Kluwer Arbitration Blog

# The Unilateral Appointment of Adjudicators to a Multilateral Investment Court: A Failed Attempt to Enhance the Legitimacy of the System?

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Investor-State Dispute Settlement ("ISDS") has gone through significant changes over the years. Before arbitration became the principal mechanism for resolving investment disputes, options of foreign investors were limited to either initiating proceedings before national courts or relying on diplomatic protection. The dissatisfaction with both options, for reasons of a perceived lack of neutrality and sufficient enforcement, led to the shift towards arbitration, enabling investors to directly assert their rights before a body of neutral decision-makers selected by both sides.

Recent developments, however, have questioned whether arbitration remains the appropriate mechanism for resolving investor-state disputes. Opponents argue that the current system lacks legitimacy, given that private adjudicators rule upon the legality of state measures. As discussed during a recent conference on "The Rule of Law and the Future of Investment Protection" in Berlin as well as earlier on this blog, reform proposals foresee replacing arbitration with a standing mechanism through the establishment of a Multilateral Investment Court ("MIC"), staffed with permanent adjudicators selected solely by states and allocated randomly to the respective disputes (see the work of UNCITRAL Working Group III, including the report on its 50th session in January 2025).

This blog post is not aimed at analysing the specificities of this mechanism. Rather, it is intended to discuss the more fundamental question of whether the proposed selection process – i.e. appointment by states only – adequately addresses concerns raised with respect to the "legitimacy" of arbitrators dealing with investment disputes.

**Potential Justifications for the Reform: Pro-Investor Bias and Lack of Expertise**

Two of the alleged deficits relating to the legitimacy of investment arbitration are that arbitral tribunals are predominantly composed of (commercial) lawyers without the necessary expertise in international law and that they tend to decide in favour of investors rather than states.

The allegation of a pro-investor bias is not supported by empirical evidence. The latest ICSID Caseload Statistics reveal an almost even split in outcomes, with investors prevailing in 49% of

cases. Similarly, the latest data published by UNCTAD shows that states prevailed in 38% and investors in 28% of cases. The remaining cases were settled (18%), discontinued (13%) or resulted in a finding of a breach, but without any damages being awarded to the investor (3%). Notably, the data on investors prevailing also includes cases in which their claims were only partially upheld. In *ABCI v Tunisia*, for example, the investor claimed compensation of approximately USD 12 billion, but the arbitral tribunal, after finding that Tunisia was liable, awarded only a fraction of this sum, namely USD 350,000. If one were to consider quantum, states could be seen as having prevailed in even more cases.

Given the limited availability of data, it is impossible to make an equally definitive statement regarding expertise. However, while the qualifications and expertise of the adjudicators are undeniably crucial for the proper functioning of any decision-making body dealing with investment disputes, it is doubtful whether the stipulation and assessment of the requirements by states alone can safeguard these to a better extent than the current system.

The latest note published by UNCITRAL Working Group III on the selection and appointment of the members of the MIC sets out eligibility criteria for candidates: they must be independent and have "recognised competence in the fields of public international law, including international investment law and international dispute settlement". Further criteria which are being considered are experience working in government or the judiciary – criteria which would considerably restrict the pool of potential candidates. Under such a system, states will select candidates who, in *their* opinion, have the relevant qualifications and experience to resolve investor-state disputes.

In investment arbitration, a similar procedure is already in place for the ICSID Panel of Arbitrators. Each contracting state of the ICSID Convention may designate up to four individuals deemed to be of "high moral character and recognized competence in the fields of law, commerce, industry or finance" (Article 14 of the ICSID Convention). The stipulated criteria are much broader than the ones suggested for the MIC. Accordingly, there are a number of panel members who do not have a background in international or investment law but who have been designated *by states* as appropriate candidates to resolve investor-state disputes. In fact, 66% of the state-appointed panel members have never been appointed as ICSID arbitrators. Nonetheless, the ICSID system provides a practical solution to the issue of expertise, as parties are not limited in their choice to the arbitrators listed on the panel. For appointments under Article 38 of the ICSID Convention, which *are* limited to those arbitrators, it is ultimately the Chair of ICSID's Administrative Council who makes the selection.

