing in a foreign state based on Legal or lawful conditions which is stable), Unfair or actions of government which is not reasonable.

FET AND THE PROTECTION OF EXPECTATIONS: SAFEGUARD OR STRAITJACKET

Genuine expectations are one of the most important elements of the Fair and Equitable Treatment standard. When an international investor invests, they have expectations that laws related to climate and environment should remain stable. In today’s world, there are certain or sudden adjustments made by every other government, but for investors, these changes are not

⁴ Organisation for Economic Co-operation and Development ‘Our History’ (OECD) <<https://www.oecd.org/en/about/history.html>>

⁵ F A Mann, British Treaties for the Promotion and Protection of Investments ‘52 *British Yearbook of International Law*’ 241–254 <<https://doi.org/10.1093/bybil/52.1.241>>

what they were expecting, especially when there are adjustments related to public interest & welfare and environmental changes— investors may argue that these adaptations have disrupted their expectations unfairly⁶.

In the case of *Tecmed v Mexico (2003)*,⁷ the tribunal held that “foreign investors expect the host state to act invariably...free from ambiguity... to plan its investment”. Similarly, in the case of *Eiser v Spain (2017)*⁸, a fundamental change to the regulatory regime. The tribunal ruled that the violation of FET has been made by Spain, as Spain decided to change its renewable energy laws without considering the investor’s reliance on the earlier rules. This amendment was major, which affected the investors.

Cases or decisions like this show how and why the FET standards should be applied thoroughly.

THE RISK OF REGULATORY CHILL AND CLIMATE REGULATION

States may not pass strong environmental laws; this is a major setback for the FET standard⁹. This is known as regulatory chill. It is very common because of how the FET standard works; developing countries may be afraid of being sued by international investors, which leads to a lack of introduction of strong or important measures that they are willing to take for climate change, but are unable to do so due to favouritism and unreasonable support given to foreign investors.

In the case of *Vattenfall v Germany (2012)*¹⁰, Germany decided to strengthen and make their environmental rules rigid for coal-related power plants. In response, the Swedish energy company, Vattenfall, decided to sue Germany for 1.4 billion under the Energy Charter Treaty.

⁶ Federico Ortino, ‘The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?’ (2018) 21 Journal of International Economic Law 845
<<https://ssrn.com/abstract=3263592>>

⁷ *Técnicas Medioambientales Tecmed, S.A. v United Mexico* Year of the award: 2003 ICSID Case No ARB(AF)/00/2, para 154. <https://www.biicl.org/files/3917_2003_tecmed_v_mexico.pdf>

⁸ *Eiser Infrastructure Limited And Energia Solar Luxembourg S.A R.I. v Kingdom Of Spain*(Award,4 May 2017) ICSID Case No Arb/13/36
<https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants%27%20documents/CL%20%20Exhibits/CL-0298.pdf>

⁹ Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2014) 143–228 <<https://www.cambridge.org/core/books/abs/substantive-protection-under-investmenttreaties/fair-and-equitable-treatment/464B8A7ED0B3693C58FE815C0780699C>>

¹⁰ *Vattenfall AB and others v Federal Republic of Germany* (ICSID Case No ARB/12/12)
<<https://arbitrationblog.kluwerarbitration.com/2021/02/18/a-battle-on-two-fronts-vattenfall-v-federal-republic-of-germany/>>

However, this case was settled outside the tribunal, and it did not reach a final award, but it left a strong note: reasonable or rightful laws related to the environment can be seen as unfair towards investors, which can lead to fear and a lack of regulation of public laws.

ROLE OF ARBITRATOR DISCRETION AND THE FET

Arbitral discretion can lead to uncertainty. One of the major criticisms of the FET standard is the immense flexibility it provides to interpret the treaty term. For example, in the case of *Saluka v Czech Republic (2006)*¹¹, the panel stated that the state must act in a “transparent, reasonable, and non-discriminatory manner”. This means each case should be assessed differently, and the tribunal’s judgement must be independent (based on facts and treaties which are applicable) about what FET means in each case, as the meaning of FET is beyond what is written in several treaties due to a lack of a precise definition.

