Vineet Hegde

From Constitutionalism to Constitutionalization of International Investment Law: Feasibility of the EU's Multilateral Investment Court Project

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From Constitutionalism to Constitutionalization of International Investment Law: Feasibility of the EU's Multilateral Investment Court Project

by

Vineet Hegde*

Abstract

The EU's proposal to multilateralize investment disputes has received considerable degree of support. Before encouraging this proposal, it is important to analyze the feasibility of whether it will achieve the intended goals of international investment law. Currently, the international investment order functions through the lenses of constitutionalism to uphold certain constitutional norms. By constitutionalizing a multilateral court, the EU is attempting to bridge the gaps of the current system. However, a multilateral court, in the current form, is incapable of providing security, predictability and consistency. This is due to devising procedural rules as an antecedent over multilateral substantive rules. Moreover, there is no consensus for multilateral substantive rules. In such a scenario, the mandate of consistency cannot be achieved due to the applicability of different substantive rules. It would create boxes of jurisprudence that would create more chaos than already is. By elaborating these dimensions, this research contends the goals of international investment law, the rule of law in particular, are unlikely to be achieved. It could also provide coherence in the wrong direction and further fragment the system. A multilateral court would not look any different from the current system. It would be a wolf in a sheep's clothing. So, hold on. Do not constitutionalize the system yet. Devise multilateral substantive rules first.

Keywords: Multilateral Investment Court; Constitutionalism, Constitutionalization; United Nations Commission on International Trade Law; World Trade Organization

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I. Introduction

Since the 1960s, the international legal order for international investment law is fragmented with 2000+ bilateral and multilateral international investment agreements.[1] The standards of protection for each agreement is similar in terms of international standards to that of each other, and is designed to protect investor rights and their property.[2] On the procedural aspect, the dispute settlement mechanism is *ad-hoc*, and the disputing parties make use of arbitration as a model for dispute resolution.[3] However, this mechanism has received considerable backlash.[4] Due to this, since 2015, the European Union [EU] has floated the idea of a permanent multilateral court for investment disputes, departing from the *status quo* of *ad-hoc* dispute resolution mechanism.[5] In 2017, the United Nations Commission on International Trade Law [UNCITRAL] began work to reforming the mechanism for settling investment disputes, with a possibility of including a multilateral investment court system [MICS].[6] In March 2018, the Council of the EU officially provided the Commission of the EU with a mandate to negotiate on a MIC.[7] Among other things, the idea of a MIC is to

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[1] According to the United Nations Conference on Trade and Development, 2,369 bilateral investment treaties are in force and 303 agreements in force including investment provisions. Division on Investment and Enterprise, <http://investmentpolicyhub.unctad.org/IIA> [hereinafter "UNCTAD Data"]; *Factsheet on the Multilateral Investment Court*, September 2017 <http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf> [hereinafter "The *Factsheet on MIC*, the European Commission"].

[2] *See* ALVAREZ Jose A., *The Use (and Misuse) of European Human Rights Law in Investor-State Dispute Settlement*, *in* Franco Ferrari ed., "The Impact of EU Law on International Commercial Arbitration", Arbitration Law (2017), pp. 519-648, p. 605; GERVAIS Daniel J., *Investor-State Dispute Settlement: Human Rights and Regulatory Lessons from Lilly v. Canada*, 8 UC Irvine L. Rev. (2018), pp. 459-511, p. 492.

[3] *See generally*, MCLACHLAN Campbell et. al., *International Investment Arbitration: Substantive Principles*, Oxford, Oxford University Press (2017); *See generally*, SCHEFER Krista Nadakavukaren, *International Investment Law Text, Cases and Materials*, Cheltenham, Edward Elgar Publishing, (2016), 2nd ed.; *See generally,* LIM Chin Leng, HO Jean & PAPARINSKIS Martins, *International Investment Law and Arbitration: Commentary, Awards and other Materials*, Cambridge, Cambridge University Press (2019); *See generally*, DOZLER Rudolf & SCHREUR Christoph H., *Principles of International Investment Law*, Oxford, Oxford University Press (2012), 2nd ed.

[4] The backlash relates to the goals of international investment law, such as rule of law, stability, consistency, predictability, fairness, etc.

[5] The EU Commissioner for Trade Cecelia Malmström (2015): "*However, I believe that we should aim for a court that goes beyond TTIP. A multilateral court would be a more efficient use of resources and have more legitimacy. That makes it a medium-term objective to be achieved in parallel to our negotiations with the United States. I hope for Parliament's support and advice as we try to achieve it.*" *Speech: remarks at the European Parliament on Investment in TTIP of 18.3.2015.* <http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153258.pdf>.

[6] *Factsheet*, <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155744.pdf>; United Nations Commission on International Trade Law, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session (New York, 1-5 April 2019)*, paras 71, 72 & 74, A/CN.9/970 (9 April 2019) [hereinafter "UNCITRAL Working Group III, *Report of 37th Session*"].

[7] Council of the European Union, *Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes*, 12981/17 ADD 1 DCL 1, 20 March 2018 <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>.

have a permanent adjudicatory body that can rectify the problems of current *ad-hoc* arbitral tribunals and provide predictability and certainty in international investment law.[8]

A permanent investment dispute settlement body is closely paralleled with the success of the World Trade Organization [WTO]. Unlike the fragmented international investment law system, the institutionalized side of international trade law is based on a multilateral umbrella - the WTO Agreement, with 164 signatories.[9] The WTO system has a constitutionalized set up with an independent adjudicatory body [the Appellate Body] without the political interference of a WTO member the in the adjudicatory process.[10] The members of the Appellate Body are appointed for a specific term and they function independent of their nationality.[11] Although, the Appellate Body merely provides recommendations in its reports, these reports must be adopted by the WTO members through the dispute settlement body.[12] Most interestingly, as a matter of practice, the WTO members have almost always[13] welcomed the Appellate Body reports without resistance. No other international institution provides for such a mechanism as of yet, and the functioning of the Appellate Body has been considered integral part of the WTO dispute settlement system.

On the other hand, international investment law finds its basis in constitutionalism, rather than a constitutionalized system. "Constitutionalism" in this context, highlights the underlying fundamental and constitutional norms in the international investment legal order such as non-discrimination, fair and equitable treatment, rights against expropriation etc. that packs the standards of protection in investment treaty regime. The absence of a constitutionalized system is indicated by the *ad-hoc* nature of the dispute settlement system. The parties are free to appoint arbitrators to the dispute, indicating a possibility of influence in the decision-making process. If the MIC project establishes a permanent adjudicating panel of judges that is free from political interference to protect the rule of law, then it could be seen as constitutionalizing the system.

In light of the EU's proposal to constitutionalize the investment dispute system through the MIC project, it is important to analyze whether it could be a viable legal forum for such disputes. Certainly, it has worked for the multilateral trading system. However, WTO framework exists to protect and promote freedom of trade and commerce. On the other

[8] *The Factsheet on MIC*, the European Commission, *supra* note 1.
[9] The World Trade Organization, *Members and Observers* <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>
[10] Art. 17.14, DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter "DSU"]. Art. 17.14 states "*An Appellate Body report shall be adopted by the DSB [Dispute Settlement Body] and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members*". In theory, it is contestable if the DSB does not adopt the Appellate Body reports. However, in practice, almost always, the Appellate Body reports have always been accepted by the DSB.
[11] *Id.*, at Art. 17.2 and Art. 17.3.
[12] *Id.* at Art. 17.8.
[13] Except for in *US – Shrimp Turtle*, where there was a collective consensus, except by the US, objecting the Appellate Body's acceptance of *amicus curiae* briefs under Art. 13 DSU – Appellate Body Report, *United States – Import Prohibition of certain Shrimp and Shrimp Products*, WT/DS58/AV/R, 1998; BAHRI Amrita, "*Appellate Body Held Hostage": Is Judicial Activism at Fair Trial?* 53(2) JWT (2019) pp. 293-315, p. 310. [hereinafter "Bahri, *Appellate Body Held Hostage*"].

hand, investment system exists to protect investor rights, which mainly entails property rights.[14] Also, this constitutionalization proposal relates only to procedural rules. The substantive law is still based on fragmented bilateral and multilateral investment treaties. With such a striking difference in the fundamental structure of the legal order between trade and investment, it is imperative to examine the feasibility and appropriateness constitutionalizing the investment treaty regime through a MIC.

