The International Court System: A Solution to the Crisis in Investor-State Arbitration?

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Abstract

Most known investor-state disputes are referred to a form of international arbitration known as investor-state arbitration (ISA) or investor-state dispute settlement (ISDS). The rest are referred to domestic arbitration or litigation before the courts of host states. The International Centre for Settlement of Investment Disputes (ICSID) is the largest ISDS institution, having handled 829 out of 1190 cases by December 2021. However, in recent years the ISDS regime has faced challenges that have reached crisis proportions. States have responded to these challenges in different ways. For example, during 2014 the European Union (EU) intended to provide for ISDS in its anticipated trade agreements with the United States of America and Canada. In preparation the EU held public consultations wherein the public was invited to comment on whether ISDS could be used in these agreements. Over 90 per cent of the voters rejected the inclusion of ISDS therein. In response the EU abandoned ISDS and created a bilateral Investment Court System (ICS). The final death knell for ISDS in the EU came in 2018 and 2021 when the Court of Justice of the European Union (CJEU) ruled that ISDS among EU states is unlawful and incompatible with its legal order. This paper aims to assess the legal nature of the ICS, as well as whether the ICS can resolve the challenges that face ISDS worldwide. The paper concludes that firstly, the ICS is a hybrid of a court and a tribunal; secondly, that the ICS fails to fully address all the challenges faced by ISDS. It is a work in progress that must be interrogated further and be improved upon over time.

Keywords

Economic and trade agreements; investor-state dispute settlement; investor-state arbitration; investment court system; multilateral investment court.

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1 Introduction

The objective of this paper is to assess by reference to literature the legal nature of the ICS as well as whether the EU's ICS can resolve the challenges that face ISDS in the EU and wherever the ICS can be implemented. The paper focusses on the version of the ICS that is contained in chapter eight of the *Comprehensive Economic and Trade Agreement between Canada and the European Union* (hereafter *CETA*).[1]

As one scholar cautions, a solution such as the ICS may cause the same challenges it was meant to fix.[2] It can therefore not be taken for granted that the ICS is a court in the ordinary sense of the word, or that it is the solution to the challenges facing ISDS. Indeed, this paper will demonstrate that there are varying views regarding the nature of the ICS as well as its potential to resolve the challenges that face ISDS. These challenges fall under the following three categories: concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; concerns pertaining to arbitrators and decision makers; and concerns pertaining to the cost and duration of ISDS cases.[3] Taking the first category as an example, some ISDS tribunals render inconsistent awards for various reasons, such as because of the lack of judicial precedent or the lack of an appeal mechanism that can correct errors of law.

For example, prior to 1997 ISDS tribunals had not defined what an investment is, or what its features should be. *Fedax v Venezuela*[4] (hereafter *Fedax*) was the first to adopt the five criteria of an investment. In 2001 the tribunal in *Salini Construttori SPA and Italstrade SPA v Kingdom of Morocco*[5] (hereafter *Salini)* also defined the features of an investment by adopting the criteria enunciated in *Fedax*, less one criterion (hereafter the *Salini* criteria).[6] However, subsequent tribunals differed with *Salini* or supported the decision partly or in full.[7]

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1 *Comprehensive Economic and Trade Agreement between Canada and the European Union (and Its Member States)* (2017) (hereafter *CETA*).

2 Palombo 2019 *U Rich L Rev* 831.

3 These are discussed in para 2.2 below.

4 *Fedax NV v The Republic of Venezuela* (ICSID Case No ARB/96/3) Decision of the Tribunal on Objections to Jurisdiction 11 July 1997 para 25, 43.

5 *Salini Construttori SPA and Italstrade SPA v Kingdom of Morocco* (ICSID Case No ARB00/4) Decision on Jurisdiction of 16 July 2001 para 52.

6 *Salini Construttori SPA and Italstrade SPA v Kingdom of Morocco* (ICSID Case No ARB00/4) Decision on Jurisdiction of 16 July 2001 para 52, where the tribunal left out the criterion of “regularity of profit”.

7 Ngobeni 2020 *PELJ* 14-15.

The result is that to this day there is no agreement among ISDS tribunals on what an investment is. Yet an investment is the subject matter of every ISDS dispute and if there is no investment then the case must be dismissed for lack of subject matter jurisdiction (jurisdiction *rationae materiae*). There is also no agreement as to whether the *Salini* criteria are applicable in disputes that are not arbitrated under the *ICSID Convention*.[8] This means that in every case parties will always argue afresh as to whether an investment exists in their dispute or not, and if the case is a non-ICSID one, whether the *Salini* criteria should be considered or not. This consumes time, increases the costs of proceedings, and contributes to their inconsistency on the issue of what an investment is.

Secondly, the lack of an appeal mechanism in ISDS means that errors of law can go uncorrected, to the detriment of the parties and the entire ISDS regime. Coupled with the above example, this compounds the making of erroneous tribunal awards, because no single tribunal can lay the matter to rest by making a final ruling thereon. Furthermore, the lack of judicial precedent in ISDS means that tribunals are not obliged to consider previous decisions, thus leading to inconsistent decisions.

It is useful to understand how ISDS emerged and developed to the point where it became contentious. ISDS was created by capital-exporting states to protect foreign investors from possible poor rule of law and discriminatory practices which they might experience in foreign states whose legal standards might be lower than those of their home states.[9] It was originally[10] based, among other things, on the notion that the courts of developing nations' host states could not be trusted to deliver justice in the event of a dispute between a foreign investor and a host state, as they might be corrupt and inefficient.[11] This is the current position, as supported by the historical ISDS case law data which show that all known ISDS cases globally were opened by investors and not by states.[12] Investor-state disputes have a public law nature, among other reasons because in these disputes investors challenge the right of states to regulate.[13] This special protection of foreign

8 Ngobeni 2020 *PELJ* 1.

9 Brower and Ahmad 2018 *S Cal L Rev* 1140.

10 This perception has shifted since developing states conclude treaties among themselves that provide for ISDS. Nonetheless the dominant objective of ISDS remains to keep investor-state disputes away from the courts of host states. Hence the prevalent referral of disputes to ISDS in investment treaties.

11 Koeth 2016 https://www.eipa.eu/wp-content/uploads/2022/01/20161019072755_Workingpaper2016_W_01.pdf 2.

12 For a database of all known ISDS cases, see UNCTAD 2023 https://investmentpolicy.unctad.org/investment-dispute-settlement.

13 Alvarez 2016 https://www.iilj.org/wp-content/uploads/2016/09/Alvarez-Is-Invest-State-Arbitration-Public-IILJ-WP-2016_6-GAL.pdf 2.

investors and their right to challenge the state's regulatory authority are unique to ISDS and are among the challenges that face ISDS.

