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# Comparative Analysis of proposed Multilateral Investment Court and Permanent Multilateral Appellate Mechanism: Dilemma, Value, and Best Path Choice

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## Abstract

The present study finds that establishing a permanent appeals mechanism is essential to resolve the current legitimacy crisis regarding investor-State dispute settlement. Currently, States have proposed two basic models of investment arbitration appellate reform to Working Group III of the UN Commission on International Trade Law, namely the formation of a Multilateral Investment Court (MIC) and a Permanent Multilateral Appellate Process (PMAP). The latter is more legitimate and feasible than the MIC. The Appellate Mechanism's (AM) review scope should include legal and procedural errors to guarantee that the AM's error rectification function is completely accomplished. To improve the efficiency of arbitration, factual inaccuracies should be confined to apparent errors. Although *stare decisis* is not yet a general concept in international arbitration, PMAP can employ the *de facto stare decisis* evolved in WTO judicial practice to promote coherence and predictability of verdicts.

**Key Words:** Investor-State, Dispute Settlement Mechanism, Appellate Mechanism, Multilateral Appellate Body, Multilateral Investment Court, New York Convention, ICSID Convention, Trade Law, Economic Law.

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## Introduction

The traditional Investor-State Dispute Settlement (ISDS) mechanism is criticized for not providing a systematic and effective error correction system, for not ensuring consistency, coherence, predictability of arbitral awards, and not taking into account the public benefit of the

host State. The above problems with the ISDS mechanism have led some countries to consider establishing an appeal mechanism<sup>1</sup> to improve the consistency, predictability and correctness of awards, and preserve the host country's right to regulate.<sup>2</sup> Working Group III of the United Nations Commission on International Trade Law (known as UNCITRAL Working Group III), responsible for ISDS reform, published reports in 2019 submitted by governments on their options for establishing an appeal mechanism.<sup>3</sup> First, governments propose setting up a Multilateral Investment Court (MIC) with primary and subsequent instance tribunals and then using the Court's subsequent instance procedure as an appellate mechanism. A single PMAP would complement the existing ISDS process. This paper first analyzes the essential differences between these two models and argues adopting a PMAP to reform the ISDS mechanism. Secondly, based on a comparative analysis, the authors have discussed the justification and necessity of adopting a PMAP and a MIC appeals mechanism's inherent disadvantages and inherent flaws. Finally, the authors have examined two central difficulties in establishing a PMAP along with certain recommendations.

## **1. The differences between the Multilateral Investment Court (MIC), AM and the PMAP**

### **1.1 Basic Features of the MIC Appeals Mechanism**

The EU proposed to UNCITRAL Working Group III a multilateral investment court proposal with mechanisms for the first and second instances. A permanent mechanism with full-time judges would be a two-trial system under this choice.<sup>4</sup> The first instance court would operate similarly to the current ISDS mechanism, finding the facts of the dispute and applying the relevant law. The Court of Appeal hears appeals from the first instance court's judgments. For example, the CETA 8.28 (2) allows the Appellate Tribunal to rule on a case based on a legal error, a factual error, or a mistake in settling an investment dispute between two States. Moreover, the Washington Convention states that an appeal panel may modify, set aside, or remand an award on five procedural grounds.

*(a) The award may be modified, reversed, or remanded to reconsider the initial award.*

The European Union and the United States initially recommended a bilateral ICS as part of the Transatlantic Trade and Investment Partnership (TTIP) and also in various investor protection

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<sup>1</sup>Thomas, J. C., & Dhillon, H. K. (2017). The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards. *ICSID Review-Foreign Investment Law Journal*, 32(3), 459-502.

<sup>2</sup>Working Group III: Investor-State Dispute Settlement Reform Commission on International Trade Law, UNITED NATIONS (2019), [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state) (last visited Mar 4, 2021).

<sup>3</sup>Possible reform of investor-State ... - uncitral.un.org. [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/assessment\\_of\\_damages\\_and\\_compensation\\_0.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/assessment_of_damages_and_compensation_0.pdf).

<sup>4</sup>Submission establishing a standing mechanism for the settlement of International Investment Dispute. <https://trade.ec.europa.eu/doclib/html/157631.htm>

treaties of the European Union. EU-Canada Comprehensive Economic and Trade Agreement (CETA), EU-Singapore Investment Protection Accord, EU-Vietnam Investment Protection Agreement and the original EU-Mexico free trade agreement all contributed to the principle improvement of the EU-Mexico agreement.<sup>5</sup>The Investment Court system is currently a bilateral mechanism under the EU's mixed investment agreements. These agreements indicate that a permanent multilateral investment court (PMIC) will eventually replace the investment court system's bilateral model. Therefore, the bilateral investment court system is a transitional mechanism to facilitate a PMIC. However, the MIC mechanism is based on the Bilateral Investment Court mechanism, and therefore the main elements of the appeal mechanism are consistent between the two. Because of the above, the analysis of the appeal mechanism of the MIC in this paper will be based on the appeal mechanism of the Bilateral ICS in the EU Mixed Investment Agreement.