This article conceptualizes and differentiates constitutionalism and constitutionalization in international economic law (Section II). Further, it analyzes the constitutionalism principles of the WTO Agreements, in substance; and the constitutionalization of the dispute settlement system, in procedure (Section III). It then looks into the constitutionalism principles of investment treaty regime and analyzes the model put forth by the EU to constitutionalize the dispute settlement system (Section IV). This section will also compare and contrast the model to analyze the implications of the move towards constitutionalization and examine the feasibility of the EU's proposal.

II. Constitutionalism and constitutionalization: A conceptual revisit

The terms "constitutionalism" and "constitutionalization" have been discussed extensively in legal literature, with varying definitions. Anne Peters in her seminal work states that "global constitutionalism" is "an academic and political agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order."[15] She states that this agenda seeks to reconstruct features and functions of international law as "constitutional" and even "constitutionalist".[16] Her claim is that constitutional law is a normative guidance and functions to regulate the governance of law-making, application, and enforcement. In the context of international economic law, John H Jackson, Ernest-Ulrich Petersmann and Deborah Cass have laid out the elements of "constitutionalism" and "constitutionalization". For Jackson, the WTO is a rule-based entity that is problem-solving and efficiency oriented.[17] For Petersmann, constitutionalism has to do with elevation of a set of norms that bar the exercise of overarching powers by States within the international order.[18]

[14] Alvarez, *European Human Rights Law in Investor-State Dispute Settlement*, *supra* note 2.
[15] PETERS Anne, *The Merits of Global Constitutionalism* 16(2) IJGLS (2009), pp. 397-411, p. 397.
[16] *Id.*
[17] *See generally*, JACKSON John H., *The World Trade Organization: Constitution and Jurisprudence*, London, Routledge (1998).
[18] Caveat: Many of his works deal with inclusion of human rights and its interplay with the WTO framework in this context. PETERSMANN Ernst-Ulrich, *The GATT/WTO Dispute Settlement System*, Leiden, Martinus Nijhoff Publishers (1997); Some other works include: PETERSMANN Ernst-Ulrich, *Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EJIL (2002) pp. 621-50, p. 621; PETERSMANN Ernst-Ulrich, *The WTO Constitution and the Millennium Round, in* Bronckers Marco & Quick Reinhard (eds), "New Directions in International Economic Law", The Hague, Kluwer Law International (2000); PETERSMANN Ernst-Ulrich, *The WTO Constitution and Human Rights*, 3 JIEL (2000), pp. 19-25, p. 19; PETERSMANN Ernst-Ulrich, *Constitutionalism and International Organizations*, 17 Northwestern JILB (1996) pp. 398-469, p. 398; PETERSMANN Ernst-Ulrich, *How to Reform the UN System? Constitutionalism, International Law, and International Organizations*, 10 Leiden JIL, (1997) pp. 421-474, p. 421; *See generally*, PETERSMANN Ernst-Ulrich, *Constitutional Functions and Constitutional Problems of International Economic Law*, New York, Routledge (1991).

According to him, constitutions are based on certain normative values, including the rule of law.[19] On the other hand, Deborah Cass, in her seminal work on constitutionalization of the WTO, stated that the Appellate Body "is the dynamic force behind constitution-building by virtue of its capacity to generate constitutional norms and structures during dispute resolution".[20] This is where my analysis of the difference lies. The term "constitutionalism" and "constitutionalization" have been interchangeably used in many literature.[21] Peter Behrens has discussed "constitutionalization of international investment protection".[22] However, this scholarship discusses the constitutional aspects of the standards of protection. Joshua Paine uses the term "global constitutional law", "constitutionalism" and "constitutionalization" interchangeably while discussing the constitutional aspects of international investment law.[23] When it comes to international economic law, distinctions can be drawn between these three terms due to some distinct features of the legal order.

Although, the interchangeability may be acceptable in other legal orders, it can bear contrasting differences in the domain of international economic law. In the WTO framework, it can bear a difference due to the presence the Appellate Body, which is free from governmental interference in practice. Therefore, I borrow Prof. Petersmann's approach of "constitutionalism" to indicate that a set of substantive normative values and standards can be elevated to a "constitutional" status. I borrow Cass's approach of stating that the Appellate Body is a dynamic force behind constitution-building. While "constitutionalism" highlights the normative values and underlying principles threaded through international legal order, "constitutionalization" indicates a continuous process of enforcing the rule of law and administering justice. Therefore, it is important to separate "constitutionalism" and "constitutionalization" and not use them interchangeably for the purposes of this research. It should be noted that this part does not indicate whether international trade law has a "constitution" or not,[24] as this would deviate the analysis of research.

At least in the context of the international economic law, WTO law in particular, my proposition is that "constitutionalism" refers to substantive constitutionalist principles and legal

[19] DUNHOFF Jeffrey L., *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17(3) EJIL (2006), pp. 647-675, pp. 653-654.
[20] CASS Deborah, *The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EJIL (2001), pp. 39-75, p. 42 [hereinafter "Cass, Constitutionalization EJIL"]; CASS Deborah, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System*, Oxford, Oxford University Press (2005).
[21] For example, *see*, Cass, Constitutionalization EJIL *Id.*; ITO Kazuyori, *Fair Is Foul, and Foul Is Fair: The Mixed Character of Constitutionalism in the Global Economic Governance*, *in* Suami Takao et. al. (eds), "Global Constitutionalism from European and East Asian Perspectives", Cambridge, Cambridge University Press (2018), pp. 392-421 [hereinafter "Ito, *Fair Is Foul, and Foul Is Fair*"].
[22] BEHRENS Peter, *Towards the Constitutionalization of International Investment Protection*, 45(2) Archiv des Völkerrechts Internationaler Investitionsschutz / International Investment Protection (2007) pp. 153-179. [hereinafter "Behrens, *Towards Constitutionalization*"].
[23] PAINE Joshua, *Investment Protection Standards as Global Constitutional Law*, *in* Schill Stephan, Tams Christian and Hofmann Rainer (eds), "Investment Law and Constitutional Law", Cheltenham/Northamption, Edward Elgar Publishing, (forthcoming) Available at SSRN: https://ssrn.com/abstract=3455940 [last accessed on 12 October 2019]. [hereinafter "Paine, *Investment Protection*"].
[24] TRACHTMAN Joel, *The Constitutions of the WTO*, 17(3) EJIL (2006) pp. 623-646.

norms that are embedded in the structure of the specific international legal order. For example, in the WTO set-up, fundamental principles such as non-discrimination,[25] transparency,[26] etc. would be treated as constitutional norms within its institutionalized set up to uphold the rule of law. On the other hand, constitutionalization of a legal order highlights the administration of objectivity through the procedural aspect of operation of legal norms within the specific sphere. Maintenance the rule of law, judicial independence without political interference, enforcement of commitments etc. that shape the objectivity of the legal order would fall within the domain of constitutionalization. In a constitutionalized setup, individual states are barred from exerting their subjective influence over the administration of international legal norms.[27] This is mostly done through the establishment of an independent adjudicatory authority that is free from political interference of WTO members. This does not mean that the constitutionalist principles for substantive law cannot change. States have the legislative authority to change the substantive rights and obligations through modification of treaties. However, independent a judicial body would maintain the rule of law and foster objectivity in the legal order by administering the interpretation of legal norms and States' behavior within the institutional set up.

