

Does the approach of the Multilateral Investment Court to appointment of judges appropriately balance interests of States and investors?

Mark Konstantinidis Puloma Mukherjee

On 6 December 2022, the Third [Young Investment Treaty Forum Debate](#) took place in the offices of Arnold & Porter in London. The House's motion was that the approach of the Multilateral Investment Court to the appointment of judges does not appropriately balance interests of States and investors. The event was held under the Chatham House rules, and the arguments advanced by the speakers were for the purposes of the debate only. They did not represent their personal views or those of their respective organisations or clients.

Arguments that the approach of the Multilateral Investment Court to appointment of judges does not appropriately balance the interests of state and investors

The proposition team began by placing the proposal of the Multilateral Investment Court (MIC) within the broader context of investment arbitration reform. The baseline proposal discussed was drawn from the [deliberations](#) of Working Group III of the United Nations Commission on International Trade Law (UNCITRAL). The debate focused on the proposed process of appointment of arbitrators, rather than the MIC as a whole.

The team highlighted the significant uncertainties characterising the MIC's proposal relating to the process of nominating and appointment of judges, including, *inter alia*, the role of non-state stakeholders, such as investors and academics. Such uncertainties are reflective of the years which are still needed for the MIC to take a more concrete form. In any event, the MIC proposal envisages states making the final decision with regards to the appointment of judges deciding on an investment dispute.

By way of substantive argumentation, the proposition team firstly suggested that the MIC's system of state-appointed judges is not the only policy option in response to the legitimacy crisis of Investor-State Dispute Settlement (ISDS). In particular, concerns relating to the rule of law credentials of investment arbitration can be better targeted via an enhanced [Code of Conduct](#) and stricter ethics guidelines for arbitrators.

Secondly, it was argued that the MIC's proposed approach disproportionately favours states. The *status quo* is based on party autonomy, which typically ensures that parties to a dispute each nominate one arbitrator and co-decide the presiding arbitrator. Under the MIC's proposal, this would change the party dynamics at the expense of investors, signalling a shift from party autonomy to state control.

Thirdly, the proposition team discussed how the MIC's approach may challenge, rather than restore, the legitimacy of ISDS vis-à-vis investors, by undermining the confidence of investors in the system. This again relates to party autonomy from which arbitration draws legitimacy with respect to investors.

In 2020 a [survey](#) carried out by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London on investors' perceptions of ISDS, and found that only 27.5% of the respondents agreed that a MIC with state-appointed adjudicators will be viewed as impartial and independent by investors. 60% of them disagree.

On the other hand, proposals which are different to what the MIC envisages, such as appointments made from 'mandatory arbitrator lists developed by an institution with equal State and investor representation or by independent institutions' are seen more favourably by investors. It was argued that, in this sense, party autonomy is not seen as irreconcilable with increased arbitral impartiality.

Fourthly, the proposition team explained why the MIC's proposal of state-appointed judges would undermine the stability of the system of investment protection. The MIC's proposal would not only have an impact on investor-state relationships, as discussed above, but would also institutionalise state-to-state dynamics. However, these are inherently political. It was argued that this generates a tension with the traditional ISDS paradigm, whose *raison d'être* is the limitation of state control, through efficient recourse to compensation in the event of an arbitrary or discriminatory exercise of state power.

While the World Trade Organization (WTO) has been referenced as a source of inspiration for the MIC (see, *inter alia*, [academic papers](#)), the WTO Appellate Body has been [paralysed](#) since 2019 due to a broader geopolitical standoff between states. It is now unable to review appeals. This was said to demonstrate the risks of a state-controlled system of appointment, in that it may be exploited as part of states' pursuit of their respective (geo-)political interests. In turn, the MIC's stability and certainty, that is, the core of investment protection, would be undermined.

