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Why the Multilateral Investment Court is a Bad Idea for Africa

Akinwumi Ogunranti
University of Manitoba, Robson Hall

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Akinwumi Ogunranti*

Why the Multilateral Investment Court is a Bad Idea for Africa

The UNCITRAL Working Group III (WG III) is discussing procedural reforms in the investor-state dispute settlement system (ISDS). The ISDS framework is criticized on various grounds, including arbitrator bias, lack of transparency, and inconsistent arbitral decisions. One of the recent reform proposals before the WG III is the possibility of a multilateral investment court (MIC). This proposal is championed by European Union states and supported by Canada. The proposal recommends replacing ISDS' Ad hoc investment tribunals with an established and permanent court where states appoint judges. This paper examines the MIC reform option and argues that replacing the ISDS with MIC poses inherent dangers for developing countries, especially Africa. Drawing from the history of a similar multilateral court established by the World Trade Organization (Dispute Settlement Body), this paper argues that African countries should be wary of the MIC idea for three reasons. First, the EU seeks to "multilateralize" its preferred architecture for investment disputes and to transpose the idea to the rest of the world. This indicates a form of hegemony that repeats the history of ISDS and maintains the existing inequities in investment law. Second, the MIC proposal will not solve the current challenges the ISDS faces. Instead, it repackages the problem in a different garb. Third, even if the proposal succeeds, it will be difficult for African countries to access justice in the forum. This paper proposes that instead of focusing on procedural aspects of the choice of forum for investment disputes, African countries should push for reforms that correct the historical imbalance in the rights and duties of host states and foreign investors. These include reforms that support the right of third parties (local communities) to participate in ISDS proceedings and those that allow states and third parties to file counterclaims against foreign investors.

La Commission des Nations unies pour le droit commercial international (CNUDCI), dans le cadre de son groupe de travail III (GT III), examine les réformes procédurales du système de règlement des différends entre investisseurs et États (ISDS). Ce système est critiqué pour diverses raisons, notamment la partialité des arbitres, le manque de transparence et l'incohérence des décisions arbitrales. L'une des récentes propositions de réforme présentées au GT III est la possibilité de créer une cour multilatérale d'investissement (CMI). Cette proposition est défendue par les États de l'Union européenne et soutenue par le Canada. La proposition recommande de remplacer les tribunaux d'investissement ad hoc de l'ISDS par une cour établie et permanente où les États nomment les juges. Le présent document examine l'option de réforme de la MIC et soutient que le remplacement de l'ISDS par la CMI présente des dangers inhérents pour les pays en développement, en particulier en Afrique. S'inspirant de l'histoire d'une cour multilatérale similaire établie par l'Organisation mondiale du commerce (Organe de règlement des différends), ce document affirme que les pays africains devraient se méfier de l'idée de la MIC pour trois raisons. Premièrement, l'UE cherche à « multilatéraliser » l'architecture qu'elle privilégie pour les différends en matière d'investissement et à transposer cette idée au reste du monde. Il s'agit là d'une forme d'hégémonie qui répète l'histoire de l'ISDS et maintient les inégalités existantes dans le droit de l'investissement. Deuxièmement, la proposition de la CMI ne résoudra pas les défis actuels auxquels l'ISDS est confronté. Au contraire, elle reformule le problème sous une autre forme. Cela indique une forme d'hégémonie qui répète l'histoire de l'ISDS et maintient les inégalités existantes dans le droit de l'investissement. Deuxièmement, la proposition du MIC ne résoudra pas les défis actuels auxquels l'ISDS est confronté. Au contraire, elle reformule le problème sous une autre forme. Troisièmement, même si la proposition aboutit, il sera difficile pour les pays africains d'accéder à la justice dans ce forum. Ce document propose qu'au lieu de se concentrer sur les aspects procéduraux du choix du forum pour les différends en matière d'investissement, les pays africains fassent pression pour des réformes qui corrigent le déséquilibre historique entre les droits et les devoirs des États hôtes et des investisseurs étrangers. Il s'agit notamment de réformes qui soutiennent le droit des tiers (communautés locales) à participer aux procédures ISDS et qui permettent aux États et aux tiers de déposer des demandes reconventionnelles à l'encontre des investisseurs étrangers.

* Assistant Professor, Robson Hall, University of Manitoba, Manitoba, Canada; BL (University of Ilorin, Nigeria), LLM (Schulich School of Law, Dalhousie University, Canada), PhD (Schulich School of Law, Dalhousie University, Canada). Email: Akinwumi.ogunranti@Umanitoba.ca.

Introduction

The Investor-State Dispute Settlement System (ISDS) faces criticism including arbitrators' systemic bias, inconsistent arbitral awards, and encroachment on states' regulatory spaces.[1] Critics conclude that the ISDS is facing a legitimacy crisis due to these shortcomings.[2] In 2017, Working Group III was created by the United Nations Commission on International

1. See Maria Laura Marceddu & Pietro Ortolani, "What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments" (2020) 31:2 Eur J Intl L 405; Michael Waibel et al, eds, *The Backlash Against Investment Arbitration: Perceptions and Reality* (The Hague: Kluwer Law International, 2010).

2. See Julius Cosmas, "Legitimacy Crisis in Investor–State International Arbitration System: A Critique on the Suggested Solutions & the Proposal on the Way Forward" (2014) 4:11 Intl J Scientific & Research Publications 1; David Schneiderman, "Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?" (2011) 2:2 J Intl Dispute Settlement 471.

Trade Law and entrusted with a mandate to (i) identify concerns regarding ISDS; (ii) consider whether reform is desirable; and, if so, (iii) develop recommendations.[3] The submissions and debates from state members indicate that the Working Group is facing a choice of whether to reform or dismantle the ISDS.[4]

Critics of the ISDS have not coalesced around one solution. I adopt Anthea Roberts' classification of the different sides of the debate into three categories: incrementalists, systemic reformers, and paradigm shifters.[5] The incrementalists view the criticisms of the ISDS as exaggerations because the ISDS works according to its design. Therefore, they favour retaining the system, albeit with changes addressing specific concerns.[6] Although the systemic reformers support foreign investors' access to an international dispute system, they argue that the ISDS is flawed and should give way to more suitable institutional designs like a multilateral investment court (MIC).[7] The paradigm shifters do not support the ISDS framework to begin with. They argue that foreign investors should not be allowed to file claims before ISDS or international courts. Instead, the

3. *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its 34th session (Vienna, 27 November–1 December 2017),* UNCITRAL, 51st Sess, UN Doc A/CN9/930/Rev1 (2017) at para 6.

4. Working Group III: Investor-State Dispute Settlement Reform, online: <uncitral.un.org/en/working_groups/3/investor-state>.

5. Anthea Roberts, "Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration" (2018) 112:3 AJIL 410; Anthea Roberts, "The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecideds" (15 June 2017), online: <www.ejiltalk.org/the-shifting-landscape-of-investor-state-arbitration-loyalists-reformists-revolutionaries-and-undecideds/> [perma.cc/YF3W-BLAR].

6. José Manuel Alvarez Zárate, "Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?" (2018) 59:8 Boston College L Rev 2765; Agata Zwolankiewicz, "Multilateral Investment Court—a Cure for Investor-State Disputes Under Extra-EU International Investment Agreements? (2021) 9:1 Groningen J Intl L 195; Emily Palombo, "Evaluating a Permanent Court Solution for International Investment Disputes Investment Dispute" (2019) 53:2 U Rich L Rev 799.

7. See generally David Howard, "Creating Consistency through a World Investment Court" (2017) 41:1 Fordham Intl LJ 1; Omar Garcia-Bolivar, "Permanent Investment Tribunals: The Momentum is Building" in Jean E Kalicki & Anna Joubin-Bret, eds, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Leiden: Brill, 2015) 394; Amina Akperlinova & Kasper Jastrzebski, "Reforming Investor-state Dispute Settlement: The EU Multilateral Investment Court Perspective" (2022) 11:1 J Investment & Management 1; Umair Ghori, "Investment Court System or 'Regional' Dispute Settlement?: The Uncertain Future of Investor-state Dispute Settlement" (2018) 30:1 Bond L Rev 83; Ilia Rachkov & Olga Magomedova, "Investment Court: Review of the EU Initiative" (2019) 2 Moscow J Intl L 54; Pavla Kristkova, "A Comparative Study of Judicial Safeguards in Relation to Investor-State Dispute Settlement" (PhD Dissertation, Osgoode Hall Law School, 2020) [unpublished]; *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, UNGA, 76th Sess, UN Doc A/76/238 (2021).

appropriate forum for investment disputes is domestic courts, ombudsmen, or state-to-state arbitration.[8]

This paper falls into the incrementalist category. Although I do not believe that criticisms of the ISDS are exaggerations, I share the incrementalists' view that ISDS needs to be reformed to address specific concerns. Contrary to the systemic reformers' view, this paper argues against replacing the ad-hoc tribunals composed of private arbitrators that determine investment disputes with a MIC, a permanent court comprised of state-appointed judges. The implication is that the public-private features of the ISDS will be converted into a public regime where states appoint judges like other international court structures, including the World Trade Organization (WTO) and the International Court of Justice (ICJ).[9] This paper examines the MIC proposal through its implication for developing countries, especially those in Africa, and argues that African countries should be wary of the MIC proposal. First, the proposal addresses procedural aspects of the ISDS without touching on issues important to African countries—the imbalanced obligations between foreign investors and host states. Second, the MIC is a creation of developed countries (European Union) that indirectly recreates the post-colonial and hegemonic history of the ISDS. Third, the proposal is fraught with procedural challenges, and even if it succeeds, it will be difficult for African countries to access justice in the forum. Therefore, instead of dismantling the ISDS and creating an untested forum with its challenges, the Working Group should focus on making the ISDS work for both developed and developing countries. Although the Working Group has not decided on the MIC proposal, it is developing parallel reform options for the ISDS and MIC, with the hope that states will make a final decision soon.[10] I argue that specific ISDS reforms should prevail over the MIC.

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8. Muthucumaraswamy Sornarajah, "An International Investment Court: Panacea or Purgatory?" (15 August 2016), online: <isds.bilaterals.org/?an-international-investment-court&lang=en> [perma.cc/U7X8-QRPD] [Sornarajah, "An International Investment Court: Pancea or Purgatory?"]. (He argues that instead of the MIC, domestic courts should resolve investment disputes like some countries do, including South Africa and Brazil). See also Trisha Menon & Gladwin Isaac, "Developing Country Opposition to an Investment Court: Could State-State Dispute Settlement be an Alternative? (17 February 2018), online: <arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/> [perma.cc/59CZ-A8U7].

9. For analysis of the ISDS as a hybrid system that combines public and private law features, see Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007).

10. See *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-fourth session (Vienna, 23–27 January 2023)*, UNCITRAL, 56th Sess, UN Doc A/ACN9/1130 (2023) at para 120.

The paper proceeds in seven sections. Section I provides a background to the MIC proposal and explains the influence of the EU in the ongoing UNCITRAL reform. It argues that the proposal is borne out of the increasing trend of EU member states becoming respondents to ISDS claims. Section II discusses the MIC's essential features, including its similarity to the World Trade Organization (WTO) dispute settlement mechanism (DSM). It then draws a parallel between the DSM and the MIC. Like the MIC, the DSM is a state-centric two-tiered system touted for its independence, consistent decisions, and efficiency. Since the EU is presenting the DSM as a model the MIC should follow, section III examines the experience of African countries with the DSM to determine whether they have benefited from the DSM. It argues that despite the success stories of the DSM, African countries do not have access to justice in this forum due to procedural, institutional, and political barriers. Section IV then contends that based on their experience with the DSM, African countries will likely face the same problems with the MIC. Therefore, African countries should be wary of the MIC proposal. Section V argues that instead of procedural reforms like the MIC that seeks to replace the ISDS, African countries must push for reforms within the ISDS that correct the historical imbalance between host states and foreign investors. The last section concludes.

I. *MIC Proposal—Background*

Scholars from Third World countries criticize the ISDS for its colonial origin, especially because it was designed to protect the business interest of developed countries' nationals in newly formed independent states.[11] The colonial history of developing countries allowed Multinational Corporations (MNCs) as "agents" of developed home countries to maintain and protect their economic interests in African countries.[12] Indeed, it has been noted that "aligning the interests of private investors with those of their home state is a practice with a long history."[13] The ISDS regime was

11. Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of the Capital* (Cambridge: Cambridge University Press, 2013); Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004); Jonathan Bonnitcha, Lauge Poulsen & Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford: Oxford University Press, 2017).