## 1.2 Essential Characteristics of Permanent Multilateral Appeal Mechanism

Morocco, Ecuador, and others called for creating a single court of appeal, which would allow parties to review arbitral verdicts made under the current ISDS framework. The single appellate mechanism consists of two models. The first model institutionalizes a permanent multilateral appeal structure akin to the WTO Appellate Body. These countries believe that a standardized appellate mechanism could review and correct ISDS tribunals' decisions. Thereby providing the parties with a fair judgment could evolve into general principles of legal authority, thereby enhancing the investment dispute resolution mechanism's consistency, coherence, and predictability.<sup>6</sup>The second model creates an appeal mechanism that the parties to the treaty, the disputing parties, or the arbitral body may choose to apply, i.e., an *ad hoc* appeal mechanism. Chile, Israel, and Japan support this option. Under this option, an appeal mechanism could be developed for incorporation by the parties into an investment treaty under the investment treaty, or for adoption by the disputing parties as an appeal mechanism for a particular dispute, or for incorporation into the arbitration rules of an arbitral institution dealing with ISDS cases as an appeal mechanism for that arbitral institution.<sup>7</sup> The model appeal mechanism can be used in investment arbitration practice through the aforementioned procedures. However, executing the appellate mechanism's function eventually requires establishing an appellate body. As a result,

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<sup>5</sup>Guide to the Comprehensive Economic and Trade Agreement (CETA). (n.d.). Retrieved October 2, 2021, from <https://trade.ec.europa.eu/doclib/html/156062.htm>

<sup>6</sup>United Nations. (n.d.). Working Group III: Investor-state dispute settlement reform commission on international trade law. United Nations. Retrieved October 2, 2021, from [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state).

<sup>7</sup>United Nations. (n.d.). *Working Group III: Investor-state dispute settlement reform commission on international trade law*. United Nations. Retrieved October 3, 2021, from [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state).

the model appeals process might result in either establishing a permanent multilateral appellate body or an *ad hoc* appellate body to consider appeals made under the model appeals mechanism.

The standing multilateral appellate body is the first of these models, i.e., institutionalizing the permanent multilateral appeals mechanism. However, the *ad hoc* appellate mechanism remains a decentralized *ad hoc* mechanism. The parties establish the *ad hoc* appellate tribunal for investment disputes on a case-by-case basis. It is constituted similarly to the *ad hoc* tribunal under the existing ISDS framework. As a result, it cannot overcome the existing arbitration mechanism's inconsistent and incoherent conclusions, errors in legal interpretation, and lack of protection of the host country's public interest. Therefore, this model is hardly the ultimate solution for establishing an appeal mechanism.<sup>8</sup>

## **2. The essential differences between the Multilateral Investment Court Appeals Mechanism and the Permanent Multilateral Appeals Mechanism**

Two widely accepted models for reforming the appeals mechanism are the MICA and the PMAP. The MIA necessitates forming a court system, including primary and subsequent instances. Forming a court with judicial features would eliminate the inherent shortcomings of the current ISDS arbitration procedure, such as errors, inconsistency, and uncertainty of outcomes. This is a single appeal system built on the existing arbitration method. The mechanism would still be found on the current arbitration mechanism, improving rather than replacing the existing ISDS mechanism.<sup>9</sup>In the authors' view, establishing a permanent multilateral appeals mechanism is more acceptable and feasible for countries than a multilateral investment court appeals mechanism. Therefore, the authors support establishing a permanent multilateral appeals mechanism as a reform solution to the existing ISDS problem.

## **2. Legitimacy and feasibility of establishing a permanent multilateral appeals mechanism**

### **2.1.1 Justification for a PMAP**

Establishing an appeal system improves the mechanism, increases judgment predictability, and limits judges' conduct. The tool can also help to increase procedure consistency and transparency and prevent the parties' abuse of their rights in the dispute. On the other hand, countries have not offered any precise proposals on the content of the PMAP system. For example, it is unclear whether contracting parties appoint the appellate body members or whether a roster of arbitrators

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<sup>8</sup>Morocco, Submission of Morocco to UNCITRAL Working Group III, *supra* note 6, at 6; China, Submission of China to UNCITRAL Working Group III, *supra* note 6, at 4; Ecuador, Submission of Ecuador to UNCITRAL Working Group III, *supra* note 2, at 2.

<sup>9</sup>Charris-Benedetti, J. P. (2019). The proposed Investment Court System: does it really solve the problems? *Revista Derecho del Estado*, (42), 83-115.

will be established for the dispute to appoint arbitrators on a rotation basis.<sup>10</sup> It's also unclear if the multilateral appeals system will be part of ICSID or other international bodies. Thus, assessing the institutional content of the permanent appeal procedure is difficult. A PMAP would maintain the present ISDS mechanism, which investors and host States already generally accept. States would be more readily accept and create political consensus than an entirely new investment court proposal. It would also be less costly and less economically and financially burdensome for countries. An appeals procedure would be created without a first instance court. So a PMAP is a more legitimate ISDS reform option.

### **3. Feasibility of establishing a PMAP**

A revolutionary movement against the standard ISDS procedure is establishing an appeal mechanism. Therefore, it can lead to its incompatibility with the existing international law body that worldwide enforceability is an essential component in a successful conflict resolution process. Under the proposal given to UNCITRAL Working Group III by States, permanent international appeal awards can be implemented through the two most important multilateral arbitral award enforcement mechanisms, the NY and the Washington Convention. The Enforcement Mechanism enforces the ICSID awards under the Washington Convention. There are few legal obstacles to the enforcement of NY and Washington conventions following the PMAP and the MIC.

