

On the Road to Neutrality: Multilateral Investment Court and Appointment of Adjudicators
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The proposal for establishing a Multilateral Investment Court (MIC) has been under discussion for several years now and was taken forward at intergovernmental talks at United Nations Committee on International Trade Law (UNCITRAL), with a view to reforming the current investor-state dispute settlement (ISDS) system. The intergovernmental talks are conducted under the auspices of the UNCITRAL Working Group III (WGIII). Since the commencement of the project, WGIII has outlined its concerns in three main categories, amongst which is the *integrity of arbitrators and decision-makers*. In the latest (relevant to this theme) [Report of WG III of February 2022](#), participants discussed draft provisions, and raised suggestions and criticisms. This blog examines whether the MIC's suggested method will ensure neutrality and be equally favourable to all parties, or whether it will only intensify the existing flaws of the ISDS system.

The MIC is the 'brainchild' of the European Commission. Despite the proposal being in its early stages, the EU and Members States have been consistently including provisions about the MIC in their Foreign Trade Agreements. The reform has been motivated by growing concerns among States and stakeholders about the ISDS system's reliance on arbitrators, its lack of transparency, issues over the predictability and consistency of their decisions, and the high costs involved. One of the main drivers for UNCITRAL's reform relates to the so-called investment backlash caused by, amongst others, the perception that investment treaties disproportionately protect foreign investors against expropriation, discrimination, unfair and inequitable treatment, etc., whilst placing burdens and obligations on the State Parties. Therefore, the review of the ISDS system is aimed at achieving a better balance between investors and host States. Above all, it aims at resolving concerns over arbitrators' lack of independence and impartiality, including double hatting.

The MIC will be composed of a first instance and an appellate tribunal. It will appoint a permanent, remunerated, and State-appointed body of adjudicators, who will be chosen by the member States and assisted by a secretariat. Thus, the proposal for reform removes the system of party-appointed arbitrators. An important aspect of this proposal was the selection procedure. In particular, adjudicators will be appointed to take on full-time, long-term, and non-renewable positions, without outside activities. The proposal also assures that the selection will be transparent and represent diversity in terms of geography, expertise and gender. The proposal also entails the creation of a Code of Conduct which will guarantee, *inter alia*, arbitrators' independence and impartiality, integrity, diligence and confidentiality. The adjudicators will be allocated to cases on a random basis.

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In adopting this approach, the MIC seeks to overcome concerns regarding the independence and impartiality of party-appointed arbitrators in the ISDS system. However, the proposal is far from being final, with a number of questions left unanswered, thus causing practitioners and academics to question its viability and effectiveness. A pertinent question is whether the method of appointing judges will ensure appropriate neutrality – issues which have been heavily under review lately, especially since the UK Supreme Court decision in *Halliburton v Chubb [2020]*, which transformed international arbitration under English law by incorporating an express legal duty on arbitrators to disclose repeat appointments with one common party.²

A leading worry is that the proposal has been going for over seven years without an end in sight. While it is evident that progress has been made, by means of having a draft proposal and discussion by all relevant stakeholders, there is still no firm consensus on the wording of the provisions. One reason for this might be the fact that the process is highly politicised – States, international organisations and NGOs are taking part in the discussions. While the proposal’s main objective is to bring a better balance between the interests of host States and foreign investors, the fact that the reform is largely led by States suggests that they might be more inclined to protect their own interests. Under the current ISDS system, decision-makers are appointed by the parties, thus ensuring equal balance of interests in the arbitral proceedings. However, the proposed one-sided appointment might cast doubt over the intention to create a truly neutral tribunal. While there has been criticism that the current system favours investors, the draft proposal might have the reverse effect and suggest a pro-State approach. This is not to suggest that States will actively and intentionally nominate adjudicators who they believe will decide in their favour. They may do so unintentionally by selecting arbitrators with greater exposure to governmental work, as opposed to experience in dealing with private companies. As a result, this might diminish investors’ trust and threaten the legitimacy of the MIC.

This fear is further exacerbated by the required qualifications in the current draft proposal. It requires that arbitrators possess an ‘understanding of different policy considerations’ and ‘experience in or consulting governments including as part of the judiciary.’ This requirement might already be problematic as it creates a suggestion of bias. How would the State ensure that it appoints a neutral arbitrator, if he/she has already been involved in government-related work? How would investors perceive the appointment as free from bias? Perhaps, the current wording could be adjusted by including a reference to possessing ‘experience in advising investors’ or ‘experience of working in the private sector’ to add fairness to the requirement. Nevertheless, an understanding of governmental policies can also be beneficial as arbitral awards might decide (and sometimes have decided) in favour of the investor, even when the host State’s actions and regulations were motivated by public interest. Simultaneously, a logical question is whether practising lawyers will find this long-term position attractive, as they could not be involved in legal practice during their

² For a discussion, see K Noussia, S Nedeva, A Aakaansha, C Wang, and M Glynou, ‘Bias of arbitrators: a critical analysis on the law post-Halliburton v. Chubb and a comparative approach’ (2022) 2(1) *Journal of International Trade and Arbitration*, 31-92. ISSN 2146-9717 Available at <https://centaur.reading.ac.uk/104005/> .

term of appointment, or whether most appointments will be made to former government officials and former judges.