The idea of protecting foreign investors and their property has been in existence for centuries.[14] Originally, such agreements protected merchants.[15] The modern-day regime for the protection of foreign investors can be traced to the practice of the United States of America (USA), which protected merchants through Treaties of Friendship, Commerce and Navigation (FCN). The FCN laid the basis of the modern-day investment treaty.[16]

The protection of investors using ISDS became entrenched when the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* of 1965 was concluded (hereafter *ICSID Convention*). The convention established ICSID as the institutional arbitration facility for investor-state disputes between host states that are members of the convention and investors whose home states are members of the convention.[17] The creation of ICSID encouraged the conclusion of bilateral investment treaties (BITs) mainly between developing and developed states, such that on 1 July 2022 there were 2871 BITs,[18] of which 2232 were in force.[19] Hence investors commenced 60 per cent of all ICSID cases based on consent to arbitration contained in BITs.[20] In addition to BITs, states also concluded trade treaties with investment provisions (TIPs)[21] such as the *CETA*. On 1 July 2022 there were 429 TIPs, of which 336 were in force.[22] Fifteen per cent of all ICSID cases were opened based on consent provided in TIPs.[23]

In addition to investment treaties, some states passed legislation for the promotion and protection of investments, which referred investor-state

14 Ngobeni 2019 *CILSA* 3-5.
15 Ngobeni 2019 *CILSA* 4.
16 For a history of BITs, see Gathii 2009 *Int C L Rev* 353; Ngobeni 2019 *CILSA* 4; Vandevelde 2005 *University of California Davis Journal of International Law and Policy* 157-194.
17 Articles 1-6 of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965) (ICSID Convention) (hereafter *ICSID Convention*).
18 For a database of BITs see UNCTAD 2023 https://investmentpolicy.unctad.org/international-investment-agreements.
19 UNCTAD 2023 https://investmentpolicy.unctad.org/international-investment-agreements.
20 ICSID 2022 https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics 11.
21 UNCTAD 2023 https://investmentpolicy.unctad.org/international-investment-agreements.
22 UNCTAD 2023 https://investmentpolicy.unctad.org/international-investment-agreements.
23 ICSID 2022 https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics 11.

disputes to ISDS. As a result, nine per cent of all ICSID cases were opened based on consent to ISDS contained in legislation.[24] Some states concluded investment agreements with foreign investors, which also referred disputes to ISDS. Hence fifteen per cent of all ICSID cases were opened based on consent to ISDS contained in investment contracts.[25]

As a result of foreign investors' rights to commence ISDS derived from the above-mentioned regulatory instruments, there has been a steady increase in the number of known ISDS cases. The first known ICSID case was opened in 1971, when it was the sole case for that year.[26] No cases were opened at ICSID in 1973, 1975, 1979 and 1980, 1985, 1988, 1990 and 1991.[27] Between 1971 and 1996 there was a maximum of four new ICSID cases per year.[28] From 1997 the number of ICSID cases per year rose to ten, and in 2021 they reached the highest ever total of sixty-six for the year.[29] By the end of 2021 there were 1190 known ISDS (ICSID and non-ICSID) cases and the number rises yearly.[30] Of these cases, 807 were concluded, 370 were pending while the status of 13 was unknown.[31] As of 31 December 2021, 829 ISDS cases had been opened at ICSID, thus showing the sheer volume of cases opened at ICSID relative to other institutions.[32]

The increase in ISDS has not gone unnoticed in the public domain, among other reasons due to the high-profile nature of some of these cases that challenge a state's regulatory authority, such as *Philip Morris v Uruguay*,[33]

24 ICSID 2022 https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics 11.

25 ICSID 2022 https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics 11.

26 ICSID 2022 https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics 7.

27 ICSID 2022 https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics 7.

28 ICSID 2022 https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics 7. See also Schwieder 2016 *Colum J Transnat'l L* 186.

29 ICSID 2022 https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics 7.

30 UNCTAD 2023 https://investmentpolicy.unctad.org/investment-dispute-settlement.

31 UNCTAD 2023 https://investmentpolicy.unctad.org/investment-dispute-settlement.

32 ICSID 2022 https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics 7.

33 *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (ICSID Case No ARB/10/7) Decision on Jurisdiction of 2 July 2013.

and *Philip Morris v Australia*.[34] The case of *Foresti v South Africa*[35] led to the change in government policy away from the use of ISDS.

Hence, for years there have been concerns among developing states, scholars and the public alike regarding the way ISDS cases were being conducted, as well as their impact.[36] Developed states largely ignored these concerns, partly because they are the least sued and thus ISDS is not costly to them, yet their nationals are the ones suing developing states.[37]

ISDS got the public's attention in the EU when EU states faced a barrage of high value, high profile cases from 1999.[38] Later ISDS took centre stage when between 27 March and 13 July 2014 the EU conducted public consultations where it sought input from the public on whether ISDS could be used in the proposed *Transatlantic Trade and Investment Partnership Agreement* (hereafter *TTIP*) with the USA.[39] The consultation was necessary because the negotiating mandate relating to the *TTIP* required that the final agreement protected the interests of the EU.[40] Over 150 000 responses were received.[41]

The vast majority of respondents rejected the inclusion of ISDS in the *TTIP* on grounds such as that ISDS threatens democracy, public finance and policy;[42] it lacks legitimacy and transparency; it is not suitable for the resolution of ISDS disputes; EU proposals would not deter frivolous and meritless claims; and the EU and the USA had well-established judiciaries that could resolve investor-state disputes.[43] The vast majority of the

34 *Philip Morris Asia Limited v The Commonwealth of Australia* (UNCITRAL, PCA Case No 2012/12) Award on Jurisdiction and Admissibility of 17 December 2015 (hereafter *Philip Morris Asia)*.

35 *Piero Foresti, Laura de Carli v Republic of South Africa* (ICSID Case No ARB(AF)/07/1).

36 See for example Zarate 2018 *BC L Rev* 2766; Langford, Potesta and Kaufmann-Kohler 2020 *Journal of World Investment and Trade* 168.

37 Zarate 2018 *BC L Rev* 2766; ICSID 2021 https://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The%20ICSID%20Caseload%20Statistics%202021-2%20Edition%20ENG.pdf 24.

38 Zarate 2018 *BC L Rev* 2766.

39 EU Commission 2015 https://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf 8.

40 EU Commission 2015 https://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf 8.

41 EU Commission 2015 https://trade.ec.europa.eu/doclib/docs/2015/January/tradoc_153044.pdf 9.

42 EU Commission 2015 https://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf 14.

43 EU Commission 2015 https://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf 90.

respondents were clear that these disputes must be resolved exclusively before the domestic courts of host states.[44]

After the above-mentioned public consultations the EU Parliament abandoned ISDS. Reforms were introduced leading to the creation of an ICS with an appellate mechanism.[45] In September 2015 the first ICS was included in the aborted *TTIP*, and then later in the *CETA* in February 2016.[46] The *CETA* came into provisional application on 21 September 2017. It will be fully in effect once all EU member states have ratified it.

Having created the ICS, in March 2018 the EU Council mandated the EU Commission to negotiate a convention establishing a Multilateral Investment Court (MIC) on behalf of the EU and member states.[47] The MIC will replace the ICS once it is fully operational.

During 2018 and 2021 the CJEU made two decisions that finally ended intra-EU ISDS. The first decision was in the *Achmea* case.[48] In *Achmea* the CJEU ruled that intra-EU ISDS is unlawful as it is incompatible with the EU's legal order.[49] In the *Komstroy* the CJEU held that the intra-EU ISDS provisions contained in the *Energy Charter Treaty* of 1994 (hereafter *ECT*) were invalid between EU member states.[50] The effect of these cases was that the EU reached a point of no return regarding the use of ISDS among its member states. The EU thus desperately needed a replacement to ISDS, and the solution came in the form of the ICS.