In investment treaty regime, constitutional norms such as non-discrimination, fair treatment, and compensation for expropriation, are upheld by arbitral tribunals. However, there is no independent [in the absolute or practical sense] adjudicatory body that functions to administer justice; and provide consistency in jurisprudence and objectivity in the legal order. This is due to the use of arbitration as a dispute resolution model. Arbitrators are appointed by parties to the dispute, which, even though impartiality and independence are key factors, it is not comparable to the WTO framework, where the Appellate Body is permanent, free from political interference in practice; and the WTO Secretariat appoints panelists to the dispute in the first instance, and the parties may not reject the nominations without "compelling reasons".[28] Therefore in comparison to the WTO framework, investment treaty regime can be seen through the lenses of "constitutionalism", rather than a being in a "constitutionalized" state.

[25] The World Trade Organization, *Principles of the Trading System* <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> [last accessed on 12 October 2019].
[26] *Id.*
[27] Ito, *supra* note 21 at 393.
[28] Art. 8.6, DSU, *supra* note 10.

III. Constitutionalism and constitutionalization of the WTO framework

A. Constitutionalism: Engraving constitutional norms

The WTO system is built upon certain normative legal principles such as the freedom of commerce, rule of law to regulate international trade, competitive opportunities, development, high standards of living etc. some of which are also embedded in the Preamble of the WTO Agreement.[29] To achieve the objectives of the WTO agreements, it is important to highlight certain key legal norms that bind the institution of the WTO together. The principles of non-discrimination, binding commitments, due process, reciprocity etc. are these fundamental norms, that help in achieving the objectives of multilateral trading system. This section will look at how the practice of the trading partners, the Appellate Body jurisprudence, as well as academic literature suggest that some key obligations such as non-discrimination and due process are core fundamental values that can be elevated to the status of constitutional norms, even if one does not consider the WTO Agreement as strict constitution. These norms are also based on domestic legal systems through constitutional guarantees. These norms prohibit the overarching powers that could potentially be exercised by the States within the international economic order. While, this section does not delve into the basics of non-discrimination and transparency obligations, it shows the consensus as to the core nature of these norms, without which, it would be difficult for the WTO framework to function.

1. Non-discrimination

Non-discrimination is one of the fundamental principles of the international trade,[30] and has been woven into various agreements under the WTO umbrella. The preamble highlights the object of elimination of discriminatory treatment in international trade relations.[31] The absence of principle of non-discrimination spawns distorting effects of free market principles. Therefore, it is considered as a "key concept"[32] and one of the "core principles"[33] in the WTO law and policymaking.

Although, "non-discrimination" can encompass broad subject areas like human rights law, this analysis is limited to international economic law for the purposes of this research. The economic aspect of non-discrimination can be comparable to certain domestic legal systems as well. Within the US, freedom of trade and commerce within federal states is considered

[29] Preamble, WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter "WTO Agreement"].
[30] BOSSCHE Peter Van den & ZDOUC Werner, *The Law and Policy of the World Trade Organization: Text, Cases and Material,* Cambridge, Cambridge University Press (2018), pp. 305 [hereinafter "Bossche & Zdouc, WTO Law"].
[31] Preamble, WTO Agreement *supra* note 29.
[32] Bossche & Zdouc, WTO Law, *supra* note 30 at 305.
[33] LESTER Simon, MERCURIO Bryan & DAVIES Arwel, WORLD TRADE LAW TEXT, MATERIALS AND COMMENTARY 259 (3rd ed. Hart Publishing 2018). [hereinafter "Lester, Mercurio & Davies, WTO Law"].

as a constitutional norm.[34] Some domestic legal system also provide a broader encompassment of non-discrimination through "equality before the law" as a constitutional guarantee.[35]

The non-discrimination principle is divided into two rules under the WTO Agreement: i) the most-favored nation [MFN] treatment; and ii) the national treatment. The MFN and national treatments are considered as key concepts in WTO law and some of the "original cornerstones" of regulation of trade in goods.[36] The WTO Appellate Body in *EC – Tariff Preferences* stated the MFN principle is "one of pillars of the WTO trading system".[37] The Appellate Body in *EC – Tariff Preferences* cited the Appellate Body report in *Canada – Autos*, whereby the report stated:

> *"Like the national treatment obligation, the obligation to provide most-favoured-nation treatment has long been one of the cornerstones of the world trading system. For more than fifty years, the obligation to provide most-favoured-nation treatment in Article I of the GATT 1994 has been both central and essential to assuring the success of a global rules-based system for trade in goods."*[38]

The non-discrimination principle is a fundamental concept to the international trade regime. This view is also shared by the treaty practice, dispute settlement reports as well as scholastic writings. This concept finds its origins in medieval times[39] and has a basis in domestic constitutions. The multilateral acceptance of the principle through treaty practice, the fundamental nature of the same, highlights the constitutional basis of the principle.

2. Due process

The principle of due process is embodied in the WTO framework through various provisions such as Article X of General Agreement on Tariffs and Trade [GATT] and Article 11 of the Dispute Settlement Understanding [DSU]. Article X of the GATT imposes transparency obligations. The Appellate Body in *US – Underwear* stated that Article X:2 of the GATT "may be seen to embody a principle of fundamental importance – that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality."[40] It also stated that "[t]he relevant policy prin-

[34] Art. I(8)(3) of the US Constitution [Also known as the "commerce clause"]; PUIG Gonzalo Villalta, *Freedom of Trade and Commerce*, Max Planck Encyclopedia of Comparative Constitutional Law, Oxford, Oxford University Press (2018) [hereinafter "Puig, *Freedom of Trade and Commerce*"].
[35] For example, the Indian constitution provides constitutional guarantee of equality through Arts. 14 and 15 of the Constitution.
[36] Lester, Mercurio & Davies, WTO Law, *supra* note 33 at 313.
[37] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R para. 101 (2004).
[38] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WR/DS139/AB/R para. 69 (2000).
[39] Lester, Mercurio & Davies, WTO Law, *supra* note 33 at 311.
[40] Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, p. 21, WT/DS24/AB/R (1997).

ciple is widely known as the principle of transparency and has obviously due process dimensions."[41] Article 11 of the DSU provides for objective assessment of matters before the dispute settlement body. While clarifying this duty, the Appellate Body in *Chile – Price Band System* stated that "due process" is an obligation that is inherent to the WTO dispute settlement system.[42]

The due process dimensions can be equated to domestic legal system's constitutional guarantees. Due process is embodied in domestic constitutions like the US through the Fifth and the Fourteenth amendments. In the Indian Constitution, due process is through Article 21, which guarantees life and liberty.[43] It was also included in the Magna Carta.[44] The principle of due process finds its basis in domestic legal systems through constitutional guarantees and is an integral part of the multilateral trading system. The multilateral acceptance through treaty practice, the fundamental nature, and the basis of the norm in constitutional guarantees, elevates "due process" to a constitutional norm.