#### **3.1 Implementation of standing multilateral appeal decisions under New York Convention**

The NY Convention does not bar the implementation of appeal awards. The Convention does not preclude the implementation of appellate arbitration decisions. Domestic courts may reject implementing a non-binding award following Part V (1) (e) of the NY Convention. The award may be canceled or suspended by the State in which it was given or by the statute under which it was given. If the contesting parties agreed to use a two-tier arbitration system to settle the issue, the award granted by the appealed arbitration would be considered binding under this rule. If the contesting parties do not agree to enforce the first-instance court recognition and no appeal processes are initiated, the Convention will be applied. This is reflected in the Convention's text. The Working Group ratified that an award could not be imposed if the arbitration procedures in a question apply.<sup>11</sup> As a result, it is highly improbable that the two-tier mechanism for reviewing ISDS arbitral rulings will alter the nature of the entire enforcement process.

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<sup>10</sup> United Nations. (n.d.). Working Group III: Investor-state dispute settlement reform commission on international trade law. United Nations. Retrieved October 3, 2021, <https://undocs.org/en/A/CN.9/WG.III/WP.161>

<sup>11</sup>United Nations (UN), Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Conference on International Commercial Arbitration, Summary Record, 7th Meeting, (1958) <https://undocs.org/E/CONF.26/SR.17> (last visited Mar 4, 2021).

### **3.2 Enforcement of standing multilateral appeal decisions under the Washington Convention**

It would be difficult to recognize and enforce standing multilateral appeal decisions under the Washington Convention's provisions. An ICSID award cannot be appealed or otherwise redressed unless the Washington Convention expressly permits it. ICSID verdicts do not allow for appeals or the creation of an appeal procedure between States or opposing parties, according to its regulations.<sup>12</sup> Thus, even if a permanent multilateral appeal judgment is made following the ICSID arbitration procedures specified in bilateral or cross-border investment agreements, it might be treated as an ICS award. However, because the ICSID system precludes appeals of arbitral verdicts, an ICS arbitration award that includes an appeal mechanism cannot be considered an ICS award. The ICSID judgment will be implemented following the ICSID's procedure for ruling recognition and enforcement. Establishing an appeals procedure within the ICSID would require the approval of all ICSID member states and a change of the treaty, making it extremely difficult to implement in practice. A possible solution would be for the States to establish a standing appeals mechanism to amend the Washington Convention among themselves. A multilateral treaty's parties may acknowledge amending the treaty only amid themselves if definite conditions are met (VCLT 41(1) (b)). An appeal mechanism decision can be recognized and enforced in the State that created the mechanism after the VCLT through this revision procedure. An *inter se* modification to a treaty under VCLT Article 41 doesn't bind States who aren't parties to the amendment, which means that the appeal decision cannot be enforced in the third State's territory under this provision. To put it another way, a non-party to the appeal mechanism is not bound under the Washington Convention to recognize and enforce the appeal decision on its soil. Given the difficulty of recognizing and enforcing the conclusions of the permanent international appeals procedure established by the Washington Convention, it would be more practicable to enforce the New York Convention's appellate decisions.

## **4. Obstacles to the establishment of a MIC appeals mechanism**

### **4.1 The inherent defects of the MIC**

From the judges' selection and functioning perspective, the proposed investment court would have judges selected by the Contracting States, which would harm investors. A joint committee made up of European Union and Canadian delegates will select the candidates for the Court of Primary and Subsequent Instance judges, according to the CETA. CETA establishes a joint EU-

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<sup>12</sup> Michele Potesta & Gabrielle Kaufmann-Kohler, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection With the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? – Analysis and Roadmap*, SSRN ELECTRONIC JOURNAL (2016). August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 JOURNAL OF INTERNATIONAL ECONOMIC LAW 761–786 (2016).

Canada Court of First Instance, with fifteen members selected by the two governments. Five of them are from the EU, five from Canada, and five are third-country nationals. The Joint Committee also appoints the members of the Appeals Tribunal. Such a mechanism for appointing judges will enable contracting States to select candidates inclined to maintain the host country's power to regulate public affairs management in the country as judges, thus jeopardizing investors' interests. Also, judges will face job replacement and renewal in performing their duties. Finally, member States' appointment mechanism has led to ICS judges in the trial process being more inclined to safeguard the contracting States' interests to ensure their positions, not to guarantee investors' interests.<sup>13</sup>

The Member State dominated appointment mechanism also leads to a tendency to politicize the selection of judges. CETA requires the EU to select five judges of the Court of First Instance from its member States' nationals to choose judges. In comparison, the EU and Canada must appoint five judges of First Instance from third-country residents. Considering that the EU now has 27 member States after Brexit, it will not be easy for the 27 member States to agree on the five judges of the first instance court that they are entitled to elect. The CETA does not specify the number of judges of the second instance court. Instead, a joint committee composed of the EU and Singapore representatives will appoint the second instance court judges. However, considering that the States Parties ultimately elect judges, the Court of Investment judges' election may contest national political forces. According to the WTO's, the Permanent Court of International Justice's, and arbitral tribunals' current practices, the inclusion of States would result in the politicization of the election of judges and the associated risks.<sup>14</sup> The Court's judges' election (apart from the five permanent members of the UN Security Council) is highly politicized.<sup>15</sup> Appointments based on political considerations would undermine the judges' quality and, ultimately, the Court's independence, credibility, and legitimacy.<sup>16</sup>

#### **4.2. Limited appointment fees are challenging to attract outstanding talents**

The cost of establishing an international court is prohibitive. In the decade, since the establishment of the ICC, only one case has been heard. However, maintenance costs are high.