Some scholars argue that this is not a democratic process. When laws are introduced by their parliament, the unelected tribunal has the power to override the state law, even if those laws address major worldwide challenges like environmental reform or climate change. However, there are some critics who say that this gives private arbitrators (who are not elected) authority over the government.

This is a setback for countries as they will hesitate to enact laws related to climate change.

LEGAL FRAGMENTATION AND DISPROPORTIONATE IMPACT

States find it harder to regulate in favour of the public interest due to the unparalleled and inconsistent structure of treaties. However, an agreement that affirms states’ right to regulate for public health, climate or environmental protection and safety of the public is the US-Mexico-Canada agreement known as USMCA¹². Although these agreements are recent, there are several treaties which are longstanding and lack provisions protecting the state from legitimate rights. When the rules differ from one treaty to another, it creates legal fragmentation. Treaty shopping—the structuring of an investment to bring it within the

¹¹ *Saluka Investments BV (The Netherlands) v The Czech Republic* (Partial Award, 17 March 2006)

<https://www.transnational-dispute-management.com/downloads/27812_case_report_saluka_v_czech_republic_award_2006.pdf>

¹² Agreement between the United States of America, the United Mexico states and Canada Agreement (entered into force 1 July 2020) <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>>

coverage of at least one investment treaty¹³— raises questions about whether the regime is preferential in practice. The practice of treaty shopping poses practical challenges for states¹⁴. This issue is acute, especially for developing countries, as they already face financial and institutional constraints.

DOES IMPARTIAL PROCEDURAL GUARANTEE SUBSTANTIVE JUSTICE?

Another major limitation is ensuring procedural justice without substantial justice made against the FET standards. One of them is how the standard lies in the illusion of fairness it creates, such as the right to access or plead in front of the panel ethically, that is, access to arbitration. However, these procedural guarantees do not give rise to outcomes.

Is it important to have a distinction between procedural and substantive justice? Yes, it is important.

Definition- While procedural means fairness in process, substantive means the outcome that is unbiased and ethical. It is important because it estimates whether the arbitrary tribunals have a guaranteed process which is fair and transparent, or if the consequences were unbiased, plus a state's ability to introduce laws in favour of public interest, including areas which are sensitive like climate change or other worldwide challenges.

Application- It is also important to understand why several scholars claim that true equality in international investment Law is not present, as FET standards fail to deliver true justice.

Example- the case of *Loewen Group, Inc. and Raymond L. Loewen v United States of America*¹⁵, in this case, it was considered by the tribunal that allegations of both procedural and substantive violations within the framework of NAFTA Article 1105¹⁶ FET provision.

¹³ Frederik Heitmuller, 'Dealing with Treaty shopping across the Tax, Trade, and investment regime' in Irma Johanna Mosquera Valderrama and others (eds), *Redefining Global Governance* (2025) 97-114
<https://link.springer.com/chapter/10.1007/978-3-031-69793-7_8>

¹⁴ Julien chaise, 'the treaty shopping practice: corporate structuring and restructuring to gain access to investment treaties and arbitration' (2015) 11(2) *hastings business law journal* 225, 228.
<https://scholars.cityu.edu.hk/files/49094159/2015_corporate_structuring_and_restructuring_hblj.pdf>

¹⁵ *Loewen Group, Inc and Raymond L Loewen v United States of America* (ICSID Case No ARB(AF)/98/3) 26 June 2003 <https://icsid.worldbank.org/sites/default/files/parties_publications/C9734/D%20-%20Statement%20of%20Claim%20%2006.10.%202022/Legal%20Authorities/CL-0045-ENG%20-%20Loewen%20Group%20v%20USA.pdf>

¹⁶ Autoridades Legales RL-0062, Counter-Memorial (2022)

Wider implications- it is important to have the distinction between both the terms when issues like climate change challenges emerge due to a lack of reasonable procedures.

Third world approaches to international law (TWAIL)¹⁷ scholars argued that if FET standards were once applied to the legal system, the historical imbalances would be produced again. When the treaty was formed, it was designed to protect international investors and their interests, but it is becoming difficult as the protection limits the host country. TWAIL helps to understand the legal system by highlighting the structural power imbalances. Multilateral Investment Court (MIC)¹⁸ promises to enhance clarity, continuity of procedure; however, it also states that it is still compelled by the substantive laws and rules which are already present in BITS. *The Indian model BIT 2016*¹⁹ is an outstanding example which limits FET obligations by avoiding references which are vague by nature, which only supports investors.