The ICS is important for developing states, since they are the most frequently sued in ISDS cases,[51] and therefore the issue is whether it may be a better alternative to traditional ISDS.

This paper will proceed as follows. The next section will discuss the challenges that face ISDS, first by analysing selected trends in ICSID cases, followed by the practical challenges of ISDS identified by the United Nations Conference on International Trade Law (UNCITRAL) *Working Group III*

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44 EU Commission 2015 https://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf 90. Also see the discussion of the referendum results in Dietza, Dotzauera and Cohen 2019 *Review of International Political Economy* 760.

45 Bungenberg *et al Studies in International Investment Law* 8.

46 Bungenberg *et al Studies in International Investment Law* 8.

47 EU Parliament 2022 https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-multilateral-investment-court-(mic).

48 *Slowakische Republik v Achmea BV* (J C-284/16) Judgment of the Court (Grand Chamber) of 6 March 2018 (hereafter *Achmea*).

49 *Achmea* para 60.

50 *République de Moldavie v Komstroy LLC* (2021 C-741/19) Judgment of the Court (Grand Chamber) of 2 September 2021 paras 48-66.

51 ICSID 2022 https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf 12.

(hereafter *Working Group III*). This will be followed by a discussion of selected provisions of the ICS model, with a focus on the operation of the Tribunal and the Appellate Tribunal. The paper will then, with reference to selected literature, assess the legal nature of the ICS and whether the ICS can resolve the challenges faced by ISDS. Finally, the paper will draw conclusions.

2 The challenges facing the ISDS regime

2.1 Recent trends in ICSID cases

The *ICSID Caseload Statistics*[52] were analysed herein for the purpose of assessing if there were trends therein that might lend credence to some of the findings of *Working Group III*[53] to the effect that ISDS faced a crisis. The analysis conducted identified the following:

Firstly, ICSID cases were predominantly opened against developing states. Thus 74 per cent of all cases were opened against states from Eastern Europe and Central Asia, South America, Sub-Saharan Africa, the Middle East and North Africa.[54]

Secondly, investors had been successful in 47 per cent of all ICSID cases.[55] This meant investors had a fair rate of success that was an incentive for them to open more cases.

Thirdly, 46 per cent of the arbitrators in ICSID cases were from Western Europe, while 20 per cent were from North America.[56] This meant that the majority of the decision makers in ISDS were nationals of capital-exporting states.

Fourthly, in terms of the allocation of cases per arbitrator, the scales were balanced in favour of those from developed states. Thus, of all the ICSID cases opened, 1410 arbitrators appointed to cases were from Western Europe, while 608 were from North America.[57] By contrast, 70 of the arbitrators appointed were from Sub-Saharan Africa, 115 were from the Middle East and North Africa, while 76 were from Central America and the

52 ICSID 2022 https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics.

53 The challenges are discussed in 2.2 below.

54 ICSID 2022 https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf 12.

55 ICSID 2022 https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf 12.

56 ICSID 2022 https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf 12.

57 ICSID 2022 https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf 17.

Caribbean.[58] This affirmed the point made in the preceding finding above, that there was a lack of geographical and probably racial and cultural diversity.

Fifthly, out of all the arbitrators ever appointed in ICSID cases, 87 per cent were men while thirteen per cent were women.[59] Individually claimants appointed 787 arbitrators of whom 39 were women.[60] Respondent states appointed 636 arbitrators of whom 161 were women.[61] The Chairman of ICSID appointed 752 arbitrators of whom 132 were women.[62] Jointly claimants appointed 328 arbitrators of whom 59 were women.[63] This meant that there was a lack of gender diversity in the appointment of arbitrators.

Sixthly, arbitral awards were very high in the event that a state lost a case.[64] For example, in all known ISDS cases (ICSID and non-ICSID), in 11 cases, tribunals awarded damages of over 1 billion USD, with the highest awards being just over 8 billion USD.[65] On the low end, only in 13 cases did tribunals award less than 1 million USD in damages.[66] In the middle, in 102 cases tribunals awarded over 10 USD Million in damages.[67] On a higher scale, in 39 cases tribunals awarded damages of between 100-499 USD Million.[68] This implied that ISDS awards had major cost implications for developing states, as they were the most sued.

Seventhly, the costs of arbitration had to be considered. These costs included the fees charged by administrative institutions such as ICSID and the Permanent Court of Arbitration (PCA), arbitrator fees and fees for legal

58 ICSID 2022 https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf 17-18.

59 ICSID 2022 https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf 20.

60 ICSID 2022 https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf 20.

61 ICSID 2022 https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf 20.

62 ICSID 2022 https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf 20.

63 ICSID 2022 https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf 20.

64 For a database of awards in 219 cases see UNCTAD 2023 https://investmentpolicy.unctad.org/investment-dispute-settlement and select "Damages".

65 UNCTAD 2023 https://investmentpolicy.unctad.org/investment-dispute-settlement select "Damages".

66 UNCTAD 2023 https://investmentpolicy.unctad.org/investment-dispute-settlement select "Damages".

67 UNCTAD 2023 https://investmentpolicy.unctad.org/investment-dispute-settlement select "Damages".

68 UNCTAD 2023 https://investmentpolicy.unctad.org/investment-dispute-settlement select "Damages".

representatives and experts. ICSID[69] and PCA[70] administration and arbitrator fees were very high for small and medium-sized enterprises (SMEs) and developing states.[71] This supported the argument that ISDS costs were very high for SMEs and developing states.

2.2 The causes of the ISDS crisis according to UNCITRAL Working Group III

UNCITRAL tasked *Working Group III* with identifying concerns and reforms regarding ISDS. This mandate was limited to procedural reforms only.[72] *Working Group III* then identified that the challenges that faced ISDS covered three broad areas, namely:[73]

> those pertaining to lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; those pertaining to arbitrators and decision-makers; and those pertaining to the cost and duration of ISDS cases.

These concerns are also identified in the literature and are to an extent supported by the *ICSID Caseload Statistics* discussed above.[74]

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69 For the fees schedule see ICSID 2023 https://icsid.worldbank.org/services/content/schedule-fees.

70 PCA 2023 https://pca-cpa.org/fees-and-costs/.

71 ICSID 2023 https://icsid.worldbank.org/services/content/schedule-fees.

72 Langford, Potesta and Kaufmann-Kohler 2020 *Journal of World Investment and Trade* 172.

73 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 22; Langford, Potesta and Kaufmann-Kohler 2020 *Journal of World Investment and Trade* 171.

74 These are also discussed in the following articles which validate the concerns: Arafa and Dexiang 2021 *Journal of Politics and Law* 76-80; Arato, Brown and Ortino 2020 *Journal of World Investment and Trade* 336-373; Behn, Langford and Létourneau-Tremblay 2020 *Journal of World Investment and Trade* 188-250; Bottini *et al* 2020 *Journal of World Investment and Trade* 251-299; Bjorklund *et al* 2020 *Journal of World Investment and Trade* 410-440; Carroll 2017 *Australian Journal of International Law* 147-152; Chaisse 2021 *Arb Int'l* 863-901; De Luca *et al* 2020 *Journal of World Trade and Investment* 374-409; Dietza, Dotzauera and Cohen 2019 *Review of International Political Economy* 756-760; Giorgetti *et al* 2020 *Journal of World Investment and Trade* 441-474; Ghori 2018 *Bond LR* 104-118; Hogas 2015 *Journal of Law and Administrative Science* 235-248; Palombo 2019 *U Rich L Rev* 809-830; Perez De las Hera 2018 *Romanian Journal of European Affairs* 87-93; Van den Berg 1997 *LJIL* 509-520; Zara 2018 *Chinese JIL* 137-185; Zarate *et al* 2020 *Journal of World Investment and Trade* 300-335; Van Harten 2012 *Osgoode Hall LJ* 211-268.