12. Patricia Rinwigati, "The Legal Position of Multinational Corporation in International Law" (2019) 49:2 Jurnal Hukum & Pembangunan 376 at 388. See also David Kotz, "Globalization and Neoliberalism" (2002) 14:2 Rethinking Marxism 64. There is no legally acceptable definition of multinational corporations. In this paper, I descriptively refer to multinational corporations as corporate entities that engage in direct investment outside their home countries. See Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford: Oxford University Press, 2007) at 12-15; See also B Kogut, "Multinational Corporations" in Neil Smelser & Paul Baltes, eds, *International Encyclopedia of the Social & Behavioural Sciences* (Pergamon: Elsevier, 2001) at 10197.

13. Miles, *supra* note 11 at 33.

created to promote market-oriented policies to the detriment of host states' power to regulate their investment regimes.[14] This history accounts for lopsided rights and obligations between investors and host states in the ISDS regime.[15] Therefore, most developing countries were at the receiving end of arbitral awards that restricted their capacity to regulate salient issues, including those relating to human rights, health, and the environment.[16] These problems account for the withdrawal of countries like South Africa, Indonesia, Bolivia, India, and Venezuela from the ISDS regime.[17]

Developed countries were not initially at the receiving end of the ISDS awards because they are majorly capital-exporting countries. Developed countries had more so designed the ISDS to protect their economic interests in developing countries.[18] Therefore, most developed countries had little or no incentive to complain about the ISDS, despite the outcry from non-government organizations (NGOs), local communities, states, and academics in developing countries.

However, the ISDS is turning to haunt developed countries as MNCs are filing claims against them.[19] This is because the distinction between capital-exporting developed countries and capital-importing developing countries is quickly becoming blurred.[20] Developing and emerging economies are now becoming capital-exporting states as the political economy of investment law changes.[21] For example, Chinese state-owned enterprises (SOEs) have contributed to China's rising status as a capital-

14. Thamil Ananthayinayagan, "Critical Perspectives on International Investment Law" in Julien Chaisse et al, eds, *Handbook of International Investment Law and Policy* (Singapore: Springer, 2020) 1; Kyla Tienhaara, "Regulatory Chill and the Threat of Arbitration: A View from Political Science" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 606.

15. See Pablo Leandro Ciocchini & Stéfanie Khoury "Investor-State Dispute Settlement: Institutionalising 'Corporate Exceptionality'" (2018) 8:6 Oñati Socio-Legal Series 976.

16. See generally Gus Van Harten & Pavel Malysheuski, "Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants" (2016) Osgoode Legal Studies Research Paper No. 14.

17. See *Protection of Investment Act* (S Afr), No 22 of 2015, s 13(4) (S Afr); UNCTAD International Investment Agreements Navigator, online: <iinvestmentpolicy.unctad.org/international-investment-agreements/countries/97/indonesia> [perma.cc/78HY-AZPG] (Indonesia); UNCTAD International Investment Agreements Navigator, online: <investmentpolicy.unctad.org/international-investment-agreements/countries/96/india> [perma.cc/6FF9-KTLC] (India); UNCTAD International Investment Agreements Navigator, online: <investmentpolicy.unctad.org/international-investment-agreements/countries/228/venezuela-bolivarian-republic-of> [perma.cc/Y6GS-GDDX] (Bolivia and Venezuela).

18. Kenneth Vandevelde, "A Brief History of International Investment Agreements" in Karl Sauvant & Lisa Sachs, eds, *The Effect of Treaties on Foreign Direct Investment: Bilateral Treaties, Double Taxation Treaties, and Investment Flows* (Oxford: Oxford University Press, 2009) 1 at 13-15.

19. Zárate, *supra* note 6 at 2766.

20. Vandevelde, *supra* note 18 at 26.

21. See generally Congyan Cai, Huiping Chen & Yifei Wang, eds, *The BRICS in the New International Legal Order on Investment: Reformers or Disruptors* (Leiden: Brill, 2020).

exporting country, with Chinese SOEs becoming foreign investors in developed countries.[22] With this development, it is only natural for foreign investors from emerging economies to file claims against developed countries. Therefore, from 1999 until 2018, MNCs filed 213 arbitral claims against EU states, resulting in the EU states paying billions of dollars.[23] Countries like the Netherlands, Finland, and Malta also became respondents to ISDS claims for the first time in 2021.[24]

Furthermore, MNCs increasingly rely on treaties between developed countries, including the former North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT), to file claims against developed countries. From 1987 to 2021, over 20 per cent of the ISDS cases arose from MNCs' claims against developed countries using these treaties.[25] As of 2021, Canada was a respondent to 43 claims under Chapter 11 of NAFTA, resulting in the payment of over 263 million dollars in damages and settlement to MNCs.[26]

One of the most often cited cases which showed MNCs' use of ISDS against countries in the Global North is *Vattenfall II v Germany*.[27] Vattenfall is a Swedish company that sued Germany under the ECT in an ISDS proceeding for failure to protect the company's proprietary interest in a nuclear plant. The dispute arose from Germany's decision to phase out nuclear power plants by 2022, contrary to its earlier position that it would postpone a nuclear phase-out plan and extend the operating lives of Germany's 17 nuclear power plants until 2038.[28] The ISDS tribunal dismissed Germany's objections that it had the right to protect its regulatory space.[29] As of August 2020, Germany's legal and administrative cost of

22. See Wendy Dobson, "China's State-Owned Enterprises and Canada's FDI Policy" (2014) SPP Research Paper No 7-10, Rotman School of Management, Working Paper No 2416422. See also Karl Sauvant & Michael Nolan "China's Outward Foreign Direct Investment and International Investment Law" (2015) 18:4 J Intl Econ L 1.

23. Zárate, *supra* note 6 at 2767.

24. UNCTAD, "Facts On Investor-State Arbitrations In 2021: With A Special Focus on Tax-Related ISDS Cases" (2022) International Investment Agreement Issue Note 1, online: <unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf>.

25. UNCTAD, World Investment Report: International Tax Reforms and Sustainable Development (2022) at 74, UNCTAD online: <unctad.org/publication/world-investment-report-2022#:~:text=The%20report%20reviews%20investment%20in,fundamental%20reforms%20in%20international%20taxation> [perma.cc/T9VU-KXRU].

26. Scott Sinclair, *The Rise and Demise of NAFTA Chapter 11* (Ottawa: Canadian Centre for Policy Alternatives, 2021), online: <policyalternatives.ca/riseanddemise> [perma.cc/B8YC-S7CR].

27. *Vattenfall & Ors v Federal Republic of Germany* (2018), ICSID Case No. ARB/12/12 (International Centre for Settlement of Investment Disputes) (Arbitrators: Albert Jan Van Den Berg, Dharles N Brower, Vaugaghn Lowe), online: <www.italaw.com/sites/default/files/case-documents/italaw9916.pdf> [*Vattenfall*].

28. The change in the decision was attributed to the reactor accident in Fukushima, Japan, in 2011.

29. *Vattenfall*, *supra* note 27 at para 229. See generally Francesca Romanin Jacur, "The Vattenfall

the proceedings was estimated at around 21.7 million Euros.[30] Eventually, Germany settled the dispute by agreeing to reduce environmental standards imposed upon one of Vattenfall's coal plants.[31]

Owing to these developments, countries in the Global North are gradually leaving the ISDS regime.[32] For example, after tobacco producer Philip Morris commenced arbitration to challenge Australia's plain tobacco packaging, the Australian Government developed a nuanced approach to the ISDS.[33] Although Australia replaced BITs with Vietnam and Mexico with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which has a limited ISDS scope,[34] it completely rejected the ISDS in its BIT with India (the India-Australia Economic Cooperation Agreement—IndAus ECTA).[35] Similarly, section 14 of the United States-Mexico-Canada Agreement (USMC), which replaced section 11 of NAFTA, does not include an ISDS mechanism between Canada and the US.[36] Thus, the criticisms of ISDS that Third World scholars have identified since the late 1990s are now apparent because the tides are changing against developed countries.[37]

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v Germany Disputes: Finding a Balance Between Energy Investments and Public Concerns" in Yulia Levashova et al, eds, *Bridging the Gap Between International Investment Law and the Environment* (The Hague: Eleven International Publishing, 2016) 338.

30. Vera Weghmann & David Hall, "The Unsustainable Political Economy of Investor–state Dispute Settlement mechanisms" (2021) 87:3 Intl Rev Administrative Sciences 480 at 489.

31. Cecelia Olivet & Pia Eberhardt, "A Response to Critics of 'Profiting from Justice" (2 January 2013), online: <arbitrationblog.kluwerarbitration.com/2013/01/02/a-response-to-the-critics-of-profiting-from-injustice/> [perma.cc/D72R-ZRZQ].

32. See generally Nikesh Patel, "An Emerging Trend in International Trade: A Shift to Safeguard Against ISDS Abuses and Protect Host-State Sovereignty" (2017) 26:1 Minn J Intl L 273. According to United Nations Conference on Trade and Development (UNCTAD) data, there were 276 instances where an EU Member was a respondent, 199 claims of which have been filed in the last ten years. See UNCTAD Investment Policy Hub, online: <investmentpolicy.unctad.org> [perma.cc/HE9B-XCNG].

33. Luke Nottage, "Australia's (Dis) Engagement with Investor-State Arbitration A Sequel", *University of Sydney Japanese Law in Asia-Pacific Socio-Economic Context* (17 November 2022), online: <japaneselaw.sydney.edu.au/2022/11/australias-disengagement-with-investor-state-arbitration-a-sequel/> [perma.cc/6ZXB-MZ2X].

34. See UNCTAD International Investment Agreements Navigator, online: <investmentpolicy.unctad.org/international-investment-agreements/countries/11/australia> [perma.cc/8SA9-DBJF].

35. See *India-Australia Economic Cooperation Agreement*, 2 April 2022, [2022] ATS 8 (entered into force 29 December 2022), online:<investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/209/australia---india-bit-1999-> [perma.cc/8JZG-FYAC]. see also Kyla Tienhaara & Patricia Ranald, "Australia's Rejection of Investor-State Dispute Settlement: Four Potential Contributing Factors," *Investment Treaty News* (12 July 2011), online: <iisd.org/itn/en/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/> [perma.cc/KKX4-5ZA8]

36. See Jerry Lai, "A Tale of Two Treaties: A Study of NAFTA and the USMCA's Investor-State Dispute Settlement Mechanisms" (2021) 35:2 Emory Intl L R 259 at 281.

37. Weghmann & Hall, *supra* note 30 at 489. See also Anghie, *supra* note 11; Muthucumaraswamy Sornarajah Arajah, *The International Law on Foreign Investment*, 3rd ed (Cambridge: Cambridge University Press, 2010).

The move to replace the ISDS with MIC started with the public outcry in Europe against the Vattenfall decision.[38] The EU trade commissioner, Cecilia Malmström, described the ISDS as "the most toxic acronym," and the British environmentalist, George Monbiot, described it as "a full-frontal assault on democracy."[39] Anti-ISDS and anti-trade groups started campaigning against ISDS provisions in the Transatlantic Trade and Investment Partnership ("TTIP") agreement negotiations between the EU and the US.[40] Therefore, in 2014, during the TTIP negotiation, the European Commission (EC) launched a public consultation on international investment and the ISDS.[41] The results of the consultation and parliamentary debates, which considered criticisms from academia, human rights, consumer associations, and environmental organizations, led the EC to conclude that the ISDS needs to be transformed.[42]

Ultimately, the EC declared the ISDS illegitimate and proposed that it should be replaced by a system that will guarantee transparency, consistency, predictability, and the possibility of an appeal.[43] In 2015, the EC proposed an investment court system ("ICS") for future trade and investment negotiations with its partners.[44] Indeed, in a factsheet published in 2017, the EU claimed that "…the ISDS is dead."[45] Therefore, beyond

38. Cecilia Olivet & Natacha Cingotti, "Is ISDS Dead? No, Multi-million Lawsuit Still on the Horizon," *Euractiv* (18 April 2016), online: <www.euractiv.com/section/trade-society/opinion/is-isds-dead-no-multi-million-lawsuits-still-on-the-horizon/> [perma.cc/7LV3-8WCZ].