B. Constitutionalization: The role of the WTO Appellate Body

While subsection A dealt with some of the substantive GATT obligations, this subsection will demonstrate that the multilateral trading system has evolved from mere embodiment of constitutional norms into the system, to constitutionalization. To constitutionalize norms, means to actively engage in administering the legal order in an objective manner. While many subsets of public international law have an institutionalized dispute resolution model,[45] the Appellate Body deserves a special mention in this context. The Appellate Body is established to hear appeals from the report of the WTO panels.[46] As the name suggests, it functions as an appellate review mechanism for WTO disputes. One of the former Appellate Body member has even called it a "World Trade Court".[47] Previous to the establishment of the WTO, the dispute settlement was conducted by the GATT panels. The GATT panel reports that were released could be vetoed by a GATT member,[48] thereby indicating political interference in the judicial process of the multilateral trading system. The GATT system did not provide for judicial independence that the Appellate Body now has under the WTO set up.

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[41] *Id.*

[42] Appellate Body Report, Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, para 176, WT/DS207/AB/R (2002). The Appellate Body cited *India – Patents* to rely on the reasoning that the due process demands are implicit in the DSU [at para. 175].

[43] The Supreme Court of India's interpretation of Arts. 14 (right to equality) and 21 (right to life and liberty) has made "due process" a constitutional norm. *See* Kharak Singh v. State of Uttar Pradesh AIR 1963 SC 1295 (India); R.C. Cooper v. Union of India AIR 1970 SC 564 (India).

[44] Clause 39 of the 1215 Magna Carta states "*No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land.*"

[45] Like the International Court of Justice, Permanent Court of Arbitration etc.

[46] Art. 17.1, DSU, *supra* note 10.

[47] EHLERMANN Claus-Dieter, *Six Years on the Bench of the "World Trade Court" Some Personal Experiences as Member of the Appellate Body of the World Trade Organization* 36(4) JWT (2002), pp. 605-639.

[48] PAUWELYN Joost, *the Transformation of World Trade*, 104(1) Michigan L. Rev. (2005), pp. 1-66, p. 6.

The claim that the WTO system is constitutionalized, is not due to the mere establishment of the Appellate Body. It is the functioning of the Appellate Body that makes the system constitutionalized. It projects continuous objectivity in the international economic order within the WTO set up. It operates to administer and maintain the rule of law, and materialize the constitutional norms mentioned in the previous subsection by interpreting the rules. According to Cass, "[L]egal rules, principles, procedures, practices and institutions establishing the community, determining who has public power within it, and defining the scope of that power constitute the bulk of these practices of constitutionalization."[49] She also clarifies the usage of terminology in her arguments to state that "..one meaning which can be ascribed to constitutionalization in the international trade law context is the traditional characterization of constitution-making by judicial process."[50] Cass's argument has been transplanted in this article and I argue that Appellate Body continuously generates norms. The Appellate Body has not only performed the role of interpretation of WTO law and policy, but has generated norms wherever it thought fit to do so to uphold the objectivity of the legal order. As discussed in the subsection A, the Appellate Body used the principle of "due process" which can be witnessed in many constitutional interpretations, such as that of the US, and India, into WTO law to justify its reasoning. Taking the example of the *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*,[51] one scholar draws the conclusion that the Appellate Body has expanded its judicial authority from mere interpretation of WTO law in disputes, to the realm of law-making.[52] Other tests devised by the Appellate Body such as the "weighing and balancing test",[53] or the "necessity test",[54] indicate to substantiate the claim that the WTO Appellate Body also makes the law, that is free from political interference, unlike the previous GATT panel system.

The law-making aspect of the Appellate Body to provide objectivity in the legal order also points out to the adherence of precedents as a source of law. Joost Pauwelyn's data analysis highlights that 35.4% of the decisions of the Appellate Body are cross-referenced, and the WTO panels mostly follow the jurisprudence set by the Appellate Body, of course, with a few exceptions.[55] This indicates the acceptance by the WTO panels and the Appellate Body to adjudicate, not on an *ad-hoc* basis, but to build a WTO jurisprudence wherever there is ambiguity in the interpretation of the law. The Appellate Body [as long as it will exist][56] has

[49] Cass, Constitutionalization EJIL *supra* note 20 at 41.
[50] *Id.*
[51] Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China,* WT/DS379/AB/R (2011).
[52] Bahri, *Appellate Body Held Hostage*, *supra* note 13.
[53] For example, Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R and WT/DS169/AB/R (2001).
[54] For example, Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, WT/DS381/AB/R (2012).
[55] PAUWELYN Joost, *Minority Rules: Precedent and Participation Before the WTO Appellate Body*, *in* Jemielnaik Joanna, Neilson Laura & Olsen Henrik Palmer (eds), "Judicial Authority in International Economic Law", Cambridge, Cambridge University Press (2016), pp. 141-172, p. 155.
[56] The US has been blocking appointment of members to the Appellate Body.

been active in the realm of law-making. Therefore, as per the imported notion of "constitutionalization" from Cass's works, it could be stated that the WTO is a constitutionalized set up, whereby, the WTO Agreements are interpreted constantly by the Appellate Body to maintain objectivity in the legal order and administer the rule of law in the multilateral trading system.

IV. Towards constitutionalizing the investment regime: The multilateral investment court project

Unlike the institutionalized WTO mechanism to regulate multilateral trading system, international investment law is fragmented into 2000+ bilateral and multilateral investment treaties.[57] The dispute resolution mechanism is *ad-hoc* in nature and most investment treaties incorporate arbitration as a dispute resolution mechanism.[58] The jurisprudence is built on "constititutionalism" whereby the arbitral tribunals uphold certain international legal norms as an integral part of the legal order. However, it is not constitutionalized as of yet. The EU has been fostering the agenda for a MIC. This section will analyze in detail regarding the constitutionalism approach of international investment law, and explain the problems of constitutionalizing the system through a MIC.

A. Investment treaty regime through "constitutionalism" Lens[59]

While some authors state that international investment law has been "constitutionalized"[60] or is a part of "global constitutional law",[61] I have explained the perils of interchangeability in terms in international economic law under Section II. As identified by Stephan Schill, the regime of international investment law serves as having a "constitutional function".[62] The system is "functionally comparable to constitutional guarantees and administrative law principles at the domestic level that ensure non-discrimination, government according to the rule of law, and respect for property rights".[63] The current investment treaty regime operates to protect and promote the rule of law,[64] which operates as a constitutional norm. This constitutional norm, borrowed from national constitutions, that is being increasingly

[57] UNCTAD Data *supra* note 1.
[58] *See generally*, MCLACHLAN et al., *supra* note 3; SCHEFER Krista Nadakavukaren, *supra* note 3; LIM Chin Leng et. al., *supra* note 3; DOZLER Rudolf & SCHREUR Christoph H., *supra* note 3.
[59] Paine, *Investment Protection*, *supra* note 23. Joshua Paine has thoroughly synthesized the scholastic debate on the standards of treatments in international investment law as compared to constitutional law. The work in this subsection partly draws upon the research contained in Paine's book chapter.
[60] Behrens, *Towards Constitutionalization*, *supra* note 22.
[61] Paine, *Investment Protection*, *supra* note 23.
[62] SCHILL Stephan W., *The Multilateralization of International Investment Law,* Cambridge, Cambridge University Press (2009), p. 373. Although, Stephan W. Schill clarifies the term "constitutional function" with respect to international investment law to highlight the "functions of the constitutions in establishing principles and rights for the organization of the economy". *Id.* at p. 13, footnote 41.
[63] SCHILL Stephan W., *International Investment Law and Comparative Public Law – an Introduction*, *in* Schill Stephan W. (ed), "International Investment Law and Comparative Public Law", Oxford, Oxford University Press (2010) 24.
[64] *Id.*

transplanted into public international law. The UN Secretary-General's 2012 report described "rule of law" as a

> "*principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*"[65]

Some of the elements such as legal certainty, accountability, procedural and legal transparency, cannot be acclaimed in international investment law in totality. Concerns regarding the same have been expressed and countries are working on ISDS reforms to bridge the gaps at UNCITRAL Working Group III. However, some constitutional norms such as non-discrimination [MFN[66] and national treatment][67] fair and equitable treatment,[68] compensation for expropriation,[69] are considered constitutional norms. These principles will be analyzed to indicate their fundamental nature to the investment treaty regime.