2.2.1 Concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS Tribunals

2.2.1.1 Divergent interpretations of substantive standards, divergent interpretations relating to jurisdiction and admissibility, and procedural inconsistency

Working Group III made the following findings under this heading. Firstly, that the issues arising hereunder negatively impacted the reliability, effectiveness and predictability of ISDS tribunals.[75] Secondly, the lack of consistency would not foster foreign direct investments to achieve Sustainable Development Goals[76] (SDGs).[77] Thirdly, the lack of consistency would be costly for states as it would impact on their ability to attract foreign investment as they relied on having a predictable legal environment.[78] Finally, the inconsistency would also be costly to investors, such as when they made investment decisions, as well as when they had to decide whether to sue a host state or not.[79]

The *Working Group* found that these inconsistencies occurred for example when tribunals made decisions based on the same facts but arrived at different findings.[80] The same inconsistency also occurred at the stages of the annulment, recognition and enforcement of awards.[81] Scholars are mainly in agreement that ISDS suffers from a lack of consistency, therefore the findings of UNCITRAL are not a surprise.[82]

2.2.1.2 Lack of a framework to address multiple proceedings

In this regard *Working Group III* found that the opening of multiple (e.g., concurrent or parallel) proceedings by investors distorted the balance of rights and the interests of relevant stakeholders.[83] Parallel proceedings occur when investors and/or investments open proceedings in different forums based on the same facts. Successive claims by investors were also brought under this category.[84] *Working Group III* also found that multiple proceedings can occur when investors open cases based on investment treaties and contracts, as well as in different forums, including State courts,

75 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 30.
76 For the SDGs see UN Date unknown https://sdgs.un.org/goals.
77 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 30.
78 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 30.
79 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 30.
80 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 30.
81 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 30.
82 Lenk *EU Investment Court System* 74.
83 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 42.
84 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 42.

domestic arbitration and international arbitration, either institutional or ad hoc.[85]

Nonetheless, *Working Group III* felt that in some instances multiple proceedings could be allowed if an investor had a right to bring them. The concern therefore would arise if a state had to defend itself from multiple claims based on the same facts, leading to a duplication of claims and additional costs for a state.[86] *Working Group III* found that multiple proceedings were damaging to developing states, by virtue of these having limited financial resources, mostly to defend cases.[87] Furthermore, it was found that the ISDS system in general does not have measures to prevent or manage multiple proceedings.[88] Investors do open multiple proceedings in the form of forum shopping where investors seek to increase their chances of success by opening cases in different forums.[89]

2.2.1.3 Limitations in the current mechanisms to address the inconsistency and incorrectness of arbitral decisions

Working Group III found that there is no appeal mechanism in ISDS, including at ICSID. This means that there is no mechanism to correct errors of law made by tribunals. This is a fact. Together with the lack of judicial precedent, this adds to the lack of consistency in ISDS.

2.2.2 Concerns pertaining to arbitrators and decision makers

2.2.2.1 Lack or apparent lack of arbitrator independence and impartiality

Working Group III found that the lack of independence and impartiality on the part of arbitrators was "acute" in ISDS, in particular because ISDS cases involve public policy and the state.[90] It pointed out that independence and impartiality are among broader ethical issues, including other elements such as the qualifications criteria for arbitrators, competence, neutrality and accountability.[91] *Working Group III* identified that potential causes of lack of independence and impartiality are:

> repeat appointments, instances of conflict of interest and/or so-called issue conflicts, as well as the practice of individuals switching roles as arbitrator, counsel and expert in different ISDS proceedings.[92]

85 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 44.
86 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 46.
87 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 46.
88 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 46.
89 See for example Carroll 2017 *Australian International Law Journal* 147.
90 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 67.
91 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 69.
92 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 70.

Interestingly, it was also found that dissenting opinions by an arbitrator appointed by a losing party raised a possibility of bias.[93] There is ample support for the above finding that arbitrator independence is a key challenge in ISDS.[94]

2.2.2.3 Lack of diversity of decision makers

In this regard *Working Group III* found that there was a lack of diversity in gender and geographical representation among arbitrators. These are two of the trends that also emerged above in the discussion of the *ICSID Caseload Statistics* above. However, it was found that there are other issues allied to diversity that are also relevant, such as age, ethnicity, language, legal background and the country of origin.[95]

In terms of the potential causes of the lack of diversity, *Working Group III* found that several factors could contribute to this. The first of these was that *ad hoc* arbitral tribunals were to blame for the status quo.[96] This could be among other reasons because the appointment of arbitrators happens in private and is not monitored. Secondly, disputing parties often placed too much emphasis on the experience and qualifications of arbitrators, thus leading to a limited number of people being appointed repeatedly on the basis that they were more experienced or qualified.[97] Thirdly, the party-driven appointment of arbitrators meant that arbitral institutions could not intervene to ensure diversity (presumably because currently ISDS rules do not provide for such intervention). It may be added that another contributing factor is the failure of the rules of arbitration and the practices of arbitral institutions, including ICSID, to cater for diversity in the appointment of arbitrators.

2.2.3 Qualifications of arbitrators

Working Group III noted that due to the principle of party autonomy, disputing parties were entitled to appoint whoever they felt was properly qualified to adjudicate their dispute.[98] This is a key attribute of ISDS.[99] The group noted that it is possible to deviate from the practice of having parties choose their arbitrators, and that arbitrators could be appointed by an

93 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 71.

94 Al-Hawamdeh, Dabbas and Al-Sharariri 2018 *Journal of Politics and Law* 64; Horn 2014 *New York University Journal of Law and Business* 349; Hogas 2015 *Journal of Law and Administrative Science* 235; Nowrot and Sipiorski 2018 *LPICT* 178; Van den Berg 1997 *LJIL* 509.

95 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 92.

96 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 93.

97 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 93.

98 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state paras 99-101.

99 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 101.

independent party.[100] This practice needs to be revisited as it contributes to the problematic appointment of arbitrators such as the lack of diversity and the repeated preference of the same group of arbitrators.