RECONSIDERING FET

It is well known historically that FET has provided more liberty to investors by prioritising them, even though it costs the ability to regulate. However, treaty practices are starting to reflect more on sensitive areas like climate and environmental issues. This change suggests the *Damascus moment*²⁰ as to how the law must work in terms of Investment. This reflects a drastic change in how the legal experts contemplate rules related to investment, by shifting the way there will be protection for the climate and environment. Certain changes to treaty interpretation may challenge investors if FET supports state action taken for the protection of the environment, as seen in CETA²¹. This approach not only demonstrates that the law must evolve in circumstances like this, but it also stimulates an ethical and more adaptable understanding for the advancement of the climate and environment. This method is a refined

<https://icsid.worldbank.org/sites/default/files/parties_publications/C9734/E%20-%20Counter-Memorial%20%2012.02.2022/Autoridades%20Legales/RL-0062-ENG.pdf>

¹⁷ James Thou Gathii, 'TWAIL: A Brief History of Its Origin, its Decentralized Network, and a Tentative Bibliography' (2011) 3(1) Trade, Law and Development 26 <<https://ssrn.com/abstract=1933766>>

¹⁸ Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunal and Investment Court to a Multilateral Investment Court: Options Regarding the Institutional Design* (Springer 2020)

¹⁹ Ministry of Finance (India), *Model Text for the Indian Bilateral Investment Treaty* (2016)

<<https://www.nortonrosefulbright.com/en/knowledge/publications/46bc623b/india-releases-a-new-model-bit>>

²⁰ Ian Mwiti Mathenge, 'tackling the Conundrum: climate change and stabilization under FET' (27 September 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4230700>

²¹ Comprehensive Economic and Trade Agreement (CETA) between Canada and the Eu (signed 30 October 2016, provisionally applied 21 September 2017)<https://policy.trade.ec.europa.eu/eu-trade-relationships-country-andregion/countries-and-regions/canada/eu-canada-agreement_en>

version of reassuring fairness that permits authorities to regulate or introduce laws for the public interest without compromising the protection of investors²².

REASSESSING FET IN LIGHT OF SYSTEMIC REFORM

The Fair and Equitable Treatment standard was mainly designed to protect the interests of international investors against discriminatory decisions and unfair justice, but it has now transformed into a contested principle and complex concept, which creates tension concerning the protection of Investment laws and regulatory autonomy. Multilateral Investment Court is an institutional innovation which provides clarity in procedural matters; however, MIC does not exclusively solve the deeper complications rooted in the substantive matter of existing BITS-- Legal fragmentation, the risk of regulatory chill, and treaty shopping are some issues which is structural and contribute to the imbalance. TWAIL critiques and *India's 2016 model BITS* is a treaty practice that indicates to us a way to emerge towards an approach which is balanced. These recent treaty practices acknowledge the priorities of both development and environmental protection of the host states—scholars refer to it as a Damascus moment. The ambiguity of FET standards still provides tribunals abroad discretion, due to which states are discouraged from introducing any climate legislation for long-term goals related to climate and environmental issues. The world urges for climate governance, a system which provides fairness and delivers true justice. To balance investor rights and state power, the FET standard should be reconsidered in the treaty by redrafting and reforming the fundamental issues and limiting the power of tribunals.

MULTILATERAL INVESTMENT COURT

Investor-state dispute settlement (ISDS) under thousands of bilateral investment treaties is facing a lot of criticism. The Investment treaty regime over the past years has been facing accusations of inconsistency, legitimacy deficits and fragmentation²³, which calls for a comprehensive structure reform. The Multilateral Investment Court (MIC) is a standing international tribunal for disagreements associated with investment. To replace ad hoc

²² Maxron Holder, 'Defending climate action in investor-state dispute settlement (ISDS)' (05-Nov-2024) Edinburgh Law Review<<https://journals.ed.ac.uk/eslr/article/view/9691/12880>>

²³ United Nations Conference on Trade and Development (UNCTAD), IIA Issues Note: Investor-State Dispute Settlement - An information Note on the United States and the European Union (2014) <<https://investmentpolicy.unctad.org/publications/116/iaa-issues-note---investor-state-dispute-settlement-an-information-note-on-the-united-states-and-the-european-union>>

arbitration with a permanent MIC²⁴ was proposed, based on the rule of law in disputes related to investment, as it can ensure a structured flow, fair proceedings and judicial independence.