39. See Paul Ames, "ISDS: The Most Toxic Acronym in Europe," *Politico* (17 September 2015), online: <www.politico.eu/article/isds-the-most-toxic-acronym-in-europe/> [perma.cc/5NNH-YZC5]; George Monbiot, "This Transatlantic Trade Deal Is a Full-Frontal Assault on Democracy," *The Guardian* (4 November 2013), online: <www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy> [perma.cc/BZ5P-TGY8].

40. Vanina Sucharitkul, "Backlash in Investment Arbitration" (30 June 2022), *Jus Mundi*, online: <jusmundi.com/en/document/wiki/en-backlash-in-investment-arbitration> [perma.cc/K6M2-WSA2].

41. See Marta Requejo, "Online Public Consultation on Investment Protection and ISDS Dispute Settlement in the TTIP," *Conflict of Law.Net* (9 April 2014), online: <conflictoflaws.net/2014/online-public-consultation-on-investment-protection-and-isds-dispute-settlement-in-the-ttip/> [perma.cc/8M7Q-5LW9].

42. European Commission, *Commission Staff Working Document on Online Public Consultation on Investment Protection and Investor- To State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)* (13 January 2015), online:<www.europarl.europa.eu/meetdocs/2014_2019/documents/juri/dv/comworkingdocument_/comworkingdocument_en.pdf> [perma.cc/9FUF-B727].

43. *Ibid*. See also Céline Lévesque, "The European Commission Proposal for an Investment Court System: Out with the Old, in with the New?" in Armand de Mestral, ed, Second Thoughts: Investor-State Arbitration between Developed Democracies (Ottawa: Centre for International Governance innovation, 2017) 59.

44. Directorate-General for Trade (European Commission), *Trade for All: Towards A More Responsible Trade and Investment Policy* (Brussels: European Union 2015), online:<eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0497&from=en>.

45. Richard Allen, "New EU-Japan Trade Deal: EU declares ISDS "dead," *Global Arbitration News* (17 July 2017) online (blog): <www.globalarbitrationnews.com/2017/07/17/new-eu-japan-trade-deal-

introducing the ICS to its trade partners, the EU seeks to lead a global reform agenda that replaces the ISDS with the ICS blueprint. This model exists in negotiated bilateral agreements with Canada, Vietnam, Mexico, and Singapore.[46] In 2019, the EC introduced an MIC proposal to the world through the UNCITRAL platform to achieve its aim.[47]

The history of the MIC proposal shows that it is borne out of the EU's discontent with the ISDS. It could no longer take being at the receiving end of a system it helped to create for its benefit. This is why it unilaterally seeks to replace the ISDS with a standing investment court. Without consulting with other countries, the EU declared itself a leader in the investment law regime, whose mandate is to lead the reform. With this motive, the EU repeats the history of the ISDS by seeking to impose a permanent court to address its concerns without considering the interests of others.[48] In effect, the EU wants to perpetuate the hegemonic nature of investment law which Third World scholars have condemned.[49]

The nature and implications of the EU proposal must be understood and assessed with regard to the benefits of the MIC without prejudging its merit. This is done next. The discussion demonstrates that notwithstanding its advantages, the proposal was received with mixed reactions along a divide between developed-developing countries. The key point of this collective unease is the EU's move to transpose its idea of a multilateral investment court to the rest of the world.

II. *The EU's Multilateral Investment Court*

The EU submitted a reform proposal to Working Group III in January 2019, highlighting its concerns about the ISDS and proposing the MIC as its replacement.[50] The MIC will be comprised of a standing tribunal with

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eu-declares-isds-dead/> [perma.cc/V5ML-36RM].

46. *Ibid* at 15. See *Comprehensive Economic and Trade Agreement*, Europe and Canada, 30 October 2016, OJEU 60 and the EU agreements with Vietnam (*EU-Vietnam Investment Protection Agreement*, 30 June 2019, at Article 3.41 (not yet ratified)), Singapore (*EU Singapore Investment Protection Agreement*, 19 October 2018, OJEU 61 at Article 3.12), and Mexico (*EU-Mexico Trade Agreement: Agreement in Principle*, 23 April 2018, at s 17, ch C (not yet ratified)).

47. The EU Commission noted that "[t]he EU seeks to champion the creation of an international court and ensure that EU's policy for resolving international investment disputes mirrors the EU's approach to settling international disputes more generally." Directorate-General for Trade, "Commission Welcomes Adoption of Negotiating Directives for a Multilateral Investment Court" (20 March 2018), *European Commission*, online: <policy.trade.ec.europa.eu/news/commission-welcomes-adoption-negotiating-directives-multilateral-investment-court-2018-03-20_en> [perma.cc/2U47-CL99].

48. See Stephan Schill, "The Sixth Path: Reforming Investment Law from Within" in Jean Kalicki & Anna Joubin-Bret, eds, *Reshaping the Investor-state Dispute Settlement: Journeys for the 21st Century* (The Hague: Nijhoff, 2015) 621 at 622.

49. See Anghie, *supra* note 11; Sornarajah, *The International Law on Foreign Investment*, *supra* note 37.

50. *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European*

its own rules and procedure and an appellate court that will hear appeals based on the tribunal's error of law, serious procedural shortcomings, or manifest error in the appreciation of facts.[51] States will appoint full-time judges whose salaries will compare well to those paid to judges in other international courts.[52] Judges will not engage in political activities to maintain independence from governments and will only be employed for a non-renewable fixed term, similar to judges in other international courts.[53]

To ensure geographical and gender diversity in the appointment process, the selection criteria will include gender and geographic considerations. Other considerations include the judicial experience and case management skills of the candidates. To ensure impartiality and neutrality, the appointment process will be transparent, similar to the process adopted in selecting judges at the International Court of Justice.[54] Candidates can apply or be nominated by member state parties to be considered for the appointment. Although non-nationals of member states can apply or be nominated, they would require a significant majority of member states' votes.[55] The burden of appointing independent judges is on the member states.[56]

The MIC will be a two-tier system with a permanent appellate structure.[57] This will ensure consistent and correct decisions at the trial and appellate levels because the appellate court can remand cases back to trial courts.[58] To ensure fair treatment of public issues, judges will have a strong background in public international law.[59] Furthermore, judges will receive a fixed salary, unlike private arbitrators, who are remunerated based on the

Union and its Member States, UNCITRAL Working Group III, 37th sess, UN Doc A/CN.9/WG.III/WP.159/Add.1 (2019) [*EU Submission on ISDS*], online: <uncitral.un.org/en/working_groups/3/investor-state>. See also *Possible Reform of Investor-State Dispute Settlement (ISDS) Selection and Appointment of ISDS Tribunal Members: Note by the Secretariat*, UNCITRAL Working Group III, UN Doc A/CN.9/WG.III/WP.169 (2019), online: <uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/standing_multilateral_mechanism_-_selection_and_appointment_of_isds_tribunal_members_and_related_matters__0.pdf>.

51. *EU Submission on ISDS, supra* note 50 at 4. See also *Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters: Note by the Secretariat*, UNCITRAL Working Group III, UN Doc A/CN.9/WG.III/WP.213 (2021), online: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/092/76/PDF/V2109276.pdf?OpenElement>.
52. *EU Submission on ISDS, supra* note 50 at 5.
53. *Ibid*.
54. *Ibid*.
55. *Ibid* at 6.
56. *Ibid*.
57. *Ibid* at 9.
58. *Ibid* at 10. See also Rachkov & Magomedova, *supra* note 7 at 54.
59. *EU Submission on ISDS, supra* note 50.

amount and complexity of the work done.[60] This will remove the incentive to prolong proceedings unnecessarily.

In sum, the EU offers the following advantages of the MIC: first, the time parties spent choosing arbitrators is removed because there is a standing court with judges. Second, there will be less challenge to judges' independence and neutrality because they will be appointed through a transparent process. Third, the court's decisions will be consistent and correct, unlike the present ISDS cases. Fourth, the experience of judges in public law will ensure that states' regulatory spaces are protected. Fifth, it eliminates lengthy proceedings since there will be less incentive for arbitrators to prolong matters. Similarly, parties will not be incentivized to raise procedural objections to delay proceedings.[61]

Notwithstanding these advantages, some arbitrators oppose the proposal. For example, Charles Brower argues that the proposal on state-appointed judges will erode party autonomy and empower states to appoint retired civil servants, retired judges, and friends of politicians to the MIC.[62] Similarly, Moritz Keller and Caroline Kittelmann disagree with the claim that the proposal will promote diversity. They contend that the proposal focuses on legal systems and geography instead of gender.[63] Therefore, adopting the MIC will erode the progress already made in the ISDS on gender diversity. They also contend that the EU's criticism of the ISDS is not based on any empirical evidence. For example, no evidence supports the claim that the ISDS system does not produce "correct" decisions.[64] Therefore, introducing a system to fix an unsubstantiated problem is unnecessary. In sum, the MIC's antagonists contend that the proposal makes a mountain out of a molehill and creates more problems than the ISDS.

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60. *Ibid* at 11. See also Natalie Morris-Sharma, "The T(h)reat of Party Autonomy in ISDS Arbitrator Selection: Any Options for Preservation?" in Jean Kalicki et al, eds, *Evolution and Adaptation: The Future of International Arbitration* (ICCA Congress Series No. 20), (The Hague: Kluwer Law International, 2020) at 432, where Morris-Sharma notes that the MIC proposal will save parties from the burden of paying arbitrators.

61. *EU Submission on ISDS,* supra note 50.

62. See Joel Dahlquist, "At UNCITRAL Working Group Sessions, prominent arbitrator Charles Brower cautions against 'Revolution' of Investor-state Arbitration System" *IAReporter*, (11 April 2019), online: <www.iareporter.com/articles/at-uncitral-working-group-sessions-prominent-arbitrator-charles-brower-cautions-against-revolution-of-investor-state-arbitration-system/>.

63. Moritz Keller & Caroline Kittelmann "Creation and Implementation of a Multilateral Investment Court: Outlook from a Practitioner Perspective" in Julian Scheu, ed, *Creation and Implementation of a Multilateral Investment Court* (Baden-Baden: Nomos, 2022) 307 at 325.

64. *Ibid* at 327.

Like arbitrators, not all states support the EU proposal. Roberts remarks that "the West is divided. Non-Western powers, including the BRICS, are becoming more vocal. But they, too, are split."[65] In an unofficial report of the Fiftieth Session of the UNCITRAL in July 2017, the United States and Japan strongly questioned the need for this urgent work on reforming the ISDS in such a radical manner.[66] Japan rejects the proposal because the MIC would become a "world court" that decides highly sensitive and important issues without accountability.[67] Anthea Roberts and Taylor St John explain that the sharp difference between the US and the EU is due to their different experience levels in the ISDS. Members of the EU Commission who championed the MIC proposal have little or no experience in ISDS and so could not fathom the rationale to sustain ISDS' ad-hoc tribunals.[68] Therefore, the Commission preferred the WTO's DSM because of the EU officials' experience in this forum.[69] In contrast, US officials in the WG III are experienced in the ISDS. They appreciate the history and rationale for ISDS. Therefore, the US believes the ISDS needs to be reformed instead of replaced.[70]

Although Canada supports the proposal, other countries like China, Singapore, South Korea, New Zealand, Russia, Vietnam, Thailand, and Australia "were much more cautious and less convinced about the urgent need to replace the current ISDS system with something completely new, which may very well create new legal and policy problems."[71] Emerging economies like Brazil and India also rejected the proposal.[72] This is likely because they prefer settling investment disputes through state-to-state

65. Anthea Roberts, "Incremental, Systemic, And Paradigmatic Reform of Investor-State Arbitration" (2018) 112:3 Am J Intl L 410 at 432.

66. Charles Brower & Jawah Ahmad, "Why the "Demolition Derby' that Seeks to Destroy Investor-State Arbitration?" (2018) 91 South Calif L Rev 1139 at 1156, quoting Nikos Lavranos, *The Outcome of the UNCITRAL July 2017 Meeting: The First Steps Towards a Multilateral Investment Court (MIC)* (Washington, D.C.: Wöss & Partners, 2017) at 5.

67. Brower & Ahmad, *supra* note 66 at 1155.

68. Anthea Roberts & Taylor St John, "The Originality of Outsiders: Innovation in the Investment Treaty System" (2023) 20:20 Eur J Intl L 1153 at 1161-1166.

69. *Ibid*.

70. *Ibid* at 1166-1170

71. Nikos Lavranos, "The First Steps Towards a Multilateral Investment Court (MIC)" *EFILA Blog* (19 July 2017), online: <efilablog.org/2017/07/19/the-first-steps-towards-a-multilateral-investment-court-mic/> [perma.cc/6C5Q-HJWH]. See also Brower & Ahmad, *supra* note 66 at 1156.