2.2.4 Concerns pertaining to the cost and duration of ISDS cases

2.2.4.1 Lengthy and costly ISDS proceedings and the lack of a mechanism to address frivolous or unmeritorious cases

ISDS cases take years to conclude, as a perusal of the ICSID,[101] or United Nations Conference on Trade and Development (UNCTAD) policy hub[102] case databases will show. Hence *Working Group III* correctly found that parties invested intensive time and costs in ISDS cases.[103] These costs were significant for developing states and SMEs with limited financial and human resources.[104] *Working Group III* noted that having multiple procedures in a case contributed to the increased costs of arbitration.[105]

It was further noted that respondent states incurred additional costs due to consultations with their stakeholders and briefing external counsel and experts to assist them.[106] *Working Group III* drew a distinction between costs that were beyond the control of the parties, such as those arising from the complexity of a case, and those that could be addressed by making procedural improvements e.g. introducing time frames and expediting procedure.[107] Nonetheless it was noted that improvements aimed at the speedy resolution of cases must not sacrifice due process and the quality of outcomes.[108]

2.2.4.2 Allocation of costs in ISDS

Working Group III noted that there were challenges of difficulty and inconsistency regarding the allocation of costs at the end of a case.[109] It was felt that tribunals could benefit from guidance on when to apply default rules

100 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 105.
101 ICSID 2023 https://icsid.worldbank.org/cases/case-database.
102 UNCTAD 2023 https://investmentpolicy.unctad.org/investment-dispute-settlement.
103 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 111.
104 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 111.
105 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 114.
106 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 114.
107 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 116.
108 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 117.
109 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state paras 124-126.

for the allocation of costs, when and how to take account of party behaviour (e.g., claims without merit), and issues regarding third-party funding.[110] Costs matter especially for SMEs and developing states, therefore this finding needs to be addressed.

2.2.4.3 Concerns regarding the availability of security for costs in ISDS

Working Group III noted that in ISDS some states have difficulty in recovering costs against unsuccessful claimants.[111] Among the challenges noted in this regard were that firstly, tribunals seldom ordered or required security for costs.[112] Secondly, even if costs were ordered, some claimants used shell companies that had no assets from which to pay costs, while some claimants did not have the funds to pay any costs awarded.[113] It was observed that while it might be prudent to require claimants to lodge security for costs, this might prejudice SMEs.[114] Current ISDS rules do not uniformly address this challenge. It is in the interests of all parties concerned that this issue be resolved.

2.2.4.4 Concerns regarding third-party funding

Unregulated third-party funding[115] is controversial and detrimental to ISDS for various reasons.[116] For example, it raises challenges regarding potential conflicts of interest, third-party control and influence on the ISDS proceedings, confidentiality, costs and security for costs, as well as on speculative, marginal and/or frivolous claims.[117]

Third-party funding causes challenges in that arbitrators or their law firms may have relationships with the funders; the involvement of funders raises questions regarding the recoverability of the funds paid by funders; third-party funders may encourage the opening of frivolous or marginal claims;

110 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 126.

111 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 128.

112 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 129.

113 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 130.

114 UNCITRAL 2018 https://uncitral.un.org/en/working_groups/3/investor-state para 131.

115 For a definition hereof see UNCITRAL October 2019 https://uncitral.un.org/en/working_groups/3/investor-state para 5.

116 For a discussion of third-party funding see Moseley 2019 *Tex L Rev* 1181-1203; Sahani 2017 *Tul L Rev* 405-472; Sahani 2016 *UCLA L Rev* 388-448; Sahani 2021 *AJIL Unbound* 34-39.

117 UNCITRAL April 2019 https://uncitral.un.org/en/working_groups/3/investor-state para 16. Space constraints do not allow for a detailed discussion; see paras 17-34 for details.

third-party funders distort ISDS in that they only fund claimants and not respondents; etc.[118]

3 The ICS

This section will discuss the operation of the ICS's Tribunal and the Appellate Tribunal contained in chapter eight of the *CETA*. The ICS tribunals operate as follows.[119]

First, an investor, on its own or on behalf of a locally established entity that it owns or controls, directly or indirectly, may refer a dispute to a Tribunal if the parties could not resolve the dispute amicably by consultations.[120] This provision enables multinationals and businesses based outside of a host state to commence proceedings on behalf of their subsidiaries. The wording "an investor of a Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly" entails that for an external company with many shareholders, any of them can commence the proceedings. Furthermore, indirect control permits a company or person to commence proceedings. The result is that the network of parties who may sue a host state is wide. It unwittingly sets the scene for multiple proceedings, which nonetheless the ICS attempts to address.

Second, a claim must be submitted in terms of the *ICSID Convention*, the UNCITRAL Arbitration Rules, or any other rules on agreement of the disputing parties.[121] A claim submitted under the *ICSID Convention* shall meet the requirements of Article 25(1) thereof,[122] while a claim under the ICSID Additional Facility Rules must be submitted with the consent of the respondent that is not a member of the *ICSID Convention*. By utilising existing ISDS rules, the ICS is preventing itself from breaking away therefrom. It lends support to the argument in the conclusion herein that the ICS is a hybrid tribunal and not a court in the ordinary sense.

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118 UNCITRAL April 2019 https://uncitral.un.org/en/working_groups/3/investor-state paras 17-34.

119 For the operation of and commentary on the tribunals see Baetens 2016 *LIEI* 367-384; Baltag 2019 *Contemporary Asia Arbitration Journal* 279-312; Benedetti 2019 *Revista Derecho del Estado* 83-115; Bungenberg and Reinisch *CETA Investment Law;* Dietza, Dotzauera and Cohen 2019 *Review of International Political Economy* 749-772; Fanou 2020 *Europe and the World* 6-8; Nappert 2016 *European Investment Law and Arbitration Review* 71-190; Palombo 2019 *U Rich L Rev* 799-833; Sardinha 2018 *Can Yb Int'l L* 311-365; Schwieder 2016 *Colum J Transnat'l L* 178-227; Zarate *et al* 2020 *Journal of World Investment and Trade* 300-335.

120 Article 8.23(1) of the *CETA*.

121 Article 8.23(2) of the *CETA*.

122 Article 8.23(4) of the *CETA*.

Third, the ICS attempts to address the challenge of a lack of transparency in ISDS. It does this by adopting[123] a modified version of the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*.[124]

The transparency rules provide that exhibits shall be made public[125] and hearings shall be open to the public, with possible adjustments for parts of hearings to be held in private to accommodate privacy.[126] It is noteworthy that the provisions do not explicitly provide for the award or settlement agreements etc. to be made public. Awards and settlements matter as they show the cost of a case to a losing state. The ICS rules must explicitly make them public. It would also be ideal if all administration (e.g., ICSID), legal fees and expenses were made available for public inspection.

Fourth, the ICS tries to address the challenge of multiple proceedings. It provides that in the event that the referral of a dispute to the Tribunal coincides with an existing dispute opened in terms of another international agreement, and if it appears to the Tribunal either that there may be a duplication of compensation awarded against a respondent state, or if the other dispute may have a significant impact on the claim that is before the Tribunal, then the Tribunal may after hearing the parties stay the proceedings or otherwise take the other dispute into account when making its decision, order or award.[127] It will make investors who want to use the Tribunal as a forum for new parallel proceedings think twice, as it will thwart their plans. Claims once opened may be consolidated.[128] This will help to reduce multiple proceedings in the ICS.

Allied to the above, the rules of the Tribunal rules address the issue of claims that are manifestly without legal merit[129] and claims that are unfounded as a matter of law.[130] The respondent may object to such proceedings, and the Tribunal will at its first sitting or soon thereafter hear the parties and make its decision.[131] With regard to claims that are unfounded as a matter of law, the respondent may file its objection thereto together with its counter-memorial.[132] These are welcome rules as they will enable unworthy claims to be quickly addressed.