TWAIL scholars argue that MIC fails to address structural issues in making ISDS accountable: lack of investor obligation, public welfare laws, and risk of regulatory chill. This essay contends that although a Multilateral Investment Court (MIC) could address many of the procedural shortcomings within the investment system, it will not rectify the underlying substantive injustices that persist. This argument will be substantiated through case laws, such as *Philip Morris v. Uruguay*²⁵, *Saluka v. the Czech Republic*²⁶, and *Eco-Oro v. Colombia*²⁷. This also highlights the framework of GAL²⁸ and TWAIL.

SETBACKS OR DRAWBACKS OF THE INVESTMENT TREATY REGIME:

Lack of transparency and restrictive public engagement: All the proceedings related to Investment arbitrations are made exclusively or in private, following an independent arbitration structure. By default, proceedings are confidential, pleadings or awards are restrictive²⁹. Public health, issues related to the environment or any other services which are essential, have been decided with outsiders³⁰. These public policy disputes are crucial; therefore, the involvement of public scrutiny is minimal. There are certain reforms, like the Mauritius Convention on Transparency 2014,³¹ and the UNCITRAL Transparency Rule 2013 suggest that hearings and documents of ISDS to be open; moreover, the interest is not consistent and voluntary. Apart from occasional amicus curiae brief (*Methanex case*)³², affected communities, basically public stakeholders, do not have or minimum voice in proceedings. Situations like this not only

²⁴ Gabrielle Kaufmann-Kohler and Michele Potesta, The interplay Between Investor- State Arbitration and Domestic Court in Existing IIA Framework 'in investor-state Dispute Settlement and National Courts: Current Framework and reform Options (Springer 2020) 31 <<https://link.springer.com/book/10.1007/978-3-662-59732-3>>

²⁵ Philip Morris brands sarl v Uruguay, ICSID Case No Arb/10/7, Award (2016 July 08)

²⁶ Saluka Investment BV v Czech Republic, UNCITRAL, Partial Award (17 March 2006)

²⁷ Eco Oro Minerals Corp v Republic of Columbia ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021)

²⁸ Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15

²⁹ Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, 'Transparency and Public Participation in investor-State arbitration' (IISD, 2014) <<https://www.iisd.org/system/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf>>

³⁰ Ibid.

³¹ United Nations, Mauritius Convention on Transparency in Treaty-based Investors-State Arbitration (2014) <<https://ccsi.columbia.edu/content/mauritius-convention-transparency-comments-treaty-and-its-role-increasing-transparency>>

³² Methanex Corporation v United States of America, Final Award, 3 August 2005 UNCITRAL/NAFTA.

hamper the public's trust but also leave an impression that the justice is not fair, as they feel disconnected from the system, unlike human rights courts,³³ where the public is aware of the court proceedings.

Arbitrator conflicts and the issue of double-hatting: Arbitrators are not permanently chosen for investment disputes, as they are elected or chosen for every case; private individuals are selected for investment disputes. This practice is called double hatting³⁴ because many of these arbitrators in various cases work as lawyers. This is a major setback as it raises concerns related to fair justice and transparent proceedings, as the arbitrator may be influenced by the fact that someday they might get elected by the chosen party (especially investors) as their lawyer. These arbitrators lack strong ethics, unlike judges in permanent courts. Under article 52, the ICSID³⁵ system permits to cancellation of cases which involve misconduct during proceedings or in the award, but it does not resolve the bias which is present in the system deeply.

Delayed and expensive proceedings: Whenever there is a dispute in investment, it is mostly expensive and the proceedings are lengthy, which creates a problem for countries that are economically strong. As we know, cases have different phases—if the case falls under the state's jurisdiction, deciding who is liable and who is not, and estimating how much money to be paid for the damage caused³⁶. These are the stages followed for every case; this leads to prolonged or delayed judgment, as there are certain cases where, after these three phases, there may be further annulment. Surveys done by UNCITRAL-the legal fees can cost up to \$8 million for each side and including court proceedings, and the final award can take up to 3 to 5 years,³⁷. When the expense goes beyond estimation, it often creates tension and distress, which forces states to settle for what they can to avoid high-cost risk.