72. Trisha Menon & Gladwin Isaac, "Developing Country Opposition to an Investment Court: Could State-state Dispute Settlement Be and Alternative?" *Kluwer Arbitration* (17 February 2017), online: <arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/> [perma.cc/3Z3Y-9Z6B].

arbitration.[73] A delegate from Bahrain, who spoke for developing countries collectively, argued that

> [i]t is generally agreed that the existing [ISDS] system has flaws. But the EU wants to move to a concept that is entirely new and untested…The EU argues we do not want the existing system any longer. But who has granted the EU this natural leadership to tell the rest of the world what to do?[74]

African countries have yet to be vocal in the ongoing conversation at the Working Group. Although they openly criticize the current ISDS regime, they have not supported or opposed the MIC proposal. The current posture of African countries toward the MIC has been aptly described as "lukewarm."[75] This attitude is concerning. Although African countries had little or no contribution to the imposition of the colonial architecture of the ISDS on them, the ongoing reform is an opportunity to shape the future investment regime in their favour.

To better appreciate how African countries should respond to the proposal, we next look at the system along the lines of which the MIC is modeled—the WTO DSM.[76] The following examination identifies the DSM's features that make it a model worthy of emulation in investment law. Notwithstanding its success stories, the discussion argues that African countries have not fared well under the DSM regime. Based on their experience in the DSM system, I argue that African countries should reject the MIC proposal and push for substantive reforms that address specific concerns in the ISDS. If the EU is proposing the MIC based on their experience in the WTO, African countries can also reject the MIC based on their experience in the WTO.

1. *World Trade Organization (WTO) Dispute Settlement System*

The World Trade Organization (WTO) is a 164-member international organization created to administer multilateral trade rules, serve as a forum for trade negotiations, and resolve trade disputes.[77] After the Uruguay Round negotiations in 1994, the General Agreement on Tariffs and Trade (GATT) system was replaced with the WTO dispute settlement system (DSM), founded on a rule-based regime under which members of

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73. See Geraldo Vidigal & Beatriz Stevens, "Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?" (2018) 19 JWIT 475.
74. Roberts & St John, *supra* note 68 at 1178.
75. Brower & Ahmad, *supra* note 66 at 1156.
76. The proposal has been described as "copying basically the WTO." See Roberts & St John, *supra* note 68 at 1163.
77. WTO, "What is the World Trade Organization?," online: <www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm> [perma.cc/D3TQ-ERZ5].

the WTO could resolve disputes.[78] The DSM rules and procedures are set out in the Dispute Settlement Understanding (DSU), administered by the Dispute Settlement Body (DSB), which consists of representatives of all WTO members. Only governments and separate customs territories that are members of the WTO can participate directly in dispute settlement as parties to a case or as third parties.[79] The DSB is the diplomatic body responsible for establishing panels, adopting panels/Appellate Body (AB) reports, and authorizing the suspension of concessions.

A formal complaint by any member automatically begins the dispute settlement process. This first stage is known as a "request for consultations."[80] At this stage, disputing members will try to resolve the dispute by consulting with one another. If this fails, a dispute panel is established to examine the case. Members of the panel are composed of well-qualified governmental or non-governmental individuals.[81] These members of various backgrounds and expertise are selected to maintain the panel's independence.[82] The panel examines whether a member's actions violate the WTO provisions identified in the complaint. If so, the panel records its findings in a report and submits it to the DSB. The DSB adopts this result not less than 20 days after submission.[83]

The DSB creates a standing appellate body (AB) that hears appeals from a party dissatisfied with the panel report.[84] An appeal is limited to issues of law and legal interpretations developed by the panel.[85] The AB may uphold, modify, or reverse the legal findings and conclusions of the panel.[86] The AB comprises seven persons, three of whom serve on any case. Each person is appointed for a four-year term with the possibility

78. See WTO, *Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negotiations*, WTO Doc LT/UR/A/1 (18 February 1994), online: <www.wto.org/gatt_docs/English/SULPDF/92150173.pdf> [perma.cc/R2KH-WEN7]. See also Debra Steger, "The Founding of the Appellate Body" in Gabrielle Marceau, ed, *A History of Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge: Cambridge University Press, 2015) 447.

79. See WTO, *Understanding on Rules on Procedures Governing the Settlement of Disputes*, Art 10 [DSU Rules], online: <www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> [perma.cc/6AHY-M8EG].

80. Gary Horlick & Glenn Butterton, "A Problem of Process in WTO Jurisprudence: Identifying Disputed Issues in Panels and Consultations" (2000) 31 L & Pol'y Intl Bus 573 at 574.

81. DSU Rules, *supra* note 79, Art 8.

82. *Ibid*, Art 8 (2).

83. *Ibid*, Art 16.

84. *Ibid*, Art 17(1). See also Debra Steger, "The Founding of the Appellate Body" in Gabrielle Marceau, ed, *A History of Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press, 2015) 447.

85. DSU Rules, *supra* note 79, Art 17(6).

86. *Ibid*, Art 17 (13).

of reappointment only once.[87] The judges are independent persons with demonstrated expertise in law, international trade, and the subject matter of the covered agreements.[88]

The DSB must adopt the findings of the panels and the AB unless the WTO members agree unanimously at the DSB meeting not to do so. This is known as the "reverse consensus" rule.[89] This rule ensures that the political weight of parties does not affect the outcome of the disputes. The time to conclude both panel and AB proceedings must not exceed 18 months.[90] Also, members must report compliance to the DSB within 30 days after adopting the panel or appellate body report.[91]

Comparing the MIC with the DSM, it can be gleaned that they have similar features—specifically, a two-tier regime consisting of a panel and a standing AB. Indeed, the MIC proposal blueprint is based on the DSM model. The choice of the DSM model is probably because of the success stories of the DSM, which include judicial independence and a consistent precedent.[92] The DSM has been described as "one of the major successes of the WTO."[93] In effect, the EU seeks to replicate the DSM model in international investment law because "the WTO's efficiency with respect to quasi-judicial dispute settlement procedure is perhaps a model for emulation by other multilateral institutions."[94]

However, proponents of the MIC downplay the fact that the WTO is facing a legitimacy crisis, partly owing to the political impasse in the constitution of its AB.[95] Article 2.4 of the DSU Rules provides that the

87. *Ibid*, Art 17(2).
88. *Ibid*, Art 17(3).
89. South Center, *The WTO Dispute Settlement System: Issues to Consider in The DSU Negotiations* (Geneva: South Center Trade Analysis, 2005) at 9.
90. DSU Rules, *supra* note 79, Art 21(4).
91. *Ibid*, Art 21(3).
92. See Simon Lester & James Bacchus, "The Rule of Precedent and the Role of the Appellate Body" (2020) 54:2 J World Trade 183; Zachary Flowers, "The Role of Precedent and Stare Decisis in the World Trade Organization's Dispute Settlement Body" (2019) 47:2 Intl J Leg Info 90. Steve Charnovitz, "Judicial Independence in the World Trade Organization" in Steve Charnovitz, ed, *The Path of World Trade Law in the 21st Century* (Washington: World Scientific Publishing Co, 2014) 219 at 240.
93. David Jacyk, "The Integration of Article 25 Arbitration in WTO Dispute Settlement: The Past, Present and Future" (2008) 11 Austl Intl LJ 235 at 235.
94. Michael Ryan, "Knowledge, Legitimacy, Efficiency and the Institutionalization of Dispute Settlement Procedures at the World Trade Organization and the World Intellectual Property Organization" (2022), 22 Northwestern J Intl L & Bus 389 at 389-390.
95. See Robert McDougal, "Crisis in the WTO Restoring the WTO Dispute Settlement Function" CIGI Papers No. 194 (October 2018), online:<www.cigionline.org/static/documents/documents/Paper%20no.194.pdf> [perma.cc/5N36-WDJ6]; Nina Hart & Brandon Murrill, "The World Trade Organization's (WTO's) Appellate Body: Key Disputes and Controversies" (22 July 2021) Congressional Research Service, online:<crsreports.congress.gov/product/pdf/R/R46852>; Arman Sarvarian & Filippo Fontanelli," "The USA and Re-Appointment at the WTO: A 'legitimacy Crisis'?"

decision to appoint AB members shall be subjected to a consensus by DSB members. In 2019, there was the need to appoint more AB members as the tenure of the existing members expired. However, because of the US sovereignty concerns, it withdrew support for appointing new AB members, [96] thereby ensuring that the DSB does not reach a consensus.[97] This impasse lingers as the US continues to block the appointment of AB members, leaving the Court without the minimum quorum of adjudicators necessary to carry out its functions.[98] Apart from the quorum deadlock, developing countries, especially in Africa, face unique access to justice challenges in the DSM.

The next section examines some of these problems. It classifies them as procedural, institutional, and political problems. Using the Brazil-US cotton dispute to illustrate how these barriers block African countries' access to the DSM, it argues that these countries' experiences within the WTO dispute settlement model will be the same under the proposed MIC. Consequently, I argue that African countries will fare better if specific concerns in the ISDS are addressed.

III. *African countries' experience with the WTO Dispute Settlement Model*

Although African countries welcomed the DSM with optimism, this feeling has since dissipated. This is evidenced by their low participation in the regime.[99] A 2020 study shows that only four African countries (South Africa, Egypt, Morocco, and Tunisia) have been involved as either

(27 May 2016) Blog of the European Journal of International Law, online: <www.ejiltalk.org/the-usa-and-re-appointment-at-the-wto-a-legitimacy-crisis/> [perma.cc/VCM9-4C6P]; World Trade Organization, "Communication from The European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, and Mexico to the General Council" (26 November 2018) WT/GC/W/752, online:<trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157514.pdf> [perma.cc/RX6X-H5AU].

96. See Office of the United States Trade Representative Ambassador Robert Lighthizer, *Report on the Appellate Body of the World Trade Organization* (Washington: Executive Office of the President of the United States, 2020), online: <ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf> [perma.cc/KVN3-JVNN].

97. Giuseppe Zaccaria, "You're Fired! International Courts, Re-contracting, and the WTO Appellate Body during the Trump Presidency" (2022) 13:3 Global Policy 315.

98. Giuseppe Zaccaria, "You're Fired! International Courts, Re-contracting, and the WTO Appellate Body during the Trump Presidency" (2022) 13 Global Policy 322. See also Sarah Anne Aarup, "All Talk and no Walk': America ain't back at the WTO" *Politico* (23 November 2021), online: <politico.eu/article/united-states-world-trade-organization-joe-biden/> [perma.cc/89P3-LTVS].

99. Gerhard Erasmus, "The Non-Participation by African States in the WTO Dispute Settlement System of the WTO: Reasons and Consequences," in Trudi Hartzenberg, ed, *WTO Dispute Settlement: An African Perspective* (London, UK: Cameron May, 2008). See also Roderick Abbott, "Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the years 1995–2005" (2007) European Centre for International Political Economy, Working Paper No. 01/2007.

respondents or complainants in trade disputes.[100] In just three cases, Tunisia and South Africa were the only complainants from Africa.[101] At the time of writing, African countries' involvement in the WTO's Dispute settlement represents only two per cent of the total cases filed at the DSM.[102] African countries' low participation is due to problems with access to the DSM. I classify these problems as procedural, institutional, and political barriers.

1. *Procedural barriers*

African countries lack access to the DSM because its procedures do not distinguish between the costs of large and small claims.[103] For example, the cost of filing a $100,000 claim and a $100,000,000 claim is the same.[104] This discourages African countries from filing claims as they find it costly to pursue small but legitimate claims.[105] In effect, the DSU rules are skewed to favour countries with high trade claims (developed countries) against those with low to medium trade claims (developing countries).[106] To reorder the imbalance and lower the procedural barrier for developing countries, scholars have proposed that a small claims court be set up to respond to the sensitivities of developing countries within the WTO.[107] The proposal to enhance procedural access for developing countries is yet to materialize.