123 Article 8.36(1) of the *CETA*.
124 UNCITRAL 2014 https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency.
125 Article 8.36(3) of the *CETA.*
126 Article 8.36(5) of the *CETA.*
127 Article 8.24 of the *CETA.*
128 Article 8.43 of the *CETA.*
129 Article 8.32 of the *CETA.*
130 Article 8.33 of the *CETA.*
131 Article 8.32(5) of the *CETA.*
132 Article 8.33(1) of the *CETA.*

Fifth, the parties must consent to the jurisdiction of the Tribunal.[133] This goes without saying as the Tribunal won't have jurisdiction without the consent of the parties.

Sixth, the ICS seeks to address the concerns regarding third-party funding. It provides that when a party utilises third-party funding it shall inform the other party of the name and address of the funder at the time when it refers the dispute to the Tribunal, or if the funding is obtained after the referral of the dispute, immediately after the agreement for such funding is concluded.[134] This rule is commendable in that it introduces something new that did not exist in ISDS. *Working Group III* indicates that there are other options to regulate third-party funding, therefore these other options are worth considering.[135]

Seventh, the ICS seeks to address the challenges posed by the ISDS system of party-appointed arbitrators in terms whereof claimants and respondents appointed arbitrators. It removes investors' right to appoint members of the ICS. Instead, members of the Tribunal are appointed by a *CETA* Joint Committee.[136] A Tribunal shall have fifteen standing members.[137] Five of the Members of the Tribunal shall be nationals of a Member State of the EU, five shall be nationals of Canada and five shall be nationals of third countries.[138] The fact that the decision-makers are called members and not arbitrators or judges lends weight to the argument that the ICS is a hybrid of a tribunal and a court. It does not assist the ICS in its attempt to be seen as different from ISDS. Instead, the ICS may be seen as a new or modified version of ISDS, which this paper concludes it is.

The fact that state parties remain indirectly involved in the appointment of members of the Tribunal means that the process remains potentially politicised. This raises questions of, what measures are in place to ensure that members are not biased in favour of states that support their appointment, and what measures are in place to ensure that states do not capture the appointing committee? This challenge can be addressed by having the appointment of members done by an independent body through a process that's transparent, independent, and not capable of being influenced by states.

133 Article 8.25 of the *CETA.*
134 Article 8.26 of the *CETA.*
135 UNCITRAL October 2019 https://uncitral.un.org/en/working_groups/3/investor-state paras 10-40.
136 Article 8.27(2) of the *CETA.*
137 Article 8.27(2) of the *CETA.*
138 Article 8.27(2) of the *CETA.*

Eighth, the ICS deals with the challenge of the qualification of arbitrators by providing that members of the Tribunal must possess:[139]

> the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law … .

On paper this provision looks strict enough to serve its intended purpose. However, potentially it may limit the appointment of previously disadvantaged members or those from developing states if the ICS model is rolled out globally. Furthermore, the criteria for the qualification and appointment of members of the Tribunals fails to address gender, geographical and other forms of diversity, which the *ICSID Caseload Statistics* have shown to be lacking in ICSID arbitration.

Ninth, members of the Tribunal shall serve one five-year term that may be renewed once.[140] However, to prevent a scenario where the terms of all members end at the same time, the terms of seven of the fifteen persons appointed immediately after the entry into force of the Agreement, to be determined by lot, shall extend to six years.[141] An obvious difficulty in this provision is that since it does not provide for a lifetime tenure, members of the Tribunal have to consider their professional lives after they leave the Tribunal. Highly qualified lawyers may not risk leaving their positions to take up unsecured and low-paying posts as members of the ICS. This risks failing to solve the challenge of having adequately qualified members in the ICS.

Tenth, in order to address the challenge of unethical conduct by arbitrators, members of the Tribunal are bound by a code of ethics.[142] This manages issues such as conflict of interest, bias and independence.[143] Nappert[144] correctly points out that it is a challenge firstly that the removed member does not have an appeal remedy, and secondly that the ICS rules do not prescribe a sanction for a breach of the code. Furthermore, the Tribunal is not under an express obligation to bring any improper conduct by members of the tribunal to the attention of the parties.[145] These views find support.

Eleventh, cases shall be heard in randomly appointed divisions consisting of three members, one from each signatory to the *CETA*.[146] The

139 Article 8.27(4) of the *CETA.*
140 Article 8.27(5) of the *CETA.*
141 Article 8.27(5) of the *CETA.*
142 Article 8.30 of the *CETA.*
143 For a discussion of arbitrator independence, see for example Horn 2014 *New York University Journal of Law and Business* 349-396; Nowrot and Sipiorski 2018 *LPICT* 178-196; Van den Berg 1997 *LJIL* 509-520.
144 Nappert 2016 *European Investment Law and Arbitration Review* 185.
145 Nappert 2016 *European Investment Law and Arbitration Review* 185.
146 Article 8.27(6) of the *CETA.*

Chairperson of a division shall be from a third state.[147] Nonetheless, a case may be heard by a single member from a third state.[148] This may be necessary where the party making the request is an SME or if the compensation claimed is low.[149] The randomness of the creation of divisions is to be commended. However, this must be bolstered by the proper independent appointment of qualified members.

Twelfth, members of the Tribunal shall be paid a monthly retainer.[150] State parties make equal contributions every month to the ICSID Secretariat, which manages the funds on behalf of the Tribunal.[151] The *CETA* Joint Committee may transform the retainer into a salary.[152] The question in this regard is whether the remuneration package will be able to attract highly qualified practitioners who meet the prescribed requirements, as there is no security of tenure. In addition to the retainer, members of the Tribunal shall be paid their fees and costs on the same scale as ICSID arbitrators.[153]

Thirteenth, the ICSID Secretariat shall be the Secretariat of the Tribunal.[154] Unfortunately this ignores the fact that ICSID fees are high for developing states and SMEs, and using ICSID potentially carries the stigma that the ICS is not a move away from ISDS but a hybrid tribunal.

Fourteenth, the ICS attempts to address the challenge of the lack of consistency among tribunals, as well as the lack of a mechanism to address errors of law made in awards. It creates an Appellate Tribunal[155] that is mandated to uphold, modify, or reverse a Tribunal's awards.[156] Strangely, the Appellate Tribunal can also hear applications for reviews and annulments under Article 52 of the *ICSID Convention*.[157] This Tribunal is therefore a one-stop facility that covers challenges to awards on technical grounds as well as on merit. However, ICSID Rules do not allow for the ICS to hear annulment cases.

A division of the Appellate Tribunal shall consist of three randomly appointed members.[158] In this regard the Appellate Tribunal will serve a good purpose as it fills a gap that has been in existence for decades. However, credible though the Appellate mechanism may be, it cannot on its

147 Article 8.27(6) of the *CETA.*
148 Article 8.27(9) of the *CETA.*
149 Article 8.27(9) of the *CETA.*
150 Article 8.27(12) of the *CETA.*
151 Article 8.27(13) of the *CETA.*
152 Article 8.27(15) of the *CETA.*
153 Article 8.27(14) of the CETA; Sardinha 2018 *Can Yb Int'l L* 324.
154 Article 8.27(16) of the *CETA.*
155 Article 8.28(1) of the *CETA.*
156 Article 8.28(2) of the *CETA.*
157 Article 8.28(2(c) of the *CETA.*
158 Article 8.28(5) of the *CETA.*

own solve the challenge of a lack of consistency as there is no judicial precedent. Furthermore. the creation of this division will increase the time and costs of proceedings. It is therefore imperative that both of these are contained.