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<sup>13</sup>Robert W. Schwieder, *TTIP and the Investment Court System A New (and Improved?) The paradigm for Investor-State Adjudication*, COLUMBIA JOURNAL OF TRANSNATIONAL LAW (2016).

<sup>14</sup>Michele Potesta & Gabrielle Kaufmann-Kohler, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection With the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? – Analysis and Roadmap*, SSRN ELECTRONIC JOURNAL (2016).

<sup>15</sup>The Hon. Charles N. Brower and Jawad Ahmad, *From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court*, 41 FORDHAM INT'L LJ 791 (2018).

<sup>16</sup>Michele Potesta & Gabrielle Kaufmann-Kohler, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection With the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? – Analysis and Roadmap*, SSRN ELECTRONIC JOURNAL (2016).

The cost of the ICT increased 500-fold from its establishment to 2010.<sup>17</sup> It is consequently feasible that forming an investment court would similarly be costly. CETA uses a remuneration mechanism that combines a basic retainer fee and case performance. Unlike traditional performance-based tools in investment arbitration, CETA's basic retainer fee is intended to provide judges with adequate financial security to perform their duties impartially. In addition, to prevent judges from choosing an overly protective stance towards investors to increase their performance-based income and preserve their decisions' impartiality. The EU expects the fee to be €2,000 per month.<sup>18</sup> The Court of Primary Instance and the Subsequent Instance judges are paid a monthly payment of around €7,000.

Moreover, to increase judges' independence, judges serving on investment courts would not be allowed to act as lawyers and experts or witnesses for the parties in international investment arbitration disputes. States' reluctance to provide adequate financial support for investment courts will not attract professionals with theoretical and practical investment arbitration experience to serve as judges.<sup>19</sup> Under these terms of service, it is expected that the pool of candidates available will consist mainly of retired civil servants (with little knowledge of the field of international law), retired judges (with limited experience in the elucidation and use of international law) and politicians.<sup>20</sup> The lack of highly qualified and experienced arbitrators in the ICS system will undermine the quality and efficiency of the ICS mechanism and the establishment and long-term development of the investment court system.

#### **4.3 Obstacles to the recognition and implementation of Appeal judgments of the MIC**

The EU MIA proposes three enforcement mechanisms for the Bilateral Investment Court system, an internal enforcement mechanism following the NYC and the WC.<sup>21</sup> But no agreement has been achieved on setting up an internal enforcement mechanism. The authors will discuss MIC decision enforcement under the NY and WA Conventions.

Conversely, the enforcement of a NY Convention award matters to the constraints and restrictions of the place of implementation's domestic law. Therefore, the enforceability of MIC

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<sup>17</sup>Jon Silverman, TEN YEARS, \$900M, ONE VERDICT: DOES THE ICC COST TOO MUCH? BBC NEWS (2012), <https://www.bbc.com/news/magazine-17351946> (last visited Mar 6, 2021).

<sup>18</sup>Article 9.12, subsection 02, section 03, chapter 02, EU proposal.

<sup>19</sup>JUAN PABLO CHARRIS BENEDETTI, THE PROPOSED INVESTMENT COURT SYSTEM: DOES IT REALLY SOLVE THE PROBLEMS? REVISTA DERECHO DEL ESTADO 83–115 (2018).

<sup>20</sup>The Hon. Charles N. Brower and Jawad Ahmad, *From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court*, 41 FORDHAM INT'L LJ 791 (2018).

<sup>21</sup>Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA), EUROPEAN COMMISSION - EUROPEAN COMMISSION (2017), [http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156062.pdf](http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156062.pdf) (last visited Mar 6, 2021).



judgments following the Washington Convention deserves further discussion. The authors will discuss the obstacles to recognizing and enforcing MIC decision enforcement under the NY and WA Conventions.

#### **4.4 Implementation and Recognition of MIC decisions under New York Convention**

The MIC may have challenges enforcing its judgments as it strives to supplant the old arbitral tribunal system. A court decision cannot be enforced by an international convention, unlike arbitral awards. Most countries lack a legal or judicial foundation for enforcing such decisions. The Convention exclusively recognizes and enforces international arbitral awards. The Convention requires that MIC judgments be enforced like arbitral awards. MIC rulings are not arbitral because of the institution's court-like nature. In that case, the Convention does not apply. The EU declares expressly in the TTIP text that judges in its investment court model are meant to replace the arbitration system. However, the Investment Court's decisions would not be recognized and enforced by the Washington and Conventions on Enforcement of Arbitral Awards. Therefore, the EU substituted this manifestation with "member of the arbitral tribunal" in following varied investment agreements with Canada, Singapore, and Vietnam.<sup>22</sup> The modification in CETA formulation appears to reflect the EU's wish for investment court judgments to be treated as awards for implementation through current multilateral implementation mechanisms. Conversely, according to the Secretariat of UNCITRAL, NY Convention guidance, domestic courts will generally ratify whether an award is awarded by arbitral Tribunal, arbitral based on the nature and content of the judgment, rather than the name provided to the award by the arbitrator. As a result, whether the Court of Investment's decision is an arbitral award or a court decision must be evaluated by the courts of the Convention Contracting States throughout the recognition and enforcement procedure.