1. Fair and equitable treatment

Fair and equitable treatment is quintessential to the legal order of international investment law. Joshua Paine states that the treatment has received a considerable degree of support in investment arbitration, treaty drafting practices, and scholastic writings.[70] Marc Jacob and Stephan Schill also state that the treatment is "an emanation of recurrent public law characteristics... as found in most domestic legal systems adhering to forms of democratic constitutionalism".[71] Specifically, Stephan Schill also states that the treatment has been encompassed in the framework of rule of law.[72] Arbitral tribunals have issues awards that highlight the fundamentality of the norm. The arbitral tribunal in *LG&E Energy Corp v. Argentina*

[65] *Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels, Report of the Secretary General*, UN Doc A/66/749 (2012) at para 2.
[66] For example, Emilio Agustin Maffezini v. Kingdom of Spain (ICSID No. Apr/97/7), Decision on Jurisdiction of 25 January 2000 and Award of the Tribunal of 13 November 2000; Pope & Talbot Inc. v. Canada Técnicas Medioambientales Tecmed, S.A. v. United Mexican States [ICSID Case No. ARB(AF)/00/2]; Pope & Talbot Inc. v. Government of Canada [Tribunal Decision – 10 April 2001].
[67] For example, Marvin Feldman v. Mexico, Award of 16 December 2002, 18 ICSID-Rev.- FILJ 488 (2003); Occidental Exploration and Production Company v. Ecuador, Award of 1 July 2004; S.D. Myers Inc. v. Canada, First Partial Award of November 13, 2000, 40 ILM 1408 (2001); GAMI v. Mexico, Award of 15 November 2004, 44 ILM 545 (2005).
[68] For example, Art. 2.2, German Model BIT (2008); Art. IV.1, Argentina – Spain BIT (1991); Art. 2.2, Argentina – UK BIT (1998); Saluka Investments BV v. the Czech Republic UNCITRAL Partial Award, para 297 (2006); Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (2000).
[69] For example, Methanex Corporation v United States of America, UNCITRAL (NAFTA), Final Award,m Oart IC, Chapter D, paras. 7-9 (2005); Grand River Enterprises Six Nations Ltd., et. al., v. the United States of America (NAFTA), UNCITRAL Arbitration Award paras. 146-155 (2011).
[70] Paine, *supra* note 23 at 17.
[71] JACOB Marc & SCHILL Stephan W., *Fair and Equitable Treatment: Content, Practice, Method*, *in* Bungenberg Marc et. al. (eds), "International Investment Law: A Handbook", Oxford, Hart Publishing (2015), pp. 700-763, p. 700, para 34.
[72] SCHILL Stephan W., *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, *in* Schill Stephan W. (ed), "International Investment Law and Comparative Public Law", Oxford, Oxford University Press (2010), pp. 151-182, pp. 155-170.

stated that "[t]he Tribunal considers this interpretation to be an emerging standard of fair and equitable treatment in international law."[73]

Stephan Schill analyzes this decision to state that there are striking parallels in the award to constitutional systems with respect to fair and equitable treatment to rule of law, such as arbitrariness, discrimination, due process, and transparency.[74] Therefore, using Petersmann's definition of constitutionalism highlighted in Section II, it can be stated that fair and equitable treatment is so fundamental to the investment treaty regime, that it could be elevated to a constitutional norm.

2. Protection against expropriation

Like the fair and equitable treatment, "compensation for expropriation" is considered as a fundamental principle of investment treaty regime that is common to majority of domestic legal systems at a constitutional level. Law and policies against expropriation and nationalization of investors' properties "directly invite parallels" between international investment law and national constitutional systems.[75] Similarities have been drawn to the constitutions of Croatia, Denmark, Germany and Italy.[76] In the US, courts have permitted the State for compensated takings on the basis of government's sovereign right to protect its people.[77] The principle of protection against expropriation is common to almost all investment treaties,[78] that works towards the protection of investors' property rights. This protection can be found in domestic legal systems on a constitutional level. Some authors also note that this protection in investment treaties goes beyond the domestic constitutions to ensure protection against indirect expropriation.[79]

The "protection against expropriation" is not an objective standard *per se*. States have the right to regulate their internal markets, and modify laws and policies. The arbitral tribunal in *Tecnicas* v. *Mexico* states that "[t]he principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable."[80] Among other things, the expropriatory measures must adhere to the fol-

[73] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 125.
[74] SCHILL Stephan W., *International Investment Law and the Rule of Law*, *in* Lowell Jeffrey et. al. (eds), "Rule of Law Symposium 2014: The Importance of the Rule of Law in Promoting Development", Singapore, Academy Publishing, (2015), pp. 81-102, 90 [hereinafter "Schill, *International Investment Law and the Rule of Law*"].
[75] SCHNEIDERMAN David, *Global Constitutionalism and its Legitimacy Problems: Human Rights, Proportionality, and International Investment Law* 12(2) Journal of the Law & Ethics of Human Rights (2018), p. 251-280.
[76] DE CHAZOURNES Laurence Boisson & MCGARRY Brian, *What Roles Can Constitutional Law Play in Investment Arbitration?* 15(5-6) JWIT (2014), pp. 862-888. [hereinafter "de Chazournes & McGarry, *What Roles Can Constitutional Law Play in Investment Arbitration*"].
[77] MEYLER Bernadette A., *Economic Emergency and the Rule of Law* 56 DePaul Law Review, (2007) 539-567, 558.
[78] Paine, *Investment Protection*, *supra* note 23 at footnote 116 states that the UNCTAD's Mapping Project of International Investment Agreements highlight that 2563 out of 2671 treaties contain clauses on expropriation.
[79] Paine, *Investment Protection*, *supra* note 23 at 27-28.
[80] Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 119.

lowing conditions: a) non-discrimination, b) due process of law; and c) payment of compensation. These conditions are also an embodiment of the rule of law, as explained in the UN Secretary General's 2012 report. The protection against expropriation is one of the fundamental norm for foreign investors. Considering this standard of protection, an adoption from domestic constitutional guarantees, has received considerable degree of acceptance in international law, it can be elevated to a norm that is fundamental to the legal order of investment treaties.

3. Non-discrimination

Although, "non-discrimination" can encompass broad subject areas like human rights law, this analysis is limited to international economic law. In broad terms, principle of "non-discrimination" in investment treaty regime works towards ensuring a "level economic playing field between foreign and domestic market participants".[81] The policy objective to regulate non-discrimination in both trade and investment is because "a foreign market actor seeks access to a domestic market under equal competitive parameters compared to domestic market actors."[82] The economic aspect of non-discrimination can be comparable to certain domestic legal systems as well [as explained in Section II.A.i].