The composition of a division is random and unpredictable.[159] This is good if the members who compose a division are properly qualified, if they have no conflict of interest, if the entire panel of members adheres to geographical, gender and other forms of diversity, if they have been appointed by a body and process that is free from political influence etc. To reduce costs a sole member may be appointed where the claimant is an SME or where the damages claimed are low.[160] This is commendable and will reduce the costs for SMEs.

Finally, the ICS addresses the issue of the time it takes to conclude cases and the costs involved. According to one report, it takes an average of 40 months for an ICSID tribunal to render an award, while UNCITRAL tribunals take an average of 48 months.[161] The ICS rules attempt to manage the duration of the proceedings by setting time frames for some steps to be taken. For example, the President of the Tribunal shall constitute a division that shall hear a case within 90 days of the referral of a case to the Tribunal.[162] Furthermore, the Tribunal must render an award within 24 months from the submission of the claim.[163] This provision is silent as to the consequences if a tribunal fails to furnish reasons for the late rendering of an award, or for failing to render an award within the 24-month period. While these timeframes are an improvement on the present position they are not necessarily speedy. What is the justification for the President's taking up to three months to appoint a division to hear a case? Why not, for example, one month? Why must a party have up to three months to lodge an appeal while the successful party is looking forward to enforcing the award?

4 Does ICS resolve the challenges of ISDS?

There are mixed views regarding whether the ICS model can address the legitimacy challenges faced by ISDS. This section will first briefly discuss the literature on the legal nature of the ICS. Secondly, it will assess whether the ICS can succeed in resolving the legitimacy challenges faced by ISDS.

159 Article 8.29(7) of the *CETA.*
160 Article 8.27(9) of the *CETA.*
161 Cruz 2020 *Young Arbitration Review* 53. For a discussion of delays in arbitration, see Chaisse 2021 *Arb Int'l* 863-901.
162 Article 8.27(7) of the *CETA.*
163 Article 8.39(7) of the *CETA.*

4.1 The nature of the ICS

There's no agreement among scholars, and probably among states, about the nature of the ICS in terms of whether it is a court, an arbitral tribunal or a hybrid of both. Roberts calls the ICS "a bit of a mixed bag".[164] Reinisch[165] opines that the EU was deliberately ambiguous as to the nature of the ICS. Sornarajah[166] says that "The proposal for an International Investment Court is a red herring. The central issue is whether investment treaties should exist at all." Ebenhart[167] calls the ICS "... the politically untenable ISDS in disguise. It's an innocent sheep on the outside, but a ravenous wolf on the inside." Sardinha[168] refers to the ICS as a hybrid. Ngobeni and Fagbayibo[169] also argue that the ICS is a hybrid forum.

The writer holds the view that the ICS is a new hybrid form of ISDS for the following reasons. Firstly, ICS cases are opened in terms of the ICSID, UNCITRAL or other rules of arbitration. Secondly, ICS members are neither called arbitrators nor judges. Thirdly, at the end of a case the members issue an award, not a judgment.[170] Fourth, an award rendered on a case opened under the *ICSID Convention* is deemed to be an award in terms of the Convention and thus cannot be called a court judgment.[171] Furthermore, the *ICSID Convention* does not provide for an appeal against ICSID awards, yet an ICS award that is deemed to be made under the *ICSID Convention* is appealable.[172] This cannot validly take place without the ICSID Convention and the ICS being legally synchronised. Reinisch[173] recommends modifications to the *ICSID Convention* that would synchronise the ICS and ICSID systems, and he suggests that the modifications may be permissible under international law. Reinisch is correct in arguing that the hybrid nature of ICS may have the unintended result that some national courts may refuse to treat ICS awards as arbitral awards when the recognition of an award is sought under the *New York Convention*.[174] He suggests that in order to address enforcement challenges, ICS be seen as a form of arbitration and not a court.[175]

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164 Schwieder 2016 *Colum J Transnat'l L* 208.
165 Reinisch 2016 *J Int'l Econ L* 765.
166 Sornarajah 2016 *Perspectives on Topical Foreign Direct Investment Issues* 1.
167 Ebenhart 2016 https://publicservices.international/resources/news/investment-court-system-ics-the-wolf-in-sheeps-clothing?id=9192&lang=en 14.
168 Sardinha 2018 *Can Yb Int'l L* 316.
169 Ngobeni and Fagbayibo 2017 *African Journal of Legal Studies* 194.
170 Article 8.39 (1) of the *CETA.*
171 Article 8.41(6) of the *CETA.*
172 Ngobeni and Fagbayibo 2017 *African Journal of Legal Studies* 195.
173 Reinisch 2016 *J Int'l Econ L* 782.
174 Reinisch 2016 *J Int'l Econ L* 785.
175 Reinisch 2016 *J Int'l Econ L* 786.

Based on the hybrid nature of the ICS, there is room for scepticism in terms of whether the ICS is a departure from ISDS. This has implications for whether the ICS as a forum can repel the legitimacy concerns that arbitral tribunals had. It is argued that the ICS may fail in this regard.

4.2 Prospects of success of the ICS in resolving the challenges of ISDS

It is opportune to reflect on the question which this paper sought to address, namely whether the ICS can resolve the challenges that face ISDS. To recapitulate, the three categories of challenges that face ISDS are concerns pertaining to the lack of consistency, coherence, predictability, and correctness of arbitral decisions by ISDS tribunals; concerns pertaining to the arbitrators and decision makers; and concerns pertaining to the cost and duration of ISDS cases. A few comments will be made to illustrate that the ICS system is not perfect, although it is a commendable improvement.

Regarding the first category two issues of contention can be raised. The first is that introducing an appellate tribunal will finally enable errors of law in awards to be rectified. However, the consequential increase in the time and cost of the proceedings must be managed so as not to defeat the purpose. Secondly, the ICS system fails to address the challenge of coherency and consistency due to the lack of judicial precedent.

In the second category, two sticking points are the establishment of a permanent panel of members of the tribunals. Firstly, the current rules ignore geographical, gender, racial and other forms of diversity. As a precursor to the global MIC, the ICS should address diversity. Secondly, having a fixed panel of tribunal members is good and it will stop the current practice where the same group of arbitrators is appointed to cases. Thirdly, the provisions for the challenge and removal of members are welcome.

In the last category relating to costs, it must be noted that ICSID fees are high for SMEs and poor developing states. The regulation of fees for legal counsel is welcome. The introduction of rules relating to the security of costs and the disclosure of third-party funding are good improvements, as are the procedural innovations to reduce the duration and costs of proceedings. Therefore the ICS partially resolves this concern.

Overall, the interventions that the ICS has brought in all three areas are a significant improvement on what ISDS offered. Despite any criticism, the ICS must be seen as a work in progress that must continue to be interrogated and improved upon.

The literature on the overall prospects of the ICS shows that an approximately equal number of scholars are either pessimistic or optimistic about the prospects of the ICS in resolving the challenges faced by ISDS.