The very reason for allowing both sides to influence the composition of the decision-making body is that rational parties can be trusted with choosing competent decision-makers who possess the relevant knowledge and experience to resolve the specific dispute that is submitted to them. Three-member tribunals offer a particularly effective filtering mechanism, given that each side selects one arbitrator, and the president is selected jointly or by the two co-arbitrators. This balanced bilateral choice ensures that such decision-making bodies are not prone to systematically decide in favour of one group of parties rather than the other. Conversely, a selection procedure providing for a choice by only one group of parties would only take *their* perspectives and preferences into account. Can such a system genuinely be seen as enhancing legitimacy from the perspective of both states and investors?

**Parallel Discussion in Sports Arbitration: Applying the Legitimacy Concerns to the MIC**

Thus far, discussions regarding the independence and impartiality of the decision-makers in investor-state disputes have largely focused on arbitrators' predispositions favouring investors. An MIC, however, has the potential to reverse the focus of the debate and shift it to a structural design which potentially favours states instead.

Similar concerns have also been voiced in another area of arbitration, namely in sports-related disputes between athletes and sports federations. To be able to participate in international competitions, athletes are required to sign an arbitration clause which provides for the exclusive jurisdiction of the Court of Arbitration for Sport ("CAS") for any disputes that arise. The parties' choice of arbitrators is limited in that they can only choose persons who are listed in the closed list of CAS arbitrators. The supposed reason for this limitation is to guarantee the expertise of the decision-makers in sports-related matters (see also Article S14 of the ICAS Statutes). But what is considered problematic is that this list is set up by the International Council of Arbitration for Sport, whose 22 members are predominantly appointed by the sports federations and Olympic Committees. Athletes, on the other hand – the other group of potential parties to CAS arbitrations – cannot influence the composition of this list.

Against this background, some critics doubt the legitimacy of the CAS, and the issue has also been raised before the European Court of Human Rights ("ECtHR") in the case of *Mutu and Pechstein v Switzerland*. The case concerned a competition ban imposed on the German speed skater Claudia Pechstein due to alleged doping. After unsuccessful challenges against the decisions of the national and international speed skating associations before a CAS tribunal and various state courts, Ms. Pechstein lodged a complaint with the ECtHR, arguing that her right to an independent and impartial tribunal under Article 6(1) of the European Convention on Human Rights ("ECHR") had been violated due to the imbalance between athletes and sports bodies in the constitution of the arbitral tribunal. In this respect, the ECtHR found no violation of the ECHR because there was no evidence that the *individual* arbitrators lacked independence and impartiality. However, Judges Keller and Serghides dissented, arguing that more emphasis should be put on the *appearance* of independence and impartiality. In their view, the influence of the sports federations and Olympic Committees on the composition of the closed arbitrator list was sufficient to violate Article 6(1) of the ECHR since "the organisation's general structure has no appearance of independence or impartiality" (para. 13).

If one were to apply these considerations to ISDS, this would speak against implementing an MIC. While it may be true that the majority of the individuals selected by the states will fulfil the requirements of impartiality and independence, the fact that the composition of the decision-making bodies is merely influenced by one group of potential parties – states – might be problematic if one puts the emphasis on the structural *appearance* of independence and impartiality. The proposed standing body will certainly have a mechanism in place to address a lack of independence and impartiality on a case-by-case basis. But if there is no evidence of a pro-investor bias of arbitral tribunals, is there any compelling reason to implement a system which might itself give rise to allegations of a pro-*state* bias of the decision-makers?

**Conclusion: Legitimacy as a Matter of Perspective**

The answer to the question of whether the selection process for the adjudicators of an MIC would enhance the legitimacy of ISDS ultimately depends on how one understands the term “legitimacy”. Is legitimacy merely the result of a formal act, namely the appointment of the adjudicators by states, or must legitimacy be determined from the perspective of both sides, so that it would require the absence of structural ties or any other design which might give rise to an *appearance* of favouring one side rather than the other? The proposal to implement a system in which the roster of potential decision-makers is determined only by one group of parties is unfortunate, given that the purpose of the move away from national courts towards arbitration was precisely to guarantee the resolution of investor-state disputes in a truly neutral forum.

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