Arguments that the approach of the Multilateral Investment Court to appointment of judges does appropriately balance the interests of state and investors

The opposition team opened their arguments by noting that at least for the last decade, the ISDS regime has been suffering from a legitimacy crisis and that a reform of the ISDS system was unavoidable. In this respect, the UNCITRAL Working Group III is considering a number of different concerns with respect to ISDS which include, in addition to legal certainty and state's right to regulate, the independence and impartiality of arbitrators, reducing issue conflicts, lack of diversity among arbitrators and, in this context, mechanisms for constituting ISDS tribunals.

The MIC looks to introduce an institutionalised system to take into account these various criticisms. While this reform process has been inevitably State driven, stakeholders have not only been invited as observers to the UNCITRAL Sessions, but they have also been well represented and consulted. This is especially highlighted in the [Reports](#) of these sessions where, at various points while discussing the draft rules of the MIC (Draft Rules), they have included considerations of the stakeholders.

The team underscored the fact that permanent courts such as the MIC were certainly not a novelty and there are existing examples such as the Mexican claims tribunal and the Iran US Claims tribunal where no questions have been raised about bias in their operation. There has also been a trend of cases that have run in parallel with ISDS tribunals and Human Rights Tribunals such as in the [Yukos](#) saga where also such questions have not been raised. Moreover, such investment court systems have already been introduced by the EU in investment agreements like the Comprehensive Economic and Trade Agreement (CETA), the EU-Vietnam Investment Protection Agreement (IPA) and the EU-Singapore IPA.

The opposition team then turned to the substance of the debate itself which concerned the [Draft Rules](#) (42nd Session, Note by the Secretariat, 8 December 2021) setting out the approach and mechanism for appointment of judges to the MIC. The team noted that, as per the MIC proposal, the appointment of judges under the Draft Rules was a multi-layered process, whose very purpose was to constrain the discretion of the States in the appointment of judges.

In this respect, the team considered in detail each of the relevant Draft Rules related to nomination, selection and appointment of judges (Draft Rules 6, 7 and 8) noting that the participation of non-state actors is taken into account in the process and that at all places where the State parties are involved there are safeguards in place to ensure that there is a system of checks and balances at work.

For example, at the selection process, while the Draft Rules provide that the selection panel will be appointed by the State parties, (a) this panel is to be composed of independent individuals who are experts in their field, free of conflicts of interest, acting independently; (b) vacancies are filled through open calls; and (c) [views](#) have been expressed at the Working Group sessions that members of the Panel should also comprise of persons representing the views of non-State actors (see 42nd Session, Note by the Secretariat, 8 December 2021, para. 43).

Further, under the Draft Rules (Draft Rule 11) there is [support](#) (see 43rd Session, Report of Working Group III, para. 35 et seq.) for the proposal that the actual assignment of cases at the time of a dispute be undertaken on a randomized basis, ensuring that capacity and diversity of the judges is taken into account when composing a chamber (or in addition with the President of the tribunal being able to adjust or vary that assignment based on pre-established and publicly available criteria).

The opposition team stressed the importance of this provision, as it reflected that, in a significant departure from the current regime, appointments in this proposed system would be made prior to any dispute. States would thus not only have no reason to appoint a judge based on that person's view of a specific issue but would also have an interest in ensuring that the mechanism is fair because

their investors would also be using this system.

The team noted moreover that the Draft Rules are just that - they are draft provisions and nothing has yet been set in stone. And, while it is true that not everyone's views are aligned, the Reports of the Working Group sessions suggest that various views are being discussed, considered and reflected in the Draft Rules.

The opposition team concluded by noting that there is always a natural hesitation to try something new and it is understandable that there is resistance to any change: that's called being conservative. In the context of the MIC, it is in fact in the interest of the institution that it is balanced. The whole point of the MIC is to set up a system that deals with the current issues of the ISDS regime. If the institution that is finally set up is not fair, it will simply not survive and States would have invested all this time and cost of setting up the institution only to sabotage it and have it fail.

Authors:

[Mark Konstantinidis](#), King's College London

[Puloma Mukherjee](#), LALIVE (London) LLP

URL: <https://www.biiicl.org/blog/57/does-the-approach-of-the-multilateral-investment-court-to-appointment-of-judges-appropriately-balance-interests-of-states-and-investors>