As stated, the reform seeks to address concerns for lack of arbitral impartiality and independence, double-hatting and the limited pool of arbitrators. There are existing instruments which already seek to minimise occurrences of bias. One example is the ICSID Convention (Article 57), which sets a considerably high standard to prove lack of independence and impartiality. On the other hand, arbitral tribunals refer more increasingly to the IBA Guidelines on Conflicts of Interests 2014. The standard therein is that of ‘reasonable doubts’ of lack of impartiality and independence and the Guidelines divide specific examples of arbitral conduct into three categories – Red, Orange and Green. While the Guidelines are a form of soft and have also triggered some criticism, their general acceptance and reference during arbitral challenges is growing, which signifies that they are overall well perceived, especially because of the categorisation of situations.

It is also worth examining [the ICSID and UNCITRAL draft Code of Conduct](#) which, amongst others, introduces a new test for the practice of double hatting. The Code (even in its draft format) proposes a ban on double hatting. The draft Article 4 aims to strike a balance between party autonomy and the ongoing criticism of arbitrators taking on multiple roles. It provides that arbitrators cannot act concurrently in any other capacity in arbitration while sitting as an arbitrator in another international investment dispute which involves: a) the same measure(s), b) the same or related party (parties) or c) the same provision(s) or involving legal issues which are substantially similar. A suggested temporal scope of the obligations of three consecutive years is considered, which is consistent with the IBA Guidelines’ approach. While Article 4 seemingly resolves the double-hatting concern by imposing an outright ban, it is pondered whether this approach is the most suitable one, taking in consideration all perspectives. For example, some might think that such an approach will not only limit the pool of existing arbitrators from which the parties can make their selection and nomination, but might also practically re-direct dispute resolution towards litigation.³ On the other hand, a better equilibrium might be achieved by introducing strengthened disclosure obligations. A more balanced solution, and one taking account of the realities of arbitration, might be to incorporate a range of and better defined situations and circumstances requiring disclosure. Indeed, this might be the direction that the draft Code of Conduct will take following the [44th session of UNCITRAL Working Group III](#), but we are yet to see a finalised version of the Code of Conduct.

Another crucial element is challenges of arbitrators under the proposed Code of Conduct. The Code requires adjudicators to demonstrate, among others, ‘high standards of integrity, fairness, and competence.’ There is a suggestion that non-compliance with the Code might constitute a basis for a challenge. However, what remains unknown is how and by whom adjudicators will be challenged. Will challenges be decided by the rest of the adjudicators (similarly to the conventional

³ CI Arb News, ‘An end to the proposed ban on double-hatting?’ Feb 2023, available at <https://www.ciarb.org/news/an-end-to-the-proposed-ban-on-double-hatting/>.

approach in ICSID) or by a third body not involved in the dispute, and specifically constructed for the purpose of hearing challenges? In that sense, will the Code be made legally binding? This seems to be the intention, meaning that a decision on how and by whom the Code will be enforced is due. It will be to the benefit of certainty to see a more precise standard on how arbitrator challenges are raised.

While there are a number of unaddressed questions, the proposed establishment of the MIC has commenced the reform of the ISDS system. The MIC is intended to encourage States to adopt an open and transparent approach to nominating arbitrators. While certain provisions do raise the fear of bias and of politicisation of the process, we should be careful in assuming that all judges will be biased because they are appointed by States or that States are, for that reason, biased themselves. States might have a strong interest in protecting their own national interests and public policies, but they also have an incentive to create a system which will build trust and attract foreign investors. Hence, whilst there has been criticism that the current ISDS system favours investors, the drafters should avoid a situation where they are being criticised for establishing a court which is created by States for States. It is hard to accept that States' interests would align with investors' interests. Therefore, there should be a balance between the process being driven by States, and thus perceived as political, and achieving a fair and transparent mechanism, which works better than the current ISDS system. This is a challenging endeavour, but one which was perhaps inevitable. Since the establishment of the MIC claims to ensure impartiality and independence, the burden is on the drafters to create a system that will achieve this. The draft proposal is still work-in-progress, and it is therefore interesting to see how the discussion evolves in the future.

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