³³ Bernasconi-Osterwalder and Brauch (n 8) 11-12

³⁴ ICSID Secretariat, Background Paper on Double- Hatting in Investment Arbitration(25 February 2021)<[https://icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_\(final\)_2021.02.25.pdf](https://icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_(final)_2021.02.25.pdf)>

³⁵ ICSID, Convention on the Settlement Disputes between States And Nationals of Other States (ICSID Conventions) (1965, Last amended 2006)
<<https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf>>

³⁶ Noah Rubins and Thomas Child's 'Initial Stages of Dispute: The Investor's Perspective' in B Cremades and D Bishops (eds), The Guide to Investment Treaty Protection and Enforcement (2nd edn, Global Arbitration Review 2020) <<https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/secondedition/article/initial-stages-of-dispute-the-investors-perspective>>

³⁷ British Institute of International and Comparative Law, ISDS: Costs, Damages and Duration (June 2021)
<https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf>

THE EFFECT ON STATE REGULATION AND SUBSTANTIVE ASYMMETRY

Cases like *Micula v Romania*³⁸, where the state had to pay the compensation to the investor for ending subsidies which had become illegal, this case express how international investment law can clash with commitments made legally. In the case of *Eco Oro v Colombia* (ICSID,2021)³⁹, Colombia took measures to protect the environment (the páramo) was recognised by the tribunal; however, Colombia was still found liable for breaching the rights of the investor. This case outstretched distresses as states end up paying immense compensation even though they introduce regulations in good faith for environmental and climate issues⁴⁰. Without strong treaty protections for the welfare of the public, the general exception is present in WTO law, or in human rights courts where certain doctrines, such as like margin of appreciation, are used—investment Law continues to bring fear in states from introducing any needed regulatory action. Therefore, one of the major setbacks currently present in the system is the risk of regulatory chill⁴¹.

APPROACH FOR A PERMANENT MULTILATERAL INVESTMENT (MIC)

The goal of establishing a permanent investment court was to develop a well-structured MIC that addresses the procedural shortcomings of the ISDS system:

Ensuring consistency through appellate jurisdiction: Consistent and coherent jurisprudence would be the best innovation that MIC can offer in an investment dispute. Currently, fragmentation and unreliability are issues faced by various arbitral tribunals when they apply similar treaty standards. Permanent rosters of judges and an appeals chamber can contribute to a positive outcome while decreasing legal mistakes. In 2017 European Union made a

³⁸ *Micula v Romania*, ICSID case number ARB/05/20, Award (11 December 2013)

<<https://italaw.com/cases/697>>

³⁹ *Eco Oro v Columbia* (n 6)

⁴⁰ “The Guardian, ‘Why Fear of Billion-dollar lawsuits stops countries phasing out fossil fuels’ (6 march 2025) <<https://www.theguardian.com/environment/2025/mar/06/isds-fear-of-billion-dollar-lawsuits-stops-countries-phasing-outfossil-fuels-aoe>>

⁴¹ Kyla Tienhaara, ‘Regulatory chill and the Thread of Arbitration: A view from Political Sciences’ in Chester Brown and Kate Miles (eds), *Evolution, Investment Treaty and Arbitration* (Cambridge University press 2011)606 <<https://www.cambridge.org/core/books/abs/evolution-in-investment-treaty-law-and-arbitration/regulatory-chill-and-thethreat-of-arbitration-a-view-from-political-science/9426A8659CDD8BFB69FF552058CE7AD0>>

submission to the UNCITRAL working group III⁴², which highlighted a two-tier system: a first instance tribunal and an unbiased court that has the power to review any error made factually or legally during decisions. This proposal was made to provide a stable body of ruling and provide legal certainty; the other structures, like the WTO⁴³, succeeded in reinforcing legal stability. This proposal could help to address issues which are already present, like UNCITRAL arbitration. However, red it is extremely complicated and nearly impossible to overturn an award which is incorrect. This would bring confidence for both investors and the state by providing legal certainty and ensuring that proceedings are done uniformly and decisions are made without any discrimination towards any party.