Related to the foregoing is the cost of prosecuting claims, which are often long and complex.[108] In 2002, a group in Africa noted that African countries do not participate in the DSM proceedings because accessing the system is overly expensive and complex.[109] Lacking the expertise

100. See WTO, Disputes by Members, online: <wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm> [perma.cc/5CYG-CFMM].
101. *Ibid.*
102. *Ibid*.
103. Iddrisu Abdul-Latif, "Africa and The WTO Dispute Settlement Mechanism: Underlying Challenges and Reform Proposals" (Masters Thesis, University of British Columbia, 2021) [unpublished] at 91.
104. Samuel Rambo "African Countries and The World Trade Organization Dispute Settlement Mechanism; The Challenges, Constraints and the Need for Reforms" (Masters Thesis, University of Nairobi, Kenya, 2014) [unpublished] at 8.
105. *Ibid*. See also Center for Global Studies, *A Proposal for the Design of WTO Small Claims: A Case for Developing Countries* (Victoria, Canada: University of Victoria, 2001), online: <www.uvic.ca/research/centres/globalstudies/assets/docs/publications/AProposalfortheDesignofWTOSmallClaimsCourt.pdf>.
106. Hakan Nordstrom & Gregory Shaffer, "Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?" (2008) 7:4 World Trade Rev 587 at 590.
107. *Ibid* ("Small trading nations are effectively constrained from being able to use the legal system to the full extent, constituting, in practice, a form of in-built discrimination").
108. See generally Kristin Bohl, "*Problems of Developing Country Access to WTO Dispute Settlement"* (2009) 9 Chicago-Kent J Intl & Comp L 131.
109. WTO, *Negotiations on the Dispute Settlement Understanding: Proposal by the African Group,* WTO Doc TN/DS/W/15 (25 September 2002), online: <docs.wto.org/dol2fe/Pages/SS/directdoc.

of government counsel to handle complex trade disputes, the legal fees of private legal counsel are estimated to cost roughly $10 million USD, an amount higher than some African countries' GDPs.[110] This does not include the "litigation-only" fees estimated to be roughly $500,000 and the costs of technical submissions by experts at the proceedings.[111] Although private industries can fund developed countries in DSU proceedings, most developing countries cannot access third-party funds.[112]

In a 2021 study, academics, policymakers, and African government officials were asked about their perception of the cost and duration of filing claims at the WTO.[113] A participant remarked, "[p]ersonally, I feel that the delays in the resolution of WTO cases are one of the main factors that has restricted the participation of African nations in the WTO dispute settlement mechanism."[114] Another participant noted that "[i]n some way the excess legal costs associated with the WTO proceedings are prohibitive to African countries."[115] These views reiterate the converging scholarship on the insensitivity of the DSU rules to the barriers that impede African countries' access to the system.

2. *Institutional barrier—lack of representation*

There is an unequal representation of countries in the WTO panels and AB. A report from an African group describes the composition of the WTO panels and AB as "unbalanced."[116] From 1999–2010, out of 706 panel positions, African countries only occupied 43, which is a low six per cent representation.[117] As of 2006, only nine individuals from African countries have served as either panelists or AB members.[118] In contrast, just one country—New Zealand—had 13 members serving on panels and

aspx?filename=Q:/TN/DS/W15.pdf&Open=True> [African Group Proposal].

110. Hunter Nottage, "Developing countries in the WTO Dispute Settlement System" (2009) University of Oxford, Global Economic Governance Programme (GEG), Working Paper No 2009/47, at 5-6.

111. *Ibid*.

112. *Ibid*.

113. See Abdul-Latif, *supra* note 103.

114. *Ibid* at 68.

115. *Ibid*.

116. African Group Proposal, *supra* note 109.

117. Joan Apecu, "The Level of African Engagement at the World Trade Organization from 1995 to 2010" (2013) 4:2 Revue Internationale de Politique de Développement 29 at 40. The individuals are from Egypt, Mauritius, Morocco, and South Africa, which are countries that are traditionally viewed as active in the WTO.

118. Victor Mosoti, "Africa in the First Decade of WTO Dispute Settlement" (2006) 9:2 J Intl Econ L 427 at 440. Four were from Egypt, four from South Africa, and one from Mauritius.

one member in the AB.[119] As of 2020, only three individuals served on the AB.[120] The last appointment was in 2013.

The lack of representation in the WTO panels and AB may be attributed to Africa's lack of technical expertise and inefficient trade policy infrastructure.[121] It is impossible to prosecute or defend WTO cases efficiently without adequate training for government officials, policymakers, and government counsel. Similarly, with the high level of experience required for panel and AB appointments, it is difficult for individuals from Africa to secure a position. This means that Africans rarely contribute to WTO jurisprudence. The cumulative effect is a marginalization of the interests of African countries in this lopsided institutional system that allows developed countries to file cases and appoint their own nationals to hear them.

3. *Political barrier*

One of the problems of the DSM is its failure to account for the power disparity and asymmetry among disputing parties.[122] Power disparity is most apparent in the negotiations leading to trade agreements and disputes.[123] Even when panels deliver reports in favour of developing countries, the developed countries fail to comply.[124] No mechanism exists to ensure that they do so.[125] Although the DSU rules provide that countries may rely on a counter or retaliatory measure if the defaulting country refuses to comply with the decision, it is very difficult for developing countries that benefit from aid and grants from developed countries to resort to this option.[126] Altogether, developing countries have no remedy when developed countries do not comply with DSM decisions.[127]

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119. *Ibid*.

120. See WTO, Appellate Body Members, online: <www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm> [perma.cc/Q234-6QZ9].

121. See Olabisi Akinkugbe, "Dispute Settlement under the African Continental Free Trade Area" in Hélène Ruiz Fabri, ed, *Max Planck Encyclopedia of International Procedural Law* (Oxford: Oxford University Press, 2021); Kim Van der Borght, "*Justice for All in the Dispute Settlement System of the World Trade Organization*" (2011) 39 Ga J Inl & Comp L 787 at 792; Amin Alavi, "African Countries and the WTO's Dispute Settlement Mechanism" (2007) 25:1 Development Pol'y Rev 25 at 28.

122. Jeffery Walters, "Power in WTO Dispute Settlement" (2011) 28:1 J Third World Studies 169.

123. See Thomas Sattler & Thomas Bernauer, "Gravitation or Discrimination? Determinants of Litigation in the World Trade Organization" (Paper presented at the Second Conference on the Political Economy of International Organizations (PEIO), Geneva, February 29-31, 2009).

124. Williams Davey, "Compliance Problems in WTO Dispute Settlement" (2009) 42:1 Cornell Intl LJ 119.

125. See Garry Horlick & Judith Coleman, "The Compliance Problems of the WTO" (2007) 24:1 Arizona J Intl & Comp L 7.

126. Bhagirath Lal Das, *The WTO Agreements: Deficiencies, Imbalances, and Required changes* (London, UK: Zed Books, 1998) at 14.

127. Magezi Tom Samuel, "The WTO Dispute Settlement System and African Countries: A Prolonged

The ripple effect of politics in international relations also influences panel reports and the decisions of the AB. Although scholars do not find evidence of apparent bias in the judgments of panels and the AB, Eric Arias argues that there is partiality in the DSM's decisions generated by a developing-developed country divide.[128] In his empirical study, Arias found that judges appointed from developed countries are likely to be sympathetic to the cause of another developed country because of shared affinities based on nationality and economic relationship.[129] Therefore, a developed country that is an appellant before the AB is likely to receive a favourable judgment compared to a developing country with the same claim.[130] Arias concludes that power politics influence the determination of disputes in multilateral courts like the WTO.[131]

The case study below, in which some African countries joined Brazil to make a claim, demonstrates the procedural, institutional, and political challenges African countries face in seeking redress to protect their interests in the WTO's multilateral dispute resolution system.

4. *The US-Brazil cotton dispute—a case study*

The US-Brazil cotton dispute illustrates the marginalizing experiences of African countries in the global multilateral trade dispute system. The US, the world's largest exporter of cotton, provides subsidies to its farmers to encourage large-scale production. Compared to their colleagues in West Africa (Mali, Burkina Faso, and Benin), who enjoy none, farmers in the US enjoy subsidy support of between $2 and $3 billion from the government.[132] This creates unfair market conditions that give US farmers an advantage over their African colleagues.[133] This situation hinders the

slumber?" (LLM Thesis, The University of Western Cape, 2005) [unpublished] at 28.

128. Eric Arias, "Impartiality in International Courts: Evidence from A Natural Experiment at the WTO (January 2019), Political Economy of International Organization, online: <www.peio.me/wp-content/uploads/2019/01/PEIO12_paper_102.pdf> [perma.cc/B5KW-QCFN].

129. *Ibid* at 24-25.

130. *Ibid* at 4.

131. *Ibid* at 26. See also Fabien Besson & Racem Mehdi, "Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis" (Paper delivered at EcoMod2004, Paris, 2 July 2004), online:<ecomod.net/sites/default/files/document-conference/ecomod2004/199.pdf> [perma.cc/38NV-YNXM] (they conclude that the WTO dispute settlement does not completely eliminate power-based relationships between countries).

132. Gayle Smith & Susan Rice, "WTO Hands a Critical Victory to African Farmers" *Brookings* (21 May 2004), online: <www.brookings.edu/articles/wto-hands-a-critical-victory-to-african-farmers/> [perma.cc/476K-48S6].

133. See Oxfam, "Cultivating Poverty: The Impact of US Cotton Subsidies on Africa" (2002) Oxfam Briefing Paper 30, online: <oxfamilibrary.openrepository.com/bitstream/handle/10546/114111/bp30-cultivating-poverty-050902-en.pdf?sequence=1> [perma.cc/6XMJ-WZW7].

free market and impoverishes African countries whose primary export is cotton.[134]

In response to the unfair competition, some developing countries sought to use the DSM to force the US to change its subsidy program. On 6 February 2003, Brazil requested the establishment of a DSB Panel.[135] Benin and Chad joined Brazil on 23 March 2004.[136] They claimed the US subsidy program violates the WTO's trade liberalization agenda.[137] The significant aspect of the claim is the status of the African countries before the panel—Benin and Chad joined the claim as third parties. They could only support Brazil in the proceedings by filing a written communication. They could not appeal the panel's findings. Although these countries suffered more than Brazil in this dispute scenario, they could only join the proceedings as third parties because of problems earlier identified—procedural barriers relating to cost and technical expertise. Even as third parties, they had to draw on the strength of international organizations, like Oxfam, to prepare written submissions.[138] The Brazilian deputy agriculture minister, commenting on the rationale for joining African countries as third parties, noted that "Brazil was getting hurt by the cotton subsidies, but the African countries were getting destroyed. We knew this [joinder] would strengthen the case even more."[139]

Although the DSB panel agreed that the US subsidy program put the developing countries' farmers at a disadvantage, the claim dragged on until 2008 because the US appealed the report. This lengthy litigation process meant that the financial situation of the African countries worsened because of the loss of expected earnings from cotton revenue and legal bills.[140] Finally, the AB upheld the panel's findings that the US violated the WTO rules and ordered it to change or adjust its cotton subsidy regime and compensate the affected countries or face retaliation.

However, the US did not comply with the decision of the AB.[141] Brazil threatened to retaliate, but the African countries could not do the same

134. See generally Julian Alston, Daniel Sumner & Henrich Brunke, *Impacts of Reductions in US Cotton Subsidies on West African Cotton Producers* (Washington, DC: Oxfam International, 2005).
135. Walters, *supra* note 122 at 175.
136. *Ibid*.
137. Elinor Lynn Heinisch, "West Africa Versus the United States on Cotton Subsidies: How, Why and What Next?" (2006) 44:2 J Modern African Studies 251.
138. *Ibid* at 268.
139. Elizabeth Becker & Todd Benson, "Brazil's road to victory over US cotton" (4 May 2004) *New York Times*, online: <www.nytimes.com/2004/05/04/business/brazil-s-road-to-victory-over-us-cotton.html>.
140. Walters, *supra* note 122 at 176.
141. *Ibid* at 178. See also Gregory Shaffer, "Weakness and Proposed Improvements to the WTO Dispute Settlement System: An Economic and Market-Oriented View" (Paper prepared for WTO at

because they were third parties.[142] As stated earlier, even if African countries wanted to retaliate, it would be challenging because they depend on the US for aid and grants.[143] Following US non-compliance, Brazil threatened to impose countermeasures.[144] Yet, the US did not adjust its subsidy program. Instead, it agreed to settle the claim and entered a Memorandum of Understanding with Brazil in 2014.[145] While the US agreed to pay an estimated $750 million to Brazil,[146] the real losers in this settlement were African countries.[147] First, the US still maintains its program to the detriment of African countries.[148] Second, none of the African countries could negotiate a settlement sum because they were third parties to the claim, and notwithstanding Brazil's admission that the cotton subsidy hits Africa much worse. It would thus appear that Brazil used the plight of the African countries to strengthen and advance its national interest.[149]

This experience shows multi-faceted problems of procedural, institutional, and political barriers to African countries' participation in the WTO dispute settlement system. The problems stem from the insensitivity of the DSU rules to the weaknesses of African countries, which include a lack of financial strength, poor technical resources, and weak trade systems. Also, the power play in the multilateral dispute

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Ten: A Look at the Appellate Body, Sao Paulo, Brazil, 16-17 May, 2005) [unpublished].