Dietza, Dotzauera and Cohen argue that the ICS has failed to address the legitimacy crisis faced by ISDS in the EU. They state, for example, that the ICS retains the old pattern of favouring investors by giving them the right to sue states, which gives them unique protection in international law.[176] Hence, they argue, the ICS model fails to address the rationale of giving investors this unique protection.[177] The authors argue that this is critical, as the special protection of investors was one of the issues that made ISDS contentious.[178] This view finds acceptance, as it is a fact that the ICS is designed to enable foreign investors to sue host states. In this regard the ICS fails to change the present position that gives preference only to foreign investors to use the ICS to sue host states, and thereby to challenge the right to regulate.

Baetens[179] opines that the ISDS should be totally abandoned, and disputes could be referred to the PCA as it already has jurisdiction to hear disputes between states and non-state parties. This suggestion should not be dismissed outright, as the PCA already handles ISDS disputes. It would require a detailed assessment of the PCA's fees and operations to determine whether it could be a real alternative to ISDS. Baetens also argues that the composition of the members of the Tribunal fails to directly address the challenge of geographical and gender diversity.[180] The writer agrees with the last point, as argued above.

Baltag[181] opines that the ICS will not resolve the legitimacy challenges faced by ISDS. She argues that the ICS will be to the detriment of SMEs, and will not clearly affect wealthy investors. Furthermore, she argues that investors may resort to the practice of using investment contracts to protect themselves. This is indeed a possibility, as nothing prevents major investors from negotiating investment contracts with host states.

Benedetti[182] makes the arguments that the proposed appointment of decision makers re-politicises the process, unlike when the parties made the appointment; the appointment system may reduce by quality of the decisions made by failing to attract highly qualified decision makers;[183] the introduction of an appeal mechanism tampers with the established rule of the finality of awards and increases the duration and cost of the

176 Dietza, Dotzauera and Cohen 2019 *Review of International Political Economy* 766-768.
177 Dietza, Dotzauera and Cohen 2019 *Review of International Political Economy* 767.
178 Dietza, Dotzauera and Cohen 2019 *Review of International Political Economy* 768.
179 Baetens 2016 *LIEI* 384.
180 Baetens 2016 *LIEI* 373.
181 Baltag 2019 *Contemporary Asia Arbitration Journal* 304.
182 Benedetti 2019 *Revista Derecho del Estado* 107.
183 Benedetti 2019 *Revista Derecho del Estado* 107-108.

proceedings;[184] and that the enforcement of ICS awards contradicts established ICSID and UNCITRAL enforcement rules.[185] These comments speak to the efficiency of the ICS. Failure to address them may deter the adoption of the ICS by new stakeholders and may be fatal to the system.

Zarate[186] argues that the ICS model lacks global legitimacy in that the EU conceptualised it on its own without consulting other states. The writer agrees, as it is a fact that the EU did not consult widely at a global level with states and business groups prior to implementing the ICS.

Despite the pessimism discussed above, there are ISDS adherents who adopt the view that ISDS are exaggerated and blown out of proportion, as follows.[187]

Brower and Ahmad[188] blame the anti-ISDS movement on a populist trend inspired by fear and fake news, among other things. They go as far as saying that *Working Group III* is the wrong entity for the reform of ISDS, and that the task should have been given to *Working Group II*.[189] They further blame Professor Jan Paulsson for starting the anti-ISDS movement, and especially the campaign to end party-appointed arbitrators in 2010.[190] Finally, the authors conclude that it is questionable whether the ICS can succeed, and suggest that major investors may reject it.[191] Clearly ICS supporters will have difficulty in convincing hard-line ISDS adherents that the ICS solves any problem, as according to them none exists.

Palombo[192] argues that the ICS is a premature solution. She argues that the ICS is not a "one-size-fits-all" solution, as states have different views on the use of ISDS in the first place.[193] Finally, Palombo[194] argues that the ICS may hurt host states by dissuading investors from investing in states that use the ICS, or by increasing the cost of investing in such states. The writer agrees. It has been shown above that the ICS is a product of limited consultation and that it tampers with the right which was a feature of ISDS: the right of investors to appoint their preferred arbitrators. Hence it remains to be seen whether or not investors will support the ICS by opening cases therein.

184 Benedetti 2019 *Revista Derecho del Estado* 108.
185 Benedetti 2019 *Revista Derecho del Estado* 110.
186 Zarate 2018 *BC L Rev* 2764, 2768-2769, 2773-2775.
187 Langford, Potesta and Kaufmann-Kohler 2020 *Journal of World Investment and Trade* 168.
188 Brower and Ahmad 2018 *S Cal L Rev* 1158-1165.
189 Brower and Ahmad 2018 *S Cal L Rev* 1166-1167.
190 Brower and Ahmad 2018 *S Cal L Rev* 1168.
191 Brower and Ahmad 2018 *S Cal L Rev* 1184, 1196.
192 Palombo 2019 *U Rich L Rev* 831.
193 Palombo 2019 *U Rich L Rev* 831.
194 Palombo 2019 *U Rich L Rev* 832.

5 Conclusion

This paper concludes that the ICS fails to fully resolve the challenges that face ISDS. Nonetheless, it is a positive development in the reform of ISDS, for which currently there is no viable non-litigation alternative. The ICS must be seen as a work in progress that requires ongoing improvement.

More research needs to be conducted on the functioning of the ICS and its possible impact on all stakeholders. Furthermore, the EU must be open to wider and genuine consultation with other states as it rolls out the ICS. Failure to do so may complicate its efforts to have the ICS adopted in future trade negotiations. This in turn may complicate the adoption of its planned MIC.

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List of Abbreviations

AJIL	American Journal of International Law
Arb Int'l	Arbitration International
BC L Rev	Boston College Law Review
BIT	bilateral investment treaty
Bond LR	Bond Law Review
Can Yb Int'l L	Canadian Yearbook of International Law
CETA	Comprehensive Economic and Trade Agreement between Canada and the European Union
Chinese JIL	Chinese Journal of International Law
CILSA	Contemporary and International Law Journal of Southern Africa
CJEU	Court of Justice of the European Union
Colum J Transnat'l L	Columbia Journal of Transnational Law
ECT	Energy Charter Treaty
EU	European Union
FCN	Treaties of Friendship, Commerce and Navigation
ICS	Investment Court System
ICSID	International Centre for the Settlement of Investment Disputes
Int C L Rev	International Community Law Review
ISA	investor-state arbitration
ISDS	investor-state dispute settlement
J Int'l Econ L	Journal of International Economic Law
LIEI	Legal Issues of Economic Integration
LJIL	Leiden Journal of International Law
LPICT	Law and Practice of International Courts and Tribunals
MIC	Multilateral Investment Court
Osgoode Hall LJ	Osgoode Hall Law Journal
PCA	Permanent Court of Arbitration
PELJ	Potchefstroom Electronic Law Journal
S Cal L Rev	Southern California Law Review
SME	small and medium-sized enterprise

SDGs	Sustainable Development Goals
Tex L Rev	Texas Law Review
TIP	treaty with investment provisions
TTIP	Transatlantic Trade and Investment Partnership Agreement
Tul L Rev	Tulane Law Review
U Rich L Rev	University of Richmond Law Review
UCLA L Rev	University of California, Los Angeles Law Review
UN	United Nations
UNCITRAL	United Nations Conference on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
USD	United States Dollar