To ensure that Investment Court judgments are treated as arbitral awards and enforceable under the Convention, Part I of the Convention dealing with business ties or transactions is referenced in the EU Hybrid Investment Agreement. The MIA further specifies that final awards are not subject to appeal, reconsideration, annulment, invalidation, or any other remedy by the domestic courts of the enforcement site. Those who have joined MICA have agreed to treat its ruling as an arbitral award. It is binding on their domestic courts and is not subject to judicial review. A MIC decision may be enforced as an award in a third nation, not a party to the ICS. Parties to the award may contest the arbitral proceedings' fairness by submitting proof of a procedural fault to the competent authority of the place of application for recognition and enforcement. To refuse to accept and enforce international arbitral awards, Part V (2) of the Convention specifies that the state's competent authority may reject or enforce an award. It finds that the subject matter of the dispute is ineligible for arbitration under State law or that acceptance or execution of the award

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<sup>22</sup>Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA), EUROPEAN COMMISSION - EUROPEAN COMMISSION (2017), [http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156062.pdf](http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156062.pdf) (last visited Mar 6, 2021).

would be contrary to public policy. In virtue of the EU MIA, a final Investment Court judgment is deemed to constitute an arbitral award under Part I of the Convention concerning a commercial or transactional claim. The Investment Court's final award is not subject to appeal, reconsideration, set aside, annulment, or another remedy. Following the preceding provision, the EU seeks to recommend that all Convention Contracting Parties forgo the application of Part V to the review of Investment Court rulings to ensure that Investment Court decisions can be successfully enforced in all Contracting Parties to the Convention.

#### **4.5 Recognition and enforcement of appellate decisions of the Multilateral Investment Court under the provisions of the Washington Convention**

In addition, the ICSID regime does not recognize or enforce appellate judgments issued by international investment courts since they are not called for in the Convention. Due to the difficulties in enforcing Convention appeal rulings, many EU mixed investment agreements require the Contracting States to acknowledge the binding nature of investment court judgments within their jurisdiction. The rulings must be enforced as final judgments of their home courts. This clause is based on Article 54 of the Convention, which entails investment court judgments as final verdicts, consequently, spontaneously recognize and impose them in the Member State.<sup>23</sup> Because of this, the investment court mechanism denies State courts of the Signatory domestic States that are parties to the right of review recognition and implementation of arbitral verdicts. Nonetheless, the Convention is not binding on third countries.<sup>24</sup>

#### **5. Comparison of the advantages and disadvantages of the two mechanisms**

In terms of the legitimacy of both mechanisms, the establishment of a PMAP is a more appropriate option for reforming the ISDS mechanism. It is more acceptable to States and less costly, in contrast to the politicized tendency to elect judges, the high costs, and the reluctance of major economies to join the appeal mechanism of the Court of Investment. Also, there is no legal obstacle to recognizing and enforcing awards following the NY Convention from awards' enforceability. The NY Convention applies to the implementation of awards made by tribunals that include an appellate mechanism. There is uncertainty about whether the nature of a decision rendered by the judicialized MIC is an arbitral award or a court judgment. As a result, a third country that is not a party to the MIA may refuse to enforce an award in its territory by treating it as a court decision rather than an arbitral award in the recognition and implementation procedures. Since an award is rendered enforceable following the NY Convention in the legal

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<sup>23</sup>N. Jansen Calamita, *The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime*, THE JOURNAL OF WORLD INVESTMENT & TRADE 585–627 (2017).

<sup>24</sup>Elsa Sardinha, *The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement*, 32 ICSID REVIEW 625–672 (2017).

process, whereas there are many obstacles to the implementation of appellate decisions of the MIC, it is more feasible to reform the ISDS mechanism.

The Standing Multilateral Appeals Mechanism or MIC decisions include an appeal mechanism. This means that their findings cannot be subject to the mechanism for recognizing and enforcing arbitral awards under the VCLT. Parties to both mechanisms may apply the recognition and enforcement mechanism of the VCLT as between the parties by amending the treaty between them following the procedure outlined in Article 41 of the VCLT. However, a State that does not modify a treaty will not be obliged to implement the appellate mechanism's decisions under the Washington Convention. Therefore, the compatibility of the standing multilateral appeals mechanism with the Washington Convention's enforcement mechanism is a matter for further consideration in establishing the appeals mechanism.

### **5.1 Two focal points for the formation of a PMAP**

Assume that the permanent multilateral appeals mechanism is employed to create an appeals process. In that situation, several of the mechanism's key concerns will need to be addressed, such as whether the appeals mechanism's scope of review should include factual matters and whether appellate rulings have a *stare decisis* effect. These challenges are crucial for guaranteeing decision consistency, coherence, predictability, and accuracy under a PMA procedure.

### **5.2 Whether the scope of appellate review should include questions of fact**

The question as to the review's scope is whether the appeal review should be limited to applying the law or involve using the law and examining the facts. In general, appeals mechanisms of an international nature are rarely limited to examining legal issues.<sup>25</sup>For example, several recent investment treaties have limited the objective review criteria to "obvious errors" or "serious factual errors."<sup>26</sup>How much should investment appellate arbitration bodies recognize ISDS arbitral tribunal decisions? States' recommendations to UNCITRAL Working Group III have two primary points of view. One hypothesis is that appellate review should be limited to legal errors. The other is that the appellate review should cover legal mistakes, factual errors, and procedural problems. Ecuador represents the former,<sup>and</sup> According to CETA 8.28(2), the Appellate Division may affirm, vary or set aside a tribunal's decision based on (a) an error in the application or explanation of the applicable law; (b) a visible error in a finding of fact, comprising findings of

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<sup>25</sup>Wolfrum, R., & Stoll, P. T. (2006). Understanding on Rules and Procedures Governing the Settlement of Disputes. In *WTO-Institutions and Dispute Settlement* (pp. 268-618). Brill Nijhoff.