142. See Bernard Hoekman & Petros Mavroidis, "Enforcing Multilateral Commitments: Dispute Settlement and Developing Countries" (Paper presented at the WTO/World Bank Conference on Developing Countries' in a Millennium Round WTO Secretariat, Centre William Rappard, Geneva, 20-21 September 1999).

143. Bhagirath Lal Das, *supra* note 126 at 14.

144. Fuzhi Cheng, "The WTO Dispute Settlement Mechanism and Developing Countries: The Brazil—US Cotton Case (9-4)" in Per Pinstrup-Andersen & Fuzhi Cheng, eds, *Case Studies in Food Policy for Developing Countries* (Ithaca: Cornell University Press, 2009) 49 at 58.

145. WTO, *Memorandum of Understanding Related to the Cotton Dispute*, WTO Doc WT/DS267 (2014), online: <ustr.gov/sites/default/files/20141001201606893.pdf> [perma.cc/6F2P-ZPH8]. See also Alonso Soto & Krista Hughes, "Exclusive: US to Pay $300 Million to End Brazil Cotton Trade Dispute—Officials" *Reuters* (30 September 2014), online: <www.reuters.com/article/us-usa-brazil-trade-idUSKCN0HQ2QZ20141001>.

146. See Randy Schnepf, *The WTO Brazil–U.S. Cotton Case* (Washington, DC: Congressional Research Service, 2014) online: <crsreports.congress.gov/product/pdf/R/R43336>.

147. Krzysztof Pelc, "Why the Deal to Pay Brazil $300 Million just to keep US Cotton is bad for the WTO, Poor Countries, and U.S Taxpayers,"*The Washington Post* (12 October 2014), online: <www.washingtonpost.com/news/monkey-cage/wp/2014/10/12/why-the-deal-to-pay-brazil-300-million-just-to-keep-u-s-cotton-subsidies-is-bad-for-the-wto-poor-countries-and-u-s-taxpayers/>.

148. Alan Beattie, America's Craven Capitulation in the WTO," *The Washington Post* (8 October 2014), online: <www.ft.com/content/af65a6f7-6115-3e6c-852c-f070e1ebd080> ("It is hard to blame the Brazilians for settling: extracting three-quarters of a billion dollars from the US with a single legal case is a remarkable achievement. But the agreement leaves the west Africans stranded. American subsidies will continue to flow—even more so now that cotton prices have fallen to their lowest in nearly five years—and African farmers will continue to suffer").

149. Kristen Hopewell, "Heroes of the Developing World? Emerging Powers in WTO Agriculture Negotiations and Dispute Settlement" (2022) 49:3 J Peasant Studies 561 at 567-570.

system left African countries at the mercy of a developed country (the US) and an emerging economy (Brazil). Ultimately, African countries were left without any remedy, let alone compensation. Elizabeth Sidiropoulos aptly observed this: "multilateral rules are important for Africa, but the current institutions and norms reflect the views of the most powerful, who can steer outcomes to their own political and economic advantage."[150]

Given the foregoing lessons, among others, that the African countries experience in the DSM highlight, it is pertinent to consider how they should respond to the MIC proposal. The discussion below argues that since the MIC proposal is built on the DSM model, African countries' experience under it would likely be the same as it has been under the WTO. Although the DSM, and by extension, the MIC, may have some advantages, experience from the WTO shows that the MIC will likely serve the EU's interests while African countries are left to struggle to navigate a new politicized multilateral dispute resolution system.

IV. *Learning from the WTO experience—why the MIC is a bad idea for African countries*

A preliminary question worth considering is whether African countries' position in the WTO is similar to the ISDS to predict their likely experience in the MIC. I contend that African countries have similar positions in the WTO and ISDS. This is because there are many areas of convergence between the two regimes, which makes the exact nature of their contrast unclear.[151] For example, Most Favoured Nation and Fair and Equitable Treatment clauses are included in WTO and international investment law regimes.[152] Indeed, investors can convert investment disputes into trade disputes because of the overlap between the two regimes.[153] However, Chios Carmody argues that the substantive rights protected in the WTO law differ from those in IIL.[154] While WTO is based on a law of obligations among states to promote equality, IIL is primarily a law of rights to promote states' fair dealings with foreign investors. Although the nature of the

150. Elizabeth Sidiropoulos, "Africa: Aspiring to Greater Global Agency" in Sinan Ülgen et al, eds, *Rewiring Globalization* (Washington, DC: Carnegie Endowment for International Peace, 2022) 99 at 99. See also Joseph Stiglitz, *Globalisation and its Discontents* (London: Penguin Books, 2002) at 214 (he argues that the WTO structure is set up to favour the economic interests of developed countries).
151. Chios Carmody, "Obligations Versus Rights: Substantive Difference Between WTO and International Investment Law" (2017) 12 Asian J WTO & Intel Health L & Pol'y 75 at 77.
152. Nicholas DiMascio & Joost Pauwelyn, "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?" (2008) 102:1 American J Intl L 48.
153. *Ibid* at 49-50. See Gaetan Verhoorsel, "The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of the WTO Law" (2003) 6:2 J Intl Econ L 493.
154. Carmody, *supra* note 151.

protected substantive rights may differ, states have historically maintained positions as either claimants or respondents in WTO and ISDS claims.

The position of African countries in the WTO and ISDS is similar—they are mostly respondents rather than claimants.[155] As the US-Brazil cotton dispute shows, African countries are mostly respondents in the WTO partly because they lack the financial resources and technical expertise to file claims. In the ISDS, African countries are respondents because of the imbalanced obligations between host states and foreign investors.[156] As respondents in the WTO, African countries are against the inequitable results of applying trade rules.[157] As respondents in the ISDS, they are against the unfairness in the imbalanced rights and obligations in the IIL. Therefore, the analogous position of African countries in the two systems becomes apparent when we consider that African countries are seeking to protect their national space in WTO and ISDS against developed states or their "agents" (MNCs), respectively.

Like the WTO, the problems of access to justice in terms of legal cost will likely plague the MIC. Morris-Sharma argues that if states appoint judges, it will eliminate the cost of hiring ad-hoc arbitrators.[158] However, there is a difference between the arbitrator's cost and legal costs. Legal costs refer to payment for legal representation. Developing countries will still have to pay high fees for legal representation. Like in the WTO, most developing countries' government counsel lack the expertise to litigate high stake investment disputes.[159] This means African countries will continue to depend on external counsel and NGOs to prosecute or defend claims effectively. Therefore, if the experience of the African countries in the WTO is anything to go by, the MIC proposal will not solve their access to justice problems.

155. See World Trade Organization, "Developing Countries in WTO Dispute Settlement," online: <www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm> [perma.cc/D6PK-6TLK] ("…it is true that in the majority of WTO disputes so far, the complainant has been a developed country Member").

156. See Olabisi Akinkugbe, "Reverse Contributors? African State Parties, ICSID, and the Development of International Investment Law" (2019) 34:2 ICSID Rev 434.

157. See Thomas Bernhardt, "North-South Imbalances in the International Trade Regime: Why the WTO Does Not Benefit Developing Countries as Much as it Could" (2011) 6:1 Consilience: J Sustainable Development 173.

158. Natalie Morris-Sharma, "The T(h)reat of Party Autonomy in ISDS Arbitrator Selection: Any Options for Preservation?," in Jean Kalicki & Mohamed Abdel Raouf, eds, *Evolution and Adaptation: The Future of International Arbitration (ICCA Congress Series No. 20)*, (The Hague: Kluwer Law International, 2020) 432.

159. Diana Resort, *The Stakes are High: A Review of the Financial Costs of Investment Treaty Arbitration* (Winnipeg: International Institute for Sustainable Development, 2014) at 9.

Similarly, the elitism associated with the DSM will likely be replicated in the MIC. Through a highly political process,[160] the MIC will comprise selected judges or civil servants from a privileged elite circle.[161] In other words, states may only nominate judges who support and promote neoliberal and market ideologies.[162] Obviously, judges from this background will continue the ISDS neoliberal agenda under the legitimacy cover of international courts. Sornarajah agrees that the MIC would become "a device for neoliberal rules of investment protection with even greater authority."[163] Judges will continue to promote global capitalism over human rights and the environment, just like in the WTO.[164] In sum, the MIC may not temper, let alone reverse the prioritization of capitalism over human rights in the ISDS regime.[165] If anything, it may serve to legitimize it.

Similarly, the risk of politicizing the MIC through the appointment of judges is relatively high.[166] This is more troubling when considering that the DSM is considered partial.[167] If African countries are not adequately represented in the MIC, systemic bias against their interests would become institutionalized.[168] As an indicator of things to come, evidence of politicking to skew the odds in favour of developed countries can be seen in the choice of the WG III rather than the WG II as the forum for ISDS reform discussion.[169] Traditionally, the WG II is the technical group of experts tasked with producing arbitration initiatives, including

160. Eric Posner & Miguel de Figueiredo "Is the International Court of Justice Biased?" (2005) 34:2 J Leg Stud 599 at 608.

161. Lee Caplan, "ISDS Reform and the Proposal for a Multilateral Investment Court" (2019) 37 BJIL 207 at 212.

162. Tadhg Rush describes the judges as a "small elite Cabal." See Tadhg Rush, "An Investment Court System—Perpetuating or Reforming the Legitimacy Crisis in Investor-State Arbitration?" (LLM Thesis, University of Gothenburg, 2019) at 42-43.

163. Sornarajah, "An International Investment Court: Panacea or Purgatory?," *supra* note 8.

164. Saif Al-Islam Alqadhafi, "Reforming the WTO: Towards More Democratic Governance System and Decision-Making" (2007) Gaddafi Foundation for Development, Working Paper No 1 at 1; George Soros, *On Globalisation* (Cambridge, USA: Public Affairs, 2002) at 35("[i]n the absence of equally binding regulations in other fields such as human rights, labor conditions, health and environmental protection, the WTO gives international trade supremacy over other social objectives...").

165. See Center for International Environmental Law, Eu Proposal For A Multilateral Reform Of Investment Dispute Resolution: Position Paper by the Center for Internatinal Environmental Law (CIEL) (Washington, DC: CIEL, 2017), online: <www.ciel.org/wp-content/uploads/2017/06/CIEL_Position_Paper_on_the_EU_proposal_for_MIC_march_15.pdf> [perma.cc/QBE7-7AVT].

166. Caplan, *supra* note 161 at 212.

167. Arias, *supra* note 128.

168. See generally Alvarez Zárate, *supra* note 6. See also Sornarajah, "An International Investment Court: Panacea or Purgatory?," *supra* note 8.

169. Alvarez Zárate, *supra* note 6 at 1166.

the 2010 UNCITRAL Arbitration Rules and the 1985 UNCITRAL Model Arbitration Law.

In contrast, the WG III is a group of government representatives with no experience and technical expertise in arbitral reforms.[170] The EU carefully orchestrated the choice of the WG III to steer the outcome of the discussion in their favour.[171] Instead of experts debating the technicalities of the proposal, states are deciding the fate of the MIC proposal through political means. The EU's strategic choice of the WG III leaves "…no doubt that the dice, in fact, have been loaded."[172] In sum, experience from the WTO makes clear that the MIC proposal is a tool developed countries would use to steer investment dispute outcomes to their parochial political advantage.