ESSENTIAL IMPROVEMENTS (TRANSPARENCY, JUDICIAL INDEPENDENCE, EFFICIENCY)

The need for a permanent multilateral Investment court is to find procedural flaws which is present in the ISDS regime and restructure or correct them accordingly. Lack of transparency is present in the system⁴⁴. To ensure a public hearing, MIC would authorise transparency, public participation, and disputes related to Investment should be resolved with fairness, like the International Court of Justice. Secondly, the MIC would acknowledge issues related to partiality by replacing ad hoc appointments with proceedings based on merit, neutral arbitrators, as it is found that many arbitrators practice double-hatting due to a lack of strict ethical rules,⁴⁵ not receive a regular salary. Thirdly, cost is the biggest setback for states as they have to deal with a huge number of cases that lead to financial crisis faced by developing countries and settlement outside the court⁴⁶; efficiency and cost-effectiveness are one of the fundamental changes that need to be made, but it remains a drawback⁴⁷.

LIMITATION: WHAT MIC CANNOT RESOLVE

While there will be significant procedural advancements, yet multilateral Investment court would not be able to overcome. Several treaties prioritise providing rights to international

⁴² UNCITRAL, 'Working Group III: Investors-State Dispute Settlement Reform – Submission from the European Union and its Member State' (2017) <<https://www.iisd.org/projects/uncitral-working-group-iii-and-reform-investor-statedispute-settlement>>

⁴³ European Commission, Trade for All (n 23)

⁴⁴ Kaufmann-Kohler and Potesta (n 2)

⁴⁵ ICSID Secretariat, Double-Hatting (n13)

⁴⁶ BIICL (n16)

⁴⁷ European Parliament (n 21)

investors, like the fair and equitable treatment standards; therefore, MIC cannot restructure the content of those treaties. Certain latest treaties like Morocco-Nigeria BIT 2016⁴⁸ and Indian model BIT 2016⁴⁹ provide certain power to states so that they can regulate in favour of public welfare and impose duties and obligations upon investors that they must follow, so that there will be a Balance between the state and foreign investors. However, treaties like this are not common, and recently formed, traditional BITS mostly are in favour of foreign investors⁵⁰, and those treaties are still in force. Unlike domestic courts, where judges apply principles like human rights but judges in MIC cannot apply principles automatically unless it is written⁵¹. Nevertheless, unless broader treaty reforms are made, the traditional arbitrary system will keep on reinforcing unethical practices, unfair proceedings will remain the same underneath, even if the system's exterior represents reasonable and fair proceedings.

REGULATORY CHILL

Latest agreements like CETA try to protect policy space by making it clear that public welfare regulations, which are non-discriminatory, should not constitute breaches; however, it has not been implemented worldwide. As stated above cases, like *Eco Oro v Colombia*, uncovers some crucial instances where the state is liable even though it passes regulations for the public welfare. Beyond these concerns, which are regulatory, fragmented participation can limit the MIC's effectiveness. BRICS⁵² nations and other developing countries like China and the United States are willing to restructure the system where both MIC and traditional ISDS coexist. Fragmentation is an important term because it can lead investors into forum Shopping, it is a trail where treaty networks can be exploited⁵³. There are various cases which prove the

⁴⁸ Morocco-Nigeria BIT (2016), art 18 <<https://investmentpolicy.unctad.org/international-investment-agreements/treatyfiles/5409/download>>

⁴⁹ Indian Model BIT (2016) <<https://www.brookings.edu/wp-content/uploads/2018/08/India's-Model-BilateralInvestment-Treaty-2018.pdf>>

⁵⁰ UNCTAD, World Investment Report 2020: International Production Beyond the Pandemic (UN 2020) Ch IV

⁵¹ Stephan W Schill, 'Reforming Investor- State Dispute settlement (ISDS): Conceptual Framework and Options for the way Forward' (UNCTAD 2013)

⁵² Council on foreign relations, what is bricks group and why is it expanding? (17 August 2023).<<https://www.cfr.org/backgrounder/what-brics-group-and-why-itexpanding#:~:text=BRICS%20seeks%20to%20establish%20a,negotiating%20blobs%20within%20those%20institutions.>>

⁵³ UNCTAD, Reform of Investor- state dispute settlement : In search of a roadmap <https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf>

statement, like *Philip Morris v Uruguay*⁵⁴. Without proper and uniform treaty alignment, it is difficult for MIC not to replicate the very inconsistent and strategic movement.