<sup>26</sup>Investor-State Dispute Settlement Reform: Possible reform of investor-State dispute settlement (ISDS) Appellate and multilateral court mechanisms A/CN.9/WG.III/WP.185, UNITED NATIONS (2019), <https://undocs.org/en/A/CN.9/WG.III/WP.185> (last visited Mar 4, 2021).

applicable domestic law; (c) the grounds outlined in Article 52(1)(a) to (e) of the Washington Convention (if the grounds set out in Article 52(1)(a) are applicable).<sup>27</sup>

Under this provision, the appellate Tribunal will be able to review errors of law or obvious inaccuracies of fact on substantive issues, as well as procedural violations following Article 52 of the Washington Convention. This means that CETA covers all substantive and procedural challenges brought against an arbitral award. The "Other EU Mixed Investment Agreements" contains a similar provision. This provision follows the ICSID Secretariat's approach in its 2004 proposal to establish an "appellate body." The authors support the view of the European Union.

It is not disputed that appeals based on law application errors have been unanimously accepted by national and international arbitral tribunals or courts. The more complicated question is whether an investment appeals tribunal can review the factual findings made by an ISDS tribunal? Does the Tribunal have the power to inspect all genuine issues, or should it give some deference to the factual findings made by the ISDS tribunal and review only the apparent errors in the results of fact?

The authors believe the review should include factual inaccuracies because law concerns and facts might be entangled and difficult to discern. In practice, even in legal mistake appeals, the appellate Panel may need to look at the facts. The ultimate choice is correct only if the facts are correct. So, if the facts are incorrect, it may alter the ultimate conclusion. With the inclusion of factual concerns in the appellate review, the appellate mechanism ensures the final decision's overall correctness, which is one of the key reasons for the appellate mechanism.

In practice, the WTO Appellate Body examines matters of law and fact. The WTO allows disputants to appeal only matters of law and related explanations in panel reports.<sup>28</sup> Article 17.6 of the Dispute Settlement Understanding (DSU) explains that appeals are limited to concerns of applying the law covered in the Panel's report and interpreting the Panel's instruction.<sup>29</sup> Initially, Article 17.6 of the DSU performs to confine the AB assessment to legal problems. Article 11 of the DSU allows the WTO AB to review particular facts and evidence. Concerning objectively assessing facts, the AB normally analyses whether the Panel has observed its requirements under DSU Article 11. In other words, the WTO accepts appeals because the Panel did not make a fair appraisal of the facts.

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<sup>27</sup>Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA), EUROPEAN COMMISSION - EUROPEAN COMMISSION (2017), [http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156062.pdf](http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156062.pdf) (last visited Mar 6, 2021).

<sup>28</sup>Huber, M., & Tereposky, G. (2017). The WTO Appellate Body: Viability as a Model for an Investor-State Dispute Settlement Appellate Mechanism. *ICSID Review-Foreign Investment Law Journal*, 32(3), 545-594.

<sup>29</sup>Working Group III: Investor-State Dispute Settlement Reform Commission On International Trade Law, UNITED NATIONS (2019), [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state) (last visited Mar 4, 2021).

So, the AB can consider the Panel's factual findings. The Panel's requirement to make an objective assessment of the facts, including considering information submitted to the Panel and making fact findings based on such evidence, was not an issue in EC-Hormones. Denying or ignoring evidence given to the Panel violates the Panel's duty to analyze facts objectively.<sup>30</sup> The AB Report stated in EC-Asbestos and US-Wheat Gluten that we cannot conclude that the Panel's findings are inconsistent with Article 11 of the DSU because we reached a different factual result than the Panel. Rather, we must evaluate whether the Panel abused its discretion in evaluating the evidence as to the Trier of fact.<sup>31</sup> In addition to the WTO appeals mechanism, international tribunals and tribunals in the criminal field also allow appeals based on errors of law or factual findings.<sup>32</sup> The Court of Appeal of the International Court of Arbitration for Sport (CAS) also has powers to review questions of fact and apply the law".<sup>33</sup> Suppose an arbitral tribunal under the standing multilateral appeals mechanism should have jurisdiction to review questions of fact. In that case, the next question is whether it should review all questions of fact *de novo* or only clear errors of fact. In the authors' view, the appellate Tribunal's competence should be limited to reviewing obvious errors of fact. The appellate review should only be available if the error of fact is likely to result in the award being set aside, i.e., if the Tribunal has made a severe or material error of fact.<sup>34</sup> Limiting the grounds of appeal to "clear errors of fact" rather than any factual errors would limit the scope of review, achieve a balance of power between the primary and subsequent instance, speed up the appeal process, and increase arbitration efficiency.<sup>35</sup> This is why the recently signed EU hybrid investment agreement extends the cause of appeal to an apparent error in determining facts.<sup>36</sup>

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<sup>30</sup>Reports of the Appellate Body WT/DS26/AB/R; WT/DS48/AB/R, WTO (1998), [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=33861&CurrentCatalogueIdIndex=0&FullTextHash=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=33861&CurrentCatalogueIdIndex=0&FullTextHash=) (last visited Mar 8, 2021).