Although the ISDS has its chequered history, it was designed to depoliticize and transfer investment disputes from the realm of diplomacy and politics to the realm of law.[173] It has been noted that "[t]he essence of each of these arrangements [the ICSID Convention, Bilateral and Investment Treaties (BITs)] is that controversies between foreign investors and host states are insulated from political and diplomatic relations between states."[174] In essence, the purpose of the depoliticization theory in investment law is to resolve investment disputes without creating a state-to-state conflict. The MIC proposal pulls backward the progress made in the ISDS to de-politicize the settlement of investment disputes.[175] For example, on the jurisdiction of the court, draft provision two of the MIC proposal provides that

> [t]he jurisdiction of the Tribunal shall extend to any dispute, between Contracting States as well as between a Contracting State and a national of another Contracting State, arising out of an investment [under an international investment agreement], which the parties consent to submit to the Tribunal." Second, that "[t]he Tribunal shall exercise jurisdiction over any dispute which the parties have consented to submit to the

170. *Ibid*.
171. *Ibid*.
172. *Ibid* at 1167.
173. Aron Broches, "Settlement of Investment Disputes" in Aron Broches, ed, *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law* (Leiden: Martinus Nijhoff Publishers, 1995) 161 at 163. The depoliticization theory is grounded in Article 27 (1) & (2) of the *ICSID Convention,* which provides that states shall not give diplomatic protection to their nationals in cases where parties agree to submit the dispute to an arbitration panel.
174. Lowenfeld in *Corn Products International, Inc v Mexico* (2008), ICSID AF Case no ARB/(AF)/04/1, Decision on Responsibility (15 January 2008), at 1, (Arbitral Tribunal constituted under chapter 11 of NAFTA).
175. Nigel Blackaby, "Public Interest and Investment Treaty Arbitration" (2004) 1:1 Transnational Dispute Management 355.

Tribunal.[176]

This provision gives the MIC concurrent jurisdiction over state-state proceedings and investor-state proceedings. It then raises the following questions regarding the role of states in investment claims: who is the ultimate beneficiary in a BIT—states or investors? Can a home state settle an investor's claim without the investor's consent? Can the treaty parties jointly terminate an investment treaty with immediate effect, thereby affecting investors' rights? Can a host state rely on inter-state countermeasures against a home state as a defense in an investor-state dispute?[177] These questions make the co-existence of state-to-state and investor-state arbitration "complex" and "disorderly."[178] They also raise states' potential to influence and undermine investment claims. In cases where the interests of a state and investors do not align, states may intervene to compromise investors' claims.[179] Article 25 of the ICSID Rules prevents these incidents of state intervention by limiting claims to disputes between member states and investors.[180]

176. UNCITRAL Secretariat, *Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters*, UNCITRAL, Working Group III, 44th sess, UN Doc A/CN.9/WG.III/WP.213, (2021), online: <undocs.org/en/A/CN.9/WG.III/WP.213>.

177. See Anthea Roberts, "Triangular Treaties: The Extent and Limits of Investment Treaty Rights" (2015) 56:2 Harv Intl LJ 353; Anthea Roberts, "State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority" (2014) 55:1 Harv Intl LJ 1; Nathalie Bernasconi-Osterwalde, *State–State Dispute Settlement in Investment Treaties* (Winnipeg: International Institute for Sustainable Development, 2014), online: <www.iisd.org/system/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf> [perma.cc/6YSK-N4E8]. "Home state" refers to the investor's nationality, and "host state" refers to the state where the investment is made.

178. Jarrod Wong, "The Subversion of State—to State Investment Treaty Arbitration" (2014) 53 Colum J Transnat'l L 6 at 6.

179. See Zachary Douglas, "The Hybrid Foundations of Investment Treaty Arbitration" (2003) 74 Brit YB Intl L 151 at 170. For example, in the NAFTA case of *GAMI Inc v United States of Mexico*, the national state of the investor, the United States of America, intervened under Article 1128 of NAFTA to contend that the Tribunal had no jurisdiction to hear GAMI's claim. Similarly, in *Mondev International Ltd v United States of America*, Canada (the national state of Mondev) made submissions to the Tribunal, which, without claiming to address the specific facts, leaned to the conclusion that Mondev's claims should be dismissed on the merits. See *GAMI Inc. v United States of Mexico* (2004), Final Award (15 November 2004), (Arbitral Tribunal constituted under chapter 11 of NAFTA) online: <www.italaw.com/sites/default/files/case-documents/ita0353_0.pdf> [perma.cc/U3MY-9PQK]; *Mondev International Ltd v United States of America* (2002), ICSID Case No. ARB (AF)/99/2, Award (11 October 2002), (Arbitral Tribunal constituted under chapter 11 of NAFTA), online: <www.italaw.com/sites/default/files/case-documents/italaw9080.pdf> [perma.cc/5FEC-SM99].

180. It provides that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."

Even if the MIC comes to fruition, it will be difficult to overhaul the ISDS because demolishing the ISDS is complex.[181] ISDS remains the most common dispute resolution mechanism adopted in BITs.[182] It has been noted that "…there are approximately 3000 BITs. The vast majority of them have clauses providing for so-called "investor-state arbitration."[183] Therefore, states and investors would have to renegotiate their BITs and IIAs to reference the MIC. Is such a disruption worth the trouble because EU officials are more familiar with the WTO?[184] Assuming such global renegotiation is possible, this would require resources and technical expertise, which developing countries lack. Without the technical expertise, infrastructure, and political will to create a dispute settlement model that responds to IIL's historical inequities, developing countries will be norm-takers, adopting the EU's MIC proposal, just as it did with the ISDS.

In addition to the complexities of overhauling the ISDS, the WTO's experience tells us that the MIC may bring little or no improvement to the ISDS framework. For instance, the MIC will not change the difficulties that African countries experience due to the cost of legal proceedings, which is currently an issue in the ISDS. Also, there will be issues regarding judges' bias, just as they manifest in the ISDS. Furthermore, African countries will still struggle to get judges to give proper recognition to the saliency of human rights and environmental claims, just as arbitrators do in the ISDS regime. So there will also be problems regarding gender and racial diversity, as we are witnessing in the ISDS regime. The critical question is: if these issues can be fixed within the ISDS regime as the WG III proposes, why do we need a multilateral dispute settlement system prone to politicization?

In sum, considering the experience of African countries in the WTO, a similar multilateral dispute system will pose the same procedural, institutional, and political challenges to them. Although the MIC has its advantages, the proposal is bad for African countries on three levels. First, the EU seeks to "multilateralize" its preferred architecture for investment disputes and transpose the idea to the rest of the world. This indicates a form of hegemony that repeats the history of ISDS and maintains the existing

181. See Taylor St John, *The Rise of Investor-state Arbitration: Politics, Law, and Unintended Consequences* (Oxford: Oxford University Press, 2018) at 248.

182. Stephen Blythe, "The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties Resolution Mechanism in Bilateral Investment Treaties" (2013) 47:2 International Lawyer 273 at 277.

183. Kaj Hobér, "Investment Treaty Arbitration and Its Future—If Any" (2015) 7 YB Arb & Mediation 1 at 2.

184. See Roberts & St John, *supra* note 68.

inequities in investment dispute settlement. Second, the MIC proposal will not solve the current challenges the ISDS faces. Instead, it repackages the problems in a different garb.[185] Third, even if the proposal succeeds, it will be difficult for African countries to access justice in the forum because of the procedural, institutional, and political barriers already discussed.

Given the point of the analysis just above—that the proposed MIC essentially entrenches and would give international legitimacy to an inequitable investment dispute settlement regime—I now turn to offer thoughts on where African countries in the WG III should focus. I argue that rather than support procedural reforms, African countries should push for reforms supporting balanced rights and obligations between host states and foreign investors.

IV. *Towards balanced rights and obligations between investors and hosts states*

As mentioned earlier, one of the problems contributing to the legitimacy crisis of the ISDS is the unbalanced nature of the rights and obligations between foreign investors and host states. Foreign investors enjoy property and contractual rights, but without corresponding obligations to respect human rights and environmental protection duties in host communities.[186] This inequality is part of the history of imperialism, which the ISDS has helped to perpetuate through its interpretative jurisprudence.[187] This is largely why developing countries have seen their regulatory spaces shrink regarding human rights, environmental protection, and preservation.[188]

However, the investment climate is gradually changing with the conclusion of new bilateral investment treaties (BITs) that impose human rights and environmental obligations on foreign investors.[189] For example, the 2018 Dutch model BIT incorporates the *Guiding Principles* and *OECD Guidelines for Multinational Enterprises*.[190] It urges tribunals to consider

185. Fabian Flues, "Multilateral Investment Court: An Utterly Flawed and Unjust System," *Euractiv* (12 October 2017), online: <www.euractiv.com/section/all/opinion/multilateral-investment-court-an-utterly-flawed-and-unjust-system/> [perma.cc/XXR2-EFT9].

186. See Nicolás M. Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by their Own Rules* (Oxford: Oxford University Press, 2021) at 11.

187. See Anghie, *supra* note 11 at 230-236.

188. Julia Brown, "International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?" (2013) 3:1 West J Leg Stud 1.

189. Arseni Matveev, "Investor-State Dispute Settlement: The Evolving Balance Between Investor Protection and State Sovereignty" (2015) 40 UWA L Rev 348.

190. Article 23 of the Model BIT specifically provides that "[w]ithout prejudice to national administrative or criminal law procedures, a Tribunal may, in deciding on the amount of compensation [to award to an investor following a breach of the BIT by the host State], take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Businesses and Human Rights, and the OECD Guidelines for Multinational Enterprises." See Antony Crockett,

investors' non-compliance with their commitments under these guidance tools. Similar model treaties include the 2012 South-African Development Community (SADC) Model BIT,[191] the 2015 Norway Model BIT,[192] the 2016 Nigerian-Morocco BIT,[193] ECOWAS Common Investment Code,[194] and the Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS.[195] These treaties ensure that foreign investors respect human and environmental rights.

In addition to foreign investors' obligations, new-generation BITs also clearly define investors' rights. For example, the FET clause, traditionally loosely defined in BITs, is now being reworded to limit the scope of protection afforded to foreign investors.[196] Article 7.1 of the Nigeria-Morocco BIT provides that host states shall "accord to investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." The article defines equitable treatment to mean "the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance

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"Going Dutch—a Model for Rebalancing Investment Treaties to Address Human Rights Concerns?," *Herbert Smith Freehills* (24 May 2018), online:<https://www.herbertsmithfreehills.com/latest-thinking/going-dutch-%E2%80%93-a-model-for-rebalancing-investment-treaties-to-address-human-rights> [perma.cc/2HCK-6YNG].

191. Article 15(1) of the SADC Model BIT states that "[i]nvestors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the [*sic*] human rights by others in the Host State, including by public authorities or during civil strife."

192. Article 31 provides that "[t]he Parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and to participate in the United Nations Global Compact," online:<www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf> [perma.cc/Y7S3-897G].

193. Article 18(2) of the Morocco-Nigeria BIT similarly provides that "[i]*nvestors and investments shall uphold human rights in the host state*." See generally, Naomi Briercliffe & Olga Owczarek, "Human-Rights-Based Claims by States and 'New Generation' International Investment Agreements," *Kluwer Arbitration* (1 August 2018), online: <arbitrationblog.kluwerarbitration.com/2018/08/01/human-rights-based-claims-by-states-and-new-generation-international-investment-agreements/> [perma.cc/AZ7K-J7WZ]. See Tarcisio Gazzini, "The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties" (2017) 13:8 Investment Treaty News Quarterly 3.

194. *ECOWAS Common Investment Code (ECOWIC)*, Economic Community of West African States, 22 December 2019, online: <wacomp.projects.ecowas.int/wp-content/uploads/2020/03/ECOWAS-COMMON-INVESTMENT-CODEENGLISH.pdf> [perma.cc/884S-F5LA].

195. *Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS*, Economic Community of West African States, 19 December 2008, online: <jusmundi.com/en/document/pdf/treaty/en-supplementary-act-a-sa-3-12-08-adopting-community-rules-on-investment-and-the-modalities-for-their-implementation-with-ecowas-ecowas-supplementary-act-on-investments-friday-19th-december-2008> [perma.cc/DPB9-L62Z].

196. See Philip Kurek, "Next Generation of Investment Treaties" (21 July 2021), online: <arbitrationblog.practicallaw.com/next-generation-of-investment-treaties/> [perma.cc/C4V2-GSQ7].

with the principle of due process embodied in the principal legal system of a Party." It then defines full protection and security as "the level of police protection required under customary international law." These definitions limit the scope of protection for foreign investors to those offered by host states and customary international law.[197] Through this controlled wording, states and foreign investors' rights and obligations are clearly defined and removed from arbitrators' discretion.