POLITICAL INVOLVEMENT IN MIC

Like other treaties, MIC will face a lot and challenges due to political legitimacy, especially from countries which are economically strong. International investment law is seen as a biased body that favours Western interests. The TWAIL perspective is that this is a platform where powerful countries can influence and impose legal values and systems which can benefit them at the rest of the world. Instead of balanced, fairness and a global investment system, the MIC may leave an impression that it is still controlled or influenced by the global north⁵⁵. Latin American and African states have terminated several BITS because of neocolonial grounds. Instances like the WTO Appellant Body⁵⁶, which collapsed due to the denial of support by the US these instances highlight that there is a possibility that MIC may become a failure or collapse if it does not get prior political support⁵⁷. To ensure MIC success, it must maintain a strong internal structure like CETA, and both developed and developing countries should support and encourage MIC. However, TWAIL scholars suggest that to make MIC successful, it must make procedural and substantive reforms⁵⁸. “Technocratic trap” is a term used by Sornarajah⁵⁹, creating an illusion on the surface that shows awareness and equality, but it appears to be the opposite at the bottom.

COMPARATIVE PERSPECTIVE

The international adjudication system can help to design MIC, ensuring proper measures are taken while developing a multilateral investment court. “Margin of appreciation” doctrine, maintaining a balance between the state and the rights of the individuals,⁶⁰ fundamental insights

⁵⁴ Philip Morris v Uruguay (n 4)

⁵⁵ Anghie (n3)

⁵⁶ Pauwelyn, J. (2019). The WTO Appellate Body Crisis: What Next? *Journal of International Economic Law*, 22 (3),397-421

⁵⁷ UNCTAD. (2019). *World Investment Report 2019: Special Economic Zones*. United Nations Conference on Trade and Development.

⁵⁸ Chimni, B S (2006). *Third World Approaches to International Law: A manifesto*. *International Community Law Review*, 8 (1). 3-27 <https://brill.com/view/journals/iclr/8/1/article-p3_2.xml?language=en&srsid=AfmBOoqGICIJRGJurU5UGYUd8dwLyCMIZ_07wjGjUoaSUAjHiQAMKdSb>

⁵⁹ Sornarajah, M (2015). *Resistance and Change in the International Law on Foreign Investment*. Cambridge University Press. <<https://www.cambridge.org/core/books/resistance-and-change-in-the-international-law-on-foreigninvestment/1BC27E76647AD39E9D163C5A2BB0E09C>>

⁶⁰ Yuval Shany, ‘Towards a General Margin of Appreciation Doctrine in International law? (2006) 16 (5) *EJIL* 907

provided by the European Court of Human Rights (ECHR). The International Criminal Court (ICC)⁶¹ shows that if there is an active involvement of states in international courts where budgets are approved by the states, judges are appointed by the states, it makes the court more accountable and lawful. As discussed earlier, political support is a requirement for the MIC⁶²; therefore, participation of countries is a requirement that cannot be compromised, as good procedure alone cannot lead to the success of the MIC.

CONCLUDING REMARKS ON INSTITUTIONAL REFORM

A permanent multilateral court promotes efficiency, fairness, judicial independence and regularity. These procedural shortcomings will have an impact. Yet, it cannot resolve all the issues or the shortcomings of the ISD system. It promises greater consistency, which is a way towards the Rule of Law in international Investment Law. However, it. Cannot resolve the substantive issue present in investment treaties that are deeply rooted in foreign investors and states, like a lack of investor duties and regulatory chill, and sovereignty. Nevertheless, it is not a complete solution, but it represents the fundamental development. To achieve a regime which is legitimate, it will require changes towards procedure by substantive recalibration of duty standards and governance, which is inclusive⁶³.

⁶¹ Rome Statute of the International Criminal Court (last amended 2010), arts 112 and 36.

⁶² European Commission (n 22)

⁶³ Chimni (n40)

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