In international economic law, the principle of non-discrimination is not a blanket protection. States are provided an opportunity to justify discriminatory policies and measures. The legitimate policy aim must be justified and the adjudicatory bodies conduct a test of balancing the interests[83] [or proportionality analysis].[84] In WTO law, a measure that violates the GATT obligations must be justified under the *chapeau* of Article XX if the measure also fits into one of the exceptions provided under the same. Among other things, the *chapeau* mandates that the Article XX measures must not be discriminatory. Similarly in international investment law, tribunals have used the balancing mechanism to determine whether there is a reasonable nexus between the measure and a rational, non-discriminatory policy. [85] In *Parkerings-Compagniet AS* v *Lithuania*, the tribunal held "what is prohibited [] is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power"[86] to balance the host state's right to regulate and investor rights. In *Waste Management v Mexico*, an ICSID

[81] DIMASCIO Nicholas & PAUWELYN Joost, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?,* 102(1) AJIL (2007) pp. 48-89, p. 82.
[82] DIEBOLD Nicolas F., *Standards of Non-Discrimination in International Economic Law*, 60(4) The International and Comparative Law Quarterly (2011) pp. 831-865, p. 832.
[83] NAGY Csongor István, *Clash of Trade and National Public Interest in WTO Law: The Illusion of 'Weighing and Balancing' and the Theory of Reservation*, 23(1) Journal of International Economic Law (2020) forthcoming. Although the author is critical of the AB's usage of the "weighing and balancing" test, he traces the WTO AB jurisprudence on this issue in detail, starting with the 2000 AB report on *Korea – Beef* (DS 161).
[84] HENCKELS Caroline, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy*, Cambridge, Cambridge University Press (2015), pp. 23-26. The author structures a step-by-step analysis of how to determine the legitimate objective through proportionality test.
[85] Pope & Talbot Inc v Canada, UNCITRAL, Award on the Merits of Phase II (2001) para 78-79.
[86] Parkerings-Compagniet AS v Lithuania, ICSID Case No ARB/05/8, Award, para 331 (2007).

Additional Facility case under the North American Free Trade Agreement (NAFTA), the Tribunal held:

> *"… infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."*[87]

In international investment law, the obligation of national treatment, a subset of non-discrimination principle, appears in most investment treaties.[88] As explained above, domestic legal systems also incorporate this principle as one of their constitutional guarantees. The acceptance of this domestic constitutional principle in the regime of international investment law, which is also a part of rule of law in international law, suggests that it is a fundamental norm that could be elevated to the status of a constitutional norm.

The system of international investment law operates through recognition of certain constitutional principles that are fundamental to its legal order. Based on the examples provided above, it is evident that the arbitral tribunals have considered "rule of law" as one of the fundamental objectives of international investment law. To protect the rule of law, the arbitral tribunals have used constitutional norms such as fair and equitable treatment, protection against expropriation, non-discrimination as some of the tools. The system does not have a global constitution. The arbitration model is also considered flawed to promote independence of adjudicatory bodies that could generate constitutional norms through judicial processes. Therefore, it is not constitutionalized yet. The recognition of certain constitutional principles, without a global constitution or a constitutionalized mechanism, highlights that the current investment treaty regime operates through the lenses of "constitutionalism".

B. Constitutionalization of MICS: But wait…?

Currently, 163 countries are parties to the International Centre for Settlement of Investment Disputes [ICSID][89] that facilitates dispute resolution through *ad-hoc* arbitral tribunals.

[87] Waste Management, Inc. v. Mexico ICSID Case No. ARB (AF)/98/2 15 ICSID REV.-FOR. INV. L. J. 214 (2000).
[88] Paine, *Investment Protection*, *supra* note 23 at footnote 154 studies the UNCTAD Mapping Project of International Investment Agreements to show that 2018 out of 2571 treaties provide a national treatment clause for post-establishment treatment; and 165 treaties provide for pre and post establishment.
[89] International Centre for Settlement of Investment Disputes, *Database of ICSID Member States*, <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> [last accessed on 17 July 2019].

Due to the *ad-hoc* nature, conflicting decisions can arise.[90] This has raised concerns on consistency, predictability, and security, in the system, thereby attacking the rule of law.[91] Among other things, arbitral tribunals' interpretation of the vague terms like "fair and equitable treatment" and "measures tantamount to expropriation" has been criticized.[92] Concerns relating to independence and impartiality have also been raised due to the fact that arbitrators are appointed by the parties.[93] In the current system, arbitrators are often accused of favoring investors.[94] This attacks the independence and impartiality of the arbitration mechanism. However, this accusation has not been empirically proven.[95] Other concerns on legitimacy of the system also the goals of international investment law.[96]

In response to increasing criticisms that attack the core of legitimacy of the current system, the EU has proposed for a MIC. The EU states that this court will be a permanent, independent, predictable, comprehensive, cost-effective and a transparent model.[97] It has concluded economic agreements with Canada, Vietnam, Singapore, Mexico etc.[98] that includes the establishment of a MIC to resolve investment disputes. The European Court of Justice has also provided a green signal to state that incorporation of an investment court system in EU's trade agreements is compatible with the EU law.[99] At the UNCITRAL Working Group III where current negotiations on ISDS reforms are taking place, the EU is advocating for a multilateral resolution of systemic issues.[100] It is claimed by scholars as well as the EU, that institutionalizing the system has advantages: consistency in jurisprudence, greater legitimacy, independence and neutrality of judges, lack of control mechanism, cost efficiency, access for small and medium enterprises, transparency, and time efficiency.[101]

Before accepting the claim that a MIC would provide consistency in jurisprudence, predictability and legitimacy, its feasibility must be tested. The next part tests the feasibility of the same.

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[90] For example, Cont'l Cas. Co. v. Arg. Republic, ICSID Case No. ARB/03/9, Award, paras. 189-230 (Sept. 5, 2008) with Enron Corp. & Ponderosa Assets, L.P. v. Arg. Republic, ICSID Case No. ARB/01/3, Award, paras. 322-45 (May 22, 2007); Ronald S. Lauder v. Czech Republic, Final Award (UNCITRAL Sept. 3, 2001), with CME Czech Republic B.V. (Neth.) v. Czech Republic, Final Award (UNCITRAL Mar. 14, 2003).

[91] PUIG Sergio & SCAFFER Gregory, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law* 112(3) AJIL (2018), pp. 361-409, p. 362 [hereinafter "Puig & Shaffer, *Imperfect Alternatives*"]; FRANCK Susan D., *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham Law Review (2005), pp. 1521-1625, p. 1521; PAULSSON Jan, *Avoiding Unintended Consequences*, *in* Sauvant Karl & Chiswick-Patterson Michael (eds), "Appeals Mechanisms in International Investment Disputes", Oxford, Oxford University Press (2008), pp. 241-266, pp. 241, 258-59.

[92] Puig & Shaffer, *Imperfect Alternatives*, *Id.* at 366.

[93] *Id.* at 366.

[94] UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA Issues Note No. 2, (June 2013).

[95] FRANCK Susan D., *Development and Outcomes of Investment Treaty Arbitration*, 50 Harvard ILJ (2009) pp. 435-489, p. 435.

[96] Puig & Shaffer, *Imperfect Alternatives*, *supra* note 91 at 366-368.

[97] *The Factsheet on MIC*, the European Commission, *supra* note at 1.

[98] BROWN Colin M., *A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches*, 32(3) ICSID Rev – Foreign Investment Law Journal (2017) pp. 673-690, p. 682 ["The EU is currently engaging on a similar basis with all of its negotiating partners (Viet Nam, Singapore, Japan, the United States, China, Myanmar, Indonesia, Malaysia, Mexico etc.)."].

[99] ECJ, Opinion 1/17 (2019) EU:C:2019:341 (CETA Opinion).

[100] UNCITRAL Working Group III, Report of 37th Session, *supra* note 6 at paras 71, 72 & 74.

[101] BUNGENBERG Marc & REINISCH August, *From Bilateral Arbitral Tribunals and Investment Courts to A Multilateral Investment Court, Options Regarding the Institutionalization of Investor-State Dispute Settlement [European Yearbook Of International Economic Law]*, New York, Springer (2018), pp. 14-22 [hereinafter "Bungenberg & Reinisch, Multilateral Investment Court"].