<sup>31</sup>European Communities Measures Affecting Asbestos and Products Containing Asbestos WT/DS135/AB/R, WTO (2001), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds135\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm) (last visited Mar 8, 2021).

<sup>32</sup> Rome Statute of the International Criminal Court, Art.81(1); the Statue of the International Criminal Tribunal for the Former Yugoslavia Art.25(1); the Statute of the Special Tribunal for Lebanon, Art.26(1); the Statute of the Special Court for Sierra Leone, Art.20.

<sup>33</sup>The procedural rules of the Court of Arbitration for Sport, Rule 57.

<sup>34</sup>Aaron Cosbey et al., COMMENTS ON ICSID DISCUSSION PAPER, 'POSSIBLE IMPROVEMENTS ...IISD (2004), [https://www.iisd.org/system/files/publications/investment\\_icsid\\_response.pdf](https://www.iisd.org/system/files/publications/investment_icsid_response.pdf) (last visited Mar 8, 2021).

<sup>35</sup>Chester Brown, *Supervision, Control, and Appellate Jurisdiction: The Experience of the International Court* , 32 CSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL 595–610 (2017).

<sup>36</sup>Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA), EUROPEAN COMMISSION - EUROPEAN COMMISSION (2017), [http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156062.pdf](http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156062.pdf) (last visited Mar 6, 2021).

In addition to errors of factual and law, the PMA tribunal could consider including the serious procedural errors listed in Article 52 of the New York Convention to ensure that procedural issues are included in the review of the appellate mechanism. Thus, achieving a comprehensive error correction function of the appellate mechanism on the one hand and ensuring a balance between the error correction function of the appellate mechanism and the efficiency of the arbitration on the other. This is precisely what the EU's "mixed investment agreement is meant." This is the essence of the scope of review of the appeal mechanism in the EU MIA.

### **5.3 Whether the appeal decision should have precedential effect**

Following precedent requires arbitral tribunals to follow previous jurisprudence in adjudicating similar cases, thus ensuring that similar circumstances are dealt with in the same manner. If the permanent multilateral appeals mechanism's decisions have a precedential effect, they will bind subsequent tribunal decisions on similar issues. Thus, the precedent system would effectively ensure consistency and predictability in the permanent multilateral appeals mechanism's decisions.

There are two views on whether a standing multilateral appellate award has a precedential effect. First, the appeal tribunal's verdict is only obligatory on the original tribunal parties.<sup>37</sup> The other is that the appellate award should have a broader binding effect and bind subsequent tribunal decisions on similar issues. Finally, the authors believe that permanent multilateral appellate awards should not have a legal precedential impact but could be used in practice to guide or influence subsequent decisions in similar cases.

To date, treaty and arbitration procedures have not acknowledged the precedential significance of standing international appellate rulings. However, in international investment arbitration, there is no formal system of doctrine of *stare decisis*. Therefore, many international treaties expressly exclude the application of the principle of *stare decisis*. This is because only contracting States have the power to create, by treaty, fundamental rules of international law that are universally binding. Thus, any international legislation designed without the State's consent shall not apply to it.<sup>38</sup> States do not currently express a desire to give precedential effect to investment arbitration awards employing a treaty. As a result, arbitral tribunal awards bind only the disputing parties and lack a general binding impact on subsequent disputes. Investment tribunals have also refused to recognize their invocation of arbitral precedents. For example, the arbitral Tribunal in *AES v. Argentina (2005)* held that all decisions or awards made by an ICSID arbitral tribunal are binding only on the parties to the dispute in question. General international law does not

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<sup>37</sup>Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session A/CN.9/1004/Add.1, UN GENERAL ASSEMBLY (2020), <https://undocs.org/pdf?symbol=en/A/CN.9/1004/ADD.1> (last visited Mar 8, 2021).

<sup>38</sup>Norton, P. M. (2018). The role of precedent in the Development of International Investment Law. *ICSID Review-Foreign Investment Law Journal*, 33(1), 280-301.

establish a precedent rule, nor does the ICSID regime.<sup>39</sup> For example, the arbitral Tribunal in *SGS v. Philippines* (2005) also held that it would be unreasonable to allow the first international Tribunal to settle for all subsequent tribunals.

On the other hand, permanent multilateral appellate decisions will have *de facto* influence. This is because international investment law has evolved by reference to earlier findings.<sup>40</sup> The regular divergence of views among States during negotiating investment treaties has resulted in unclear or vague treaty rules that do not provide strong direction to tribunals. This has led to a *de facto* precedent: arbitral tribunals often rely on prior jurisprudence when dealing with investment disputes. For instance, in *Saipem v. Bangladesh* (2009), the Arbitral Tribunal stated that the earlier award did not bind it but at the same time held that it could take due to an account of the earlier decision of the International Tribunal. Accordingly, the Tribunal held that it was obliged to adopt the solution identified in the consistency case unless compelling reasons to the contrary.<sup>41</sup> The *de facto* effect of precedent is also reflected in the judicial practice of the WTO. Under Article 17.6 of the DSU, appeals are limited to questions of applying the law covered by the Panel's report and the legal interpretation given by the panel".<sup>42</sup> However, Article 3.2 of the DSU states that the WTO dispute settlement mechanism is a central element in providing security and predictability to the multilateral trading system. Disputants, panels, and the Appellate Body as the basis for its *de facto* precedent-setting provisions have invoked the principle of "security and predictability." To provide security and predictability to the multilateral trading system, the Appellate Body must adopt the same interpretation of a provision in a subsequent dispute as it did in an earlier debate. The Appellate Body's Position on this issue was clearly expressed in the United States Continued Existence and Application of Zeroing Methodology report.<sup>43</sup> In that report, the Appellate Body noted that it was appropriate and expected a panel to follow its findings in a previous dispute, mainly where the issues involved were the same.<sup>44</sup> In the United States - Stain-less Steel case, the Appellate Body stated that unless there are compelling reasons, the adjudicating body should address the same legal issues in the