In effect, foreign investors' defined rights and obligations in new generation BITs show that despite investment law's chequered history, an ongoing reform movement is responding to the problems of the ISDS experienced by the Global South.[198] Developing countries are renegotiating their interests to balance foreign investors' and host states' rights and obligations. Makane Moise Mbengue, Stefanie Schacherer, Olabisi Akinkugbe, and Tomasz Milej call this trend "the Africanization of international investment law."[199] However, developing countries are not only the ones challenging the status quo in the ISDS. The rise of emerging economies, including Brazil, Russia, India, and China (BRICS), is also changing the nature of global investment flows and, ultimately, challenging the existing investment law's political and institutional structure.[200] It has been noted that "…as outward foreign investment from 'developing' countries such as China expands, the reciprocity of the investment regime is no longer a legal fiction, and the traditional developed/developing country is becoming less useful in explaining attitudes and policies towards investment in different states."[201]

Consequently, it is more worthwhile for developing countries, especially in Africa, to focus on WG III reforms which support the ongoing

197. Chrispas Nyombi, Tom Mortimer & Narissa Ramsundar, "The Morocco-Nigeria BIT: Towards a New Generation of Intra-African BITs" (2018) 29:2 Int Co & Com L Rev 69.

198. See Fabio Morosini & Michelle Ratton Sanchez Badin, eds, *Reconceptualizing International Investment Law from the Global South* (Cambridge: Cambridge University Press, 2017) 1.

199. See generally Makane Moise Mbengue & Stefanie Schacherer, "The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime" (2017) 18:3 J World Investment & Trade 414; Olabisi Akinkugbe, "Africanization and the Reform of International Investment Law" (2021) 53:1 Case Wes Res J Intl L 7; Tomasz Milej, "Reclaiming African Agency: The Right to Regulate, the Investor-State Dispute Settlement and the 'Africanization' of International Investment Law" in Rainer Hofmann et al, eds, *Investment Protection, Human Rights, and International Arbitration in Extraordinary Times* (Baden-Baden: Nomos, 2021) 337.

200. Anthea Roberts, "Investment Treaties: The Reform Matrix" (2018) 112 Am J Intl L 191; Karl Sauvant, Geraldine McAllister & Wolfgang Maschek, eds, *Foreign Direct Investment from Emerging Markets: The Challenges Ahead* (New York: Palgrave Macmillan, 2010) at 3; Stephan Schill, "Tearing down the Great Wall—The New Generation Investment Treaties of the People's Republic of China" (2007) 15:1 Cardozo J Intl & Comp L 73.

201. Bonnitcha, Poulsen & Waibel, *supra* note 11 at 230.

movement to Africanize international investment law to rectify the historical imbalance forged by colonialism instead of supporting a reform that reinforces the power imbalance between the Global North and South divide.[202] I discuss two reform options that may contribute to correcting the inequities in IIL and consolidate the Africanization movement. Although these are procedural reforms, they support substantive rights in new-generation BITs.

First is the right of third parties, especially local communities, to participate directly in investment disputes. Giving standing to local communities in investment disputes will ensure that they can bring human rights and environmental claims against MNCs based on the provisions of the new generation BITs.[203] Although the rights of third parties to participate in investment disputes have been limited to written submissions,[204] a procedural reform that gives local communities standing will herald a new dispensation that scholars have advocated for.[205] This reform will clarify how local communities can claim or benefit from substantive rights in the new generation of BITs. Without a procedure to realize the substantive rights in new generation BITs, the Africanization movement may be useless because, in most cases, developing countries may be unable or unwilling to enforce MNCs' obligations, especially those relating to human rights and the environment.[206] Enabling local communities to directly claim the benefits of BITs will signify progress in correcting the imbalanced rights

202. See Stephan Schill, "The Sixth Path: Reforming Investment Law from Within" in Jean Kalicki & Anna Joubin-Bret, eds, *Reshaping the Investor-state Dispute Settlement: Journeys for the 21st Century* (The Hague: Nijhoff, 2015) 621 at 627.

203. See Akinwumi Ogunranti, "Between the Devil and the Deep Blue Sea—Towards Access to Justice for Local Communities in Investor-state Arbitration or Business and Human Rights Arbitration" (2022) 59:3 Osgoode Hall LJ 707 at 715-717.

204. See Fernando Dias Simoes, "Myopic Amici: The Participation of Non-Disputing Parties in ICSID Arbitration" (2017) 42 NCJ Intl L & Com Reg 791.

205. See Nicolás Perrone, "The International Investment Regime and Local communities: Are the Weakest Voices Unheard?" (2016) 7:3 Transnational Legal Theory 383 at 384; Nicolás Perrone, "The 'Invisible' Local communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime" (2019) 112 AJIL 16; Ibironke Odumosu, "Locating Third World Resistance in the International Law on Foreign Investment" (2007) 9 Intl Community L Rev 427; Ibironke Odumosu-Ayanu, "Governments, Investors and Local communities: Analysis of a Multi-Actor Investment Contract Framework" (2014) 15 Melbourne J Intl L 473; Ibironke Odumosu, "The Law and Politics of Engaging Resistance in Investment Dispute Settlement" (2007) 26 Penn St Intl L Rev 251; Ibironke Odumosu, *ICSID, Third World Peoples and the Re-Construction of the Investment Dispute Settlement System* (PhD Dissertation, University of British Columbia, 2010) [unpublished]; Emmanuel Laryea, "Making Investment Arbitration Work for All: Addressing the Deficits in Access to Remedy for Wronged Host State Citizens Through Investment Arbitration" (2018) 59:8 Boston College L Rev 2845.

206. This occurs when states are complicit in human rights violations. *Ibid* at 727-728.

between host states and MNCs.[207] Otherwise, what is the use of an empty right without the means to enforce it?

In 2018 and 2019, Indonesia and Ecuador proposed that local communities be parties to ISDS proceedings.[208] They argued that allowing local communities to participate in ISDS proceedings will balance the rights and obligations of all stakeholders. African countries must push for this reform proposal in the WGIII to support the Africanization of IIL. When arbitrators recognize the right of local communities to file claims and counterclaims in arbitral proceedings, it births a new normative regime where states and MNCs are held accountable for rights and obligations under the BITs.

The second reform option that supports the Africanization of IIL relates to the rights of states to file counterclaims against MNCS. Although the right to host state counterclaim is based on the provisions in each BIT, arbitral tribunals have been inconsistent in interpreting these clauses.[209] This is because there are conditions for the admissibility of counterclaims in investor-state arbitration proceedings, one of which is that the counterclaimant must prove a nexus between the claim and counterclaim. Therefore, it is difficult for states to convince arbitrators of the nexus between public law issues and private claims. This is because arbitrators "see international human rights [public law claim] as a potential, or probable, cause of political disturbances, intruding in their 'purely legal', autonomous field, with its ground rules being determined by neoliberal thoughts."[210]

To give effect to new generation BITs that recognize reciprocal obligations between host states and foreign investors, the rights of states (and local communities) to counterclaims must be clarified.[211] A framework that covers the appointment of arbitrators who are experts in issues relating to human rights and the environment should be implemented. Similarly,

207. See Ogunranti, *supra* note 203 at 758.

208. *Possible Reform of Investor-State Dispute Settlement (ISDS): Comments by the Government of Indonesia*, UNCITRAL Working Group III, sess 37, UN Doc A/CN.9/WG.III/WP.156 (2018) at para 7, online: <undocs.org/en/A/CN.9/WG.III/WP.156>; *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Ecuador*, UNCITRAL Working Group III, sess 38, UN Doc A/CN.9/WG.III/WP.175 (2019) at para 24, online: <undocs.org/en/A/CN.9/WG.III/WP.175/Add.1>.

209. See Xuan Shao, "Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law" (2021) 24 J Intl Econ L 157.

210. Bruno Simma, "Foreign Investment Arbitration: A Place for Human Rights?" (2018) 60:3 Intl & Comp LQ 573 at 576.

211. See Barnali Choudhury, "Investor Obligations for Human Rights" (2020) 35:1 ICSID Review 82 at 94-100. See also Jean Ho, "The Creation of Elusive Investment Responsibility" (2019) 113 AJIL Unbound 10.

the reformed procedural rules must guide tribunals in interpreting counterclaim clauses, one that does not take a narrow view of the nexus between public and private law.[212] This is because the ISDS intersects public and private law, a characteristic which has earned it a special status in international law.[213]

The above-noted reform option is currently before the WGIII. In 2019, the governments of South Africa and Mali submitted a proposal to recognize states' rights to file counterclaims.[214] South Africa emphatically stated that "[t]he system is asymmetrical and should allow counterclaims to address the imbalance in the existing ISDS mechanism."[215] In 2020, the Working Group Secretariate noted the complexities involved in counterclaims and current inconsistencies in arbitral tribunals on the admissibility of counterclaims.[216] The need to provide guidance to arbitral tribunals. It recommended that in addition to providing counterclaim model clauses for BITs to improve elegant drafting, a procedural framework must be reformed to support the substantive counterclaim provisions in the BIT. This is a reform that African countries must push for to enhance the prospect of the Africanization of IIL.

These proposals do not mean that other reform options before the WGIII are not worthwhile. The proposals in this paper complement other reforms within the ISDS framework rather than in a new multilateral dispute settlement system. The point is that the WGIII should not throw away the baby with the bathwater in the name of multilateralism.

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212. See Yannick Radi, "Balancing the Public and the Private in International Investment Law" in Horatia Muir Watt & Diego Fernandez Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2014) 157.

213. Julie Maupin, "Public and Private in International Investment Law: An Integrated Systems Approach" (2014) 54:2 Va J Intl L 367 at 367 ("[i]nternational investment law deals with both public and private concerns, impacts upon both public and private actors, and crosses over traditional divides separating public law from private law and public international law from private international law").

214. See *Possible Reform of Investor-state Dispute Settlement (ISDS): Submission from the Government of South Africa*, UNCITRAL Working Group III, sess 38, UN Doc A/CN.9/WG.III/WP.176 (2018), at para 64, online: <uncitral.un.org/sites/uncitral.un.org/files/176-e_submission_south_africa.pdf>; *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Mali*, UNCITRAL Working Group III, sess 38, UN Doc A/CN.9/WG.III/WP.181 (2019), at para 3(e), online: <documents.un.org/doc/undoc/ltd/v19/095/06/pdf/v1909506.pdf?token=JyyjNDXpXW5vpCxtnO&fe=true> ("[w]e are in favour of providing for counterclaims in order to enable States that are always respondents to better defend themselves by allowing them to make counterclaims against the claimant").

215. *Ibid* at para 64.

216. *Possible Reform of Investor-State Dispute Settlement (ISDS) Multiple Proceedings and Counterclaims: Note by the Secretariat*, UNCITRAL Working Group III, sess 39, UN Doc A/CN.9/WG.III/WP.193 (2019), online: <documents-dds-ny.un.org/doc/UNDOC/LTD/V20/006/03/PDF/V2000603.pdf?OpenElement>.

Conclusion

This paper examined the EU's proposal in the WG III to replace the ISDS regime with a standing multilateral investment court. This proposal stems from criticisms against the ISDS and the EU's discontent with the ISDS regime. The proposal poses inherent dangers for developing countries, especially Africa, considering their historical marginalization in IIL. The EU seeks to impose a multilateral dispute settlement on the rest of the world, as it did with the ISDS. When faced with ISDS problems—a forum it helped to create—the EU, yet again, proposes another forum (MIC) that favours its unilateral interests. This paper argues that notwithstanding the acknowledged advantages, the MIC is a bad idea for African countries. The experiences of African countries in the WTO DSM, which is the blueprint for the MIC proposal, are likely to be the same in IIL if the MIC proposal comes to fruition. Like in the WTO, African countries will face access to justice problems regarding legal and procedural costs. They will also be left to navigate a dispute settlement system that is highly politicized, a situation that leaves them at the mercy of developed states. Furthermore, the MIC will perpetuate the neoliberal agenda in the ISDS, albeit this time, with the legitimacy of an international court. In effect, the proposed MIC will create more procedural and political challenges for African countries than they already face in the ISDS.

Instead of supporting a reform that reinforces the power imbalance between the Global North and South divide, African countries must focus on reforms that rectify the historical inequities forged by colonialism in the ISDS. They must push for reforms that balance host states' and foreign investors' rights and obligations. Two procedural reforms before the WG III are germane to realizing this goal—reforms relating to the right of local communities to participate in investment proceedings and those that establish the right of host states to file counterclaims. These procedural reforms support substantive rights in new-generation BITs that balance host states' and foreign investors' rights and obligations. If the WG III supports reforms important to African countries, it shows that IIL is responsive to diversified economic interests shaped by historical inequity and colonialism. If not, the hegemonic story of IIL continues.