1. Feasibility test

Due to problems that attack core legitimacy of the current system, Sergio Puig and Gregory Shaffer have attempted to reframe the goals of international investment law.[102] They discuss in detail why the goals of fairness, efficiency and peace, are linked to rule of law. They borrow the socio-legal perspective to state that the goals of "rule of law" is to restrain the governments for the purposes of security and predictability. For international investment law specifically, they apply this definition to state that "the rule of law provides foreign investors with the security and predictability that state commitments to them will be upheld".[103] The mandate of predictability and security can be achieved through harmonization of judgments. This harmonization can be achieved through interpreting the terms of treaties in a coherent manner. However, the proposed MIC project makes it difficult to address the coherence issue and uphold the harmonization mandate. The difficulty in achieving coherence is due to the formulation of procedural rules as an antecedent without a consensus on substantive standards.

a. Procedural rules as an antecedent

Unlike the WTO framework which has multilateral substantive laws, the applicable substantive law in an investment dispute would still be under a specific investment treaty. The EU's proposal on MIC project states that a permanent court system would "rule on disputes arising under future and existing investment treaties".[104] This means, that a MIC would be institutionalized by way of procedural rules, but not by way of substantive law. The permanent court would function to interpret the law that is laid down in fragmented substantive law through 2000+ bilateral and multilateral investment treaties. In such a scenario, decisions by the permanent court could still be inconsistent depending on the substantive law in place, which is how to current system looks like through the ISDS model. Some authors have stated that proper consistency can be achieved only by way of multilateralization of substantive law.[105]

There is no inherent issue with devising procedural rules before the substantive standards. For example, the WTO dispute settlement was set up in 1995 through the DSU. The Trade Facilitation Agreement [TFA] came into force in 2017 that attaches the dispute resolution under the DSU. Although it was signed 22 years after the DSU, there is no structural issue for litigating disputes under the TFA. A similar example can be seen in domestic legal systems. In common law, courts are established through legislative enactments that may be much before certain substantive law. Therefore, there is no inherent issue with devising

[102] Puig & Shaffer, *Imperfect Alternatives*, *supra* note 91 at 375-379.
[103] *Id.* at 377.
[104] The European Commission, *The Multilateral Investment Court Project*, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608> (accessed on 14 October 2019).
[105] Bungenberg & Reinisch, Multilateral Investment Court, *supra* note 101 at 16.

procedural rules before substantive standards *per se*. There is no inherent issue for international investment law either. But, to achieve the goals of investment law such as security, predictability, and the rule of law, substantive law must be multilateralized. The application of the substantive law must be across all parties subject to the legal order.

b. Lack of multilaterality

In the absence of multilateralized substantive standards, a MIC would adjudicate disputes under the specific applicable treaty. If the mandate of harmonization is imposed, a decision provided under CETA would be applicable to future disputes under CETA; and a decision under prospective EU-China Investment Agreement [if and when ratified] would be applicable to future disputes under that treaty. This pattern would create boxes of jurisprudence rather than a coherent approach to build consistency. As elaborated by various scholars, arbitrators have already attempted to harmonize the standards of protection across various treaties. If this practice is adopted, a decision under CETA may be of use in a dispute concerning the EU-Mexico Global Agreement, due to similar wordings of the standards of protection. The cross referencing of boxes of jurisprudence comes with a danger of the "slippery-slope" effect. The previous rulings may be used on a general standard of protection such as the "fair and equitable treatment" across most investment treaties. However, it may operate against the rules of treaty interpretation. For example, if the legal reasoning for a decision on an MFN issue under CETA is adopted in a dispute where the 2016 Indian Model BIT is applicable [assuming India accedes to MIC], it could violate the rules of treaty interpretation. This is because this model BIT does not provide MFN protection at all. The MIC will be mandated to decide the dispute based on the rules of treaty interpretation under the Vienna Convention on the Law of Treaties [VCLT]. As per Article 31, a treaty must be interpreted based on the ordinary meaning of the terms in their context, and in light of its object and purpose.[106] CETA's object and purpose is to eliminate barriers, and protect investments and investors.[107] In contrast, the Indian model BIT's object and purpose is for "bilateral cooperation" between signatories with respect to foreign investments. It does not mention the protection of investments or investors. In a scenario where the texts and the objects are different, borrowing judgments under CETA into a dispute concerning the Indian model BIT would violate the rules of treaty interpretation.

The creation of boxes would cause more confusion than there already is. Now, the parties to a dispute assess the possibility of arbitrators' rulings in their favor during the appointment stage. There is also a concern that the current system allows arbitrators practice "double hatting" where they are permitted to represent clients in other arbitrations, thereby creating an incentive to favor investors. In the current MIC proposal, the dispute resolution

[106] Art. 31, *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS 1155, p. 331.
[107] Preamble, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14.1.2017, pp. 23-1079, p. 24.

mechanism is based on permanency of judges. The judges are appointed by signatories to the MIC, rather than investors. This is likely to address the concerns of independence and impartiality. However, where the level of coherence is foreseen, investors are likely to shop decisions and interpretations from other treaties that works in their favor. This increases the cross-referencing in the boxes of jurisprudence that is likely to create chaos. This chaos could further fragment the system.

c. Lack of consensus for multilateral substantive rules

As of now, there is no proposal for multilateralized substantive standards. We have seen the failure to achieve consensus on OECD's multilateral investment agreement in the late 1990s. However, is there forecast of countries working towards substantive standards along with procedural rules? No. The EU's proposal has gained support from Canada, Vietnam, Mexico, China etc. However, it has fallen short of achieving multilateral consensus. In an EU parliamentary question answered on behalf of the European Commissioner for Trade, the response stated "It seems, however, that a multilateral consensus on the substantive investment rules is difficult to achieve in the short or medium term."[108] The EU proposal also states that the establishment of a MIC is the "preferred option" without involving substantive investment rules such as non-discrimination, fair and equitable treatment, non-expropriation.[109] At the Working Group III, several UN members have proposed alternatives. Brazil suggests to move forward with a dispute-prevention model rather than a dispute resolution model. In a case of dispute resolution, it pushes for a state-state dispute resolution rather than ISDS.[110] The South African model pushes for mediation, while also expressing major concerns regarding the MIC proposal.[111] Although India has not made any proposals yet, its 2016 model BIT[112] mandates exhaustion of local remedies for five years before invoking investment arbitration, thereby highlighting its move towards domestic dispute resolution. Therefore, there is no consensus on devising multilateralized substantive rules for investment.

d. Rule of law issues

The issues concerning inconsistent decisions, certainty, and predictability, attack the core of the rule of law of a legal system. Scholars have taken divergent views on whether current

[108] The European Parliament, Parliamentary Questions, *Answer on Behalf of Ms. Malmstrom on behalf of the* Commission Question reference: E-002526/2018 <http://www.europarl.europa.eu/doceo/document/E-8-2018-002526-ASW_EN.html?redirect> [hereinafter "The European Parliament, Parliamentary Questions"].
[109] The European Parliament, *Multilateral Court for the Settlement of Investment Disputes*, *Option 5* <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/611016/EPRS_BRI(2017)611016_EN.pdf>
[110] United Nations Commission on International Trade Law, *Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of Brazil*, A/CN.9/WG.III/WP.171 (11 June 2019).
[111] United Nations Commission on International Trade Law, *Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of South Africa*, A/CN.9/WG.III/WP.1 (17 July 2019).
[112] Government of India, *Model Text for the Indian Bilateral Investment Treaty*, available at: https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

system promotes the rule of law. The most vocal critic of rule of law in this subject is Gus van Harten, who stated that a rules-based system does not exist where "procedural and institutional aspects of the system that suggest it will tend to favour claimants and, more specifically, those states and other actors that wield power over appointing authorities or the system as a whole. On the other hand, other states and investors (especially those that bring claims against a powerful state) can expect to be disadvantaged."[113] On the other hand, Stephan Schill explains the implicit nature of rule of law through objectives in the treaties and standards of protection as embodiments of the rule of law.[114] Interestingly, Puig and Shaffer who use a socio-legal perspective, also come to a conclusion that security and predictability for investments are core components of the rule of law in international investment law.[115]