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<sup>39</sup>*AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, ITALAW (2005), <https://www.italaw.com/cases/49> (last visited Mar 8, 2021).

<sup>40</sup>*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, ITALAW (2005), <https://www.italaw.com/cases/1018> (last visited Mar 8, 2021).

<sup>41</sup>*Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, ITALAW (2009), <https://www.italaw.com/cases/951> (last visited Mar 8, 2021).

<sup>42</sup>WTO DSU, *supra* note 33, Art.17.6.

<sup>43</sup>United States — Continued Existence and Application of Zeroing Methodology WT/DS350/AB/R, WTO (2009), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds350\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds350_e.htm) (last visited Mar 8, 2021).

<sup>44</sup>*Ibid.* 362-365

same way in subsequent cases.<sup>45</sup> Thus, while avoiding the term "precedent-setting," WTO panels and the Appellate Body do follow precedent in their dispute settlement practice to ensure that the WTO dispute settlement mechanism provides safeguards and predictability.<sup>46</sup> The precedent following has not yet become a general principle of international law. It, therefore, cannot be explicitly set out in the documents of the permanent multilateral appeals mechanism, thereby giving precedential effect to the decisions of the Appellate Tribunal. The United States has repeatedly objected to the WTO Appellate Body following previous rulings, which it believes would result in binding precedent".<sup>47</sup> This is one of the systemic problems with the United States' Appellate Body in its objection to its membership selection process. The United States argues that, while the Appellate Body report may clarify the relevant provisions, it is not in itself a text agreed by the parties and cannot replace the text negotiated and agreed upon by the parties".<sup>48</sup> Therefore, the WTO General Council's subsequent draft resolution states that the WTO dispute settlement procedure shall not create any precedent.<sup>49</sup>

Given the link between the current WTO crisis and the de facto binding position of the WTO Appellate Body's decisions, the sequential role of the permanent multilateral appeals mechanism's decisions should not be prescribed. However, the fact that investment tribunals may refer to earlier decisions to justify their decisions has led to a general reliance on precedent in the practice of investment treaty arbitration, resulting in de facto precedent-following. Therefore, establishing a would face the paradox of seeking a consistent interpretation of the treaty text and avoiding giving arbitral awards precedential effect. The solution may be similar to that adopted by the WTO, namely to prevent explicit precedent-setting in the appellate mechanism's arbitration rules and achieve consistency and predictability of awards by de facto precedent-setting based on investment treaty provisions such as "security and predictability" and "reasonable expectations."<sup>50</sup>

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<sup>45</sup>United States — Final Anti-Dumping Measures on Stainless Steel from Mexico DS344, WTO (2008), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds344\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds344_e.htm) (last visited Mar 8, 2021).

<sup>46</sup>Alec Stone Sweet & Thomas L. Brunell, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization*, 1 JOURNAL OF LAW AND COURTS 61–88 (2013).

<sup>47</sup>Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, June 24, 2019, atp.14-15, available at the [HTTP:// geneva.usmission.gov/2019/06/25/statements by the united states at the June 242019dsb-meeting/](http://geneva.usmission.gov/2019/06/25/statements%20by%20the%20united%20states%20at%20the%20June%2024%202019%20dsb%20meeting/).

<sup>48</sup>Ibid,

<sup>49</sup>DRAFT DECISION FUNCTIONING OF THE APPELLATE BODY Decision of ... WT/GC/W/791, WTO (2019), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:WT/GC/W791.pdf> (last visited Mar 8, 2021).

<sup>50</sup>M. HuberandG. Tereposky, *supranote38*, at 589.



## 6. CONCLUSION

The authors believe it is more legal and feasible to establish a PMAP to complement the present ISDS mechanism than establish a judicial MIC, including the first and second review courts. However, the Washington Convention's recognition and implementation mechanism not applicable to the arbitral tribunal decision should be noted. The standing multilateral appeals mechanism's decisions cannot be enforced under the Washington Convention, constituting a significant obstacle to establishing an appeals mechanism and would need to be discussed separately. On the other hand, the permanent multilateral appeals mechanism's institutional structure is essential to ensure the consistency, coherence, predictability, and correctness of appellate decisions. On the one hand, the permanent multilateral appeal mechanism's review scope should cover legal errors, obvious factual errors, and procedural errors to fully realize the appeal mechanism's error correction function.

On the other hand, factual errors should be limited to obvious errors" to improve arbitration effectiveness. Although the *stare decisis* has not yet become a universal principle of international law and cannot be explicitly incorporated into the permanent multilateral appeals mechanism's arbitration rules. The appeals mechanism could develop a body of *de facto* jurisprudence based on WTO judicial practice to ensure consistency and predictability of decisions.

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