Considering the abovementioned socio-legal perspective on rule of law, it is pertinent to ask if the proposed MIC would be a rule-based system. As explained, it's inability to create multilateral effects on coherence undermines the security and predictability goals of the proposal. The lack of security and predictability inevitably attacks the rule of law goals of the international investment law. The inability to uphold rule of law questions the legitimacy of the proposal itself. Due to the creation of box-like jurisprudential value to the decisions, the system will be at best plurilateral, rather than multilateral.

e. A genius idea with a tipping point

The EU has stated that the negotiations in the Working Group III on procedural rules can serve as a catalyst to discuss substantive rules.[116] The MIC, when established, would have jurisdiction over the EU trade agreements, such as with Canada, Vietnam and Mexico. These agreements have similarly worded texts, object and purpose. If the MIC project succeeds, and future acceding members wish for coherence, security and predictability, in the system, they must align their substantive law to that of the EU's trade agreements. If this is achieved across the board, a multilateral substantive law can be agreed upon based on similarity in the textual wordings, object and purposes. A multilateral investment agreement would come into place based on the substantive law of the EU. This is a genius idea. If the trajectory of the establishment of the system works as expected, it could indeed serve as a catalyst to discuss and agree upon multilateral substantive rules. However, due to the lack of consensus for a MIC as well as standards of protection, it is unlikely that such a trajectory would work as planned. If the tipping point for discussions is reached and the members do

[113] VAN HARTEN Gus, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, *in* Schill Stephan W. (ed) "International Investment Law and Comparative Public Law", Oxford, Oxford University Press (2010), pp. 627-657, p. 627.
[114] Schill, *International Investment Law and the Rule of Law*, *supra* note 74 at 5-11.
[115] Puig & Shaffer, *Imperfect Alternatives, supra* note 91 at 377.
[116] HEGDE Vineet, 'Rethinking Global Governance on Trade and Investment' Conference: Insights on ISDS Reform Proposals, GLOBE Project Blog, 9 September 2019, available at: https://www.globe-project.eu/en/-rethinking-global-governance-on-trade-and-investment-conference-insights-on-isds-reform-proposals_6821.

not accept the solutions of the others, it could also further fragment the system. The discussions at the UNCITRAL Working Group III could yield unfruitful and the system could further fragment, even into domestic adjudication of investment disputes.

f. Fundamental differences between trade and investment

Considering the disciplines of trade and investment are intertwined, there could be a tendency of MIC to imitate the operations of the WTO dispute settlement mechanism. A MIC would be a permanent and an independent body that is free from political interferences, just like the Appellate Body. The EU's in the parliamentary response mentioned above also stated that "Ideally and in the long-term, the international investment regime should be governed by one coherent set of rules comparable to the multilateral trade-law regime embodied in the agreements of the World Trade Organisation (WTO)."[117] However, it is important to recognize the fundamental differences in WTO law and international investment law. Among other things, the legal order for international trade law operates to protect the freedom of trade and commerce. Freedom of trade and commerce is considered as a global common good,[118] with 164 members striving to protect the same. International investment law exists to protect and promote investments and investors. The protection of investment, *inter alia* relates to the protection of property rights. One could argue that protection of property is a domestic issue. Although the efficiency of the WTO dispute resolution mechanism is celebrated,[119] a mere transplantation of the WTO dispute resolution mechanism would not be ideal. While some have praised the constitutionalized model of administering justice through the WTO Appellate Body,[120] concerns regarding the transplantation of the model into the investment order may pose a danger of "coherence in the wrong direction".[121] Importing the WTO mechanism into the ICSID model is also questioned to state that the "uniformity in investment jurisprudence may appear to some observers as a deficit in the constitutionalization of arbitral practices".[122] The same concerns may be raised for a MIC due to consistency issues that might arise in the interpretation of fragmented applicable substantive laws. Therefore, a careful evaluation on the method of investment governance must be designed in such a way that the fundamental gaps highlighted are bridged.

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[117] The European Parliament, Parliamentary Questions, *supra* note 108.
[118] Puig, *Freedom of Trade and Commerce*, *supra* note 34.
[119] *See generally*, CREAMER Cosette D., *From the WTO's Crown Jewel to its Crown of Thorns*, 113 AJIL Unbound (2019), pp. 51-55, available at: https://www-cambridge-org.kuleuven.ezproxy.kuleuven.be/core/journals/american-journal-of-international-law/article/from-the-wtos-crown-jewel-to-its-crown-of-thorns/A694F7C8B6EA004ECDEEF8D3EA33883E
[120] KLÄGER Roland, *Fair and Equitable Treatment' in International Investment* Law, Cambridge, Cambridge University Press (2011), pp. 311-312.
[121] MONTT Santiago, *State Liability in Investment Treaty Arbitration—Global Constitutional and Administrative Law in the BIT Generation*, Oxford, Oxford University Press (2009), p. 12.
[122] de Chazournes & McGarry, *What Roles Can Constitutional Law Play in Investment Arbitration supra* note 76 at 885; AFILALO Ari, *Constitutionalization Through the Back Door: A European Perspective on NAFTA's Investment Chapter* 34 NYU Journal of International Law and Policy (2001), pp. 1-55, p. 43.

g. Results of the feasibility test

International investment law works on the constitutionalism dimension, where certain constitutional principles are embodied in the legal order. Constitutionalizing this order by way of an independent and a permanent body such as a MIC would entail constitutional-making process through an adjudicatory set up. Due to the lack of multilateral consensus on substantive law, a MIC would be unable to provide coherence, stability and predictability in the system. This would undermine the rule of law goals of international investment law. If the proposed MIC works towards harmonization, there is a possibility that it would violate the rules of interpretation. In the absence of security, predictability, and the rule of law, constitutionalizing the system would be dangerous that could provide coherence in the wrong direction. Moreover, it would not look any different from the current system, and would merely be a wolf in a sheep's clothing.

V. Conclusions

The EU's proposal of a MIC may seem like a good solution to address the current ISDS problems. However, when the feasibility of the same is tested against the goals of international investment law, it fails to deliver positive results. In the dimension of coherence concerns, a MIC would operate similar to that of the current ISDS model. It would adjudicate disputes, where substantive rules are fragmented into several investment treaties. The mandate of harmonization cannot be achieved without agreeing on multilateral substantive rules, like that of the WTO framework. Moreover, there is no consensus for multilateral substantive rules. In such a scenario, a MIC would create box-like jurisprudence, thereby failing to achieve coherence, security and predictability, in their true meaning. Due to this inability, the rule of law will not upheld. The goals of international investment law cannot be met through a MIC in the current form. Furthermore, a romanticized transplantation of the Appellate Body needs to be carefully envisioned, considering the fundamental differences in the goals of international trade law and international investment law. Coming back to the "C" word dilemma, constitutionalizing the investment treaty regime by providing powers to an independent adjudicatory body in to generate constitutional norms, may not serve the intended purposes of the MIC project. Multilateral substantive rules, like the WTO framework, must be devised as an antecedent, to further the goals of international investment law.

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List of abbreviations

DSU	Dispute Settlement Understanding
EU	European Union
GATT	General Agreement on Tariff and Trade
ICSID	International Convention for Settlement of Investment Disputes
MFN	Most-Favoured Nation
MICS	Multilateral Investment Court System
TFA	Trade Facilitation Agreement
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on Law of Treaties
WTO	World Trade Organization

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