



UNCITRAL Working Group III
Resumed 38th session, Vienna, 20-24 January 2020

Structural reform of ISDS: The Establishment of a Multilateral Investment Court

The European Union and its Member States

Outline

1. Concerns identified by Working Group III
2. How a permanent structure responds to the identified concerns
3. Main features of a Multilateral Investment Court
4. Why other reform options do not address the identified concerns
5. Open architecture

1. Concerns identified by Working Group III

Three main categories of concerns

1. Consistency and correctness

- Lack of predictability caused by inconsistent interpretations
- Lack of framework for multiple proceedings
- Absence of/limited mechanisms to address inconsistency and incorrectness

2. Arbitrators and decision-makers

- Lack of actual/perceived impartiality and independence
- Inadequacy of disclosure or challenge mechanisms
- Lack of geographic and gender diversity
- Concerns regarding expertise of adjudicators

3. Cost and duration

- Cost and duration
- Allocation of costs
- Security for costs



These concerns are interlinked and systemic

2. How a permanent structure responds to the identified concerns

A permanent structure responds to:

1. Concerns related to **consistency and correctness**



Institutional structure with permanent adjudicators drives consistency and predictability as regards the interpretation of (i) same treaty, (ii) similarly-worded clauses in different treaties, and (iii) elaboration of consistent methodology for interpreting same core issues across treaties



Appeal mechanism ensures correctness and, given its hierarchical status, greater consistency

A permanent structure responds to:

2. Concerns related to **adjudicators**

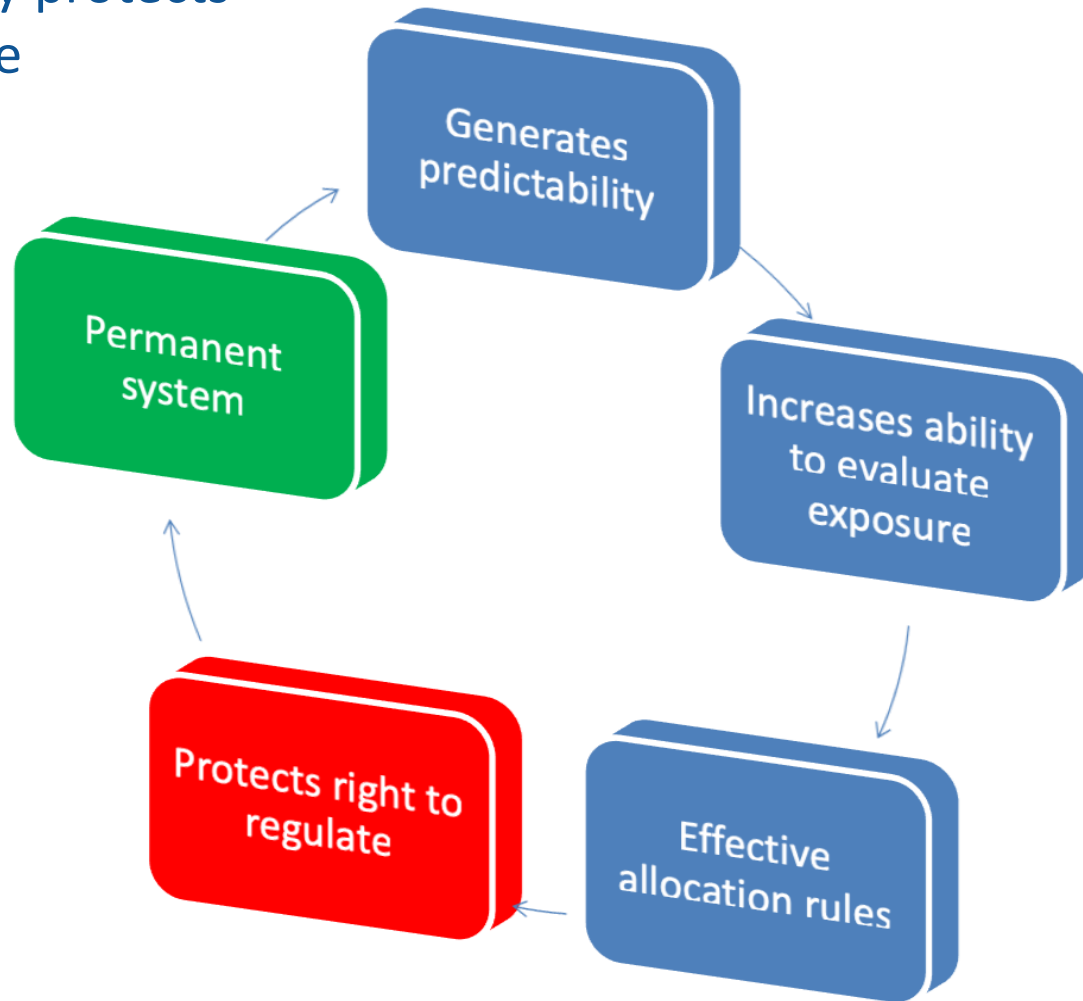
- A permanent structure with full-time adjudicators removes ethics concerns (e.g. conflicts of interest) arising from ad hoc system
- A permanent structure responds to legitimacy concerns linked to party-appointment and repeat appointments (e.g. perceived incentives to rule in favour of the appointing party in order to secure reappointment in future cases)
- Diversity concerns can be directly addressed through direct requirements in structure

A permanent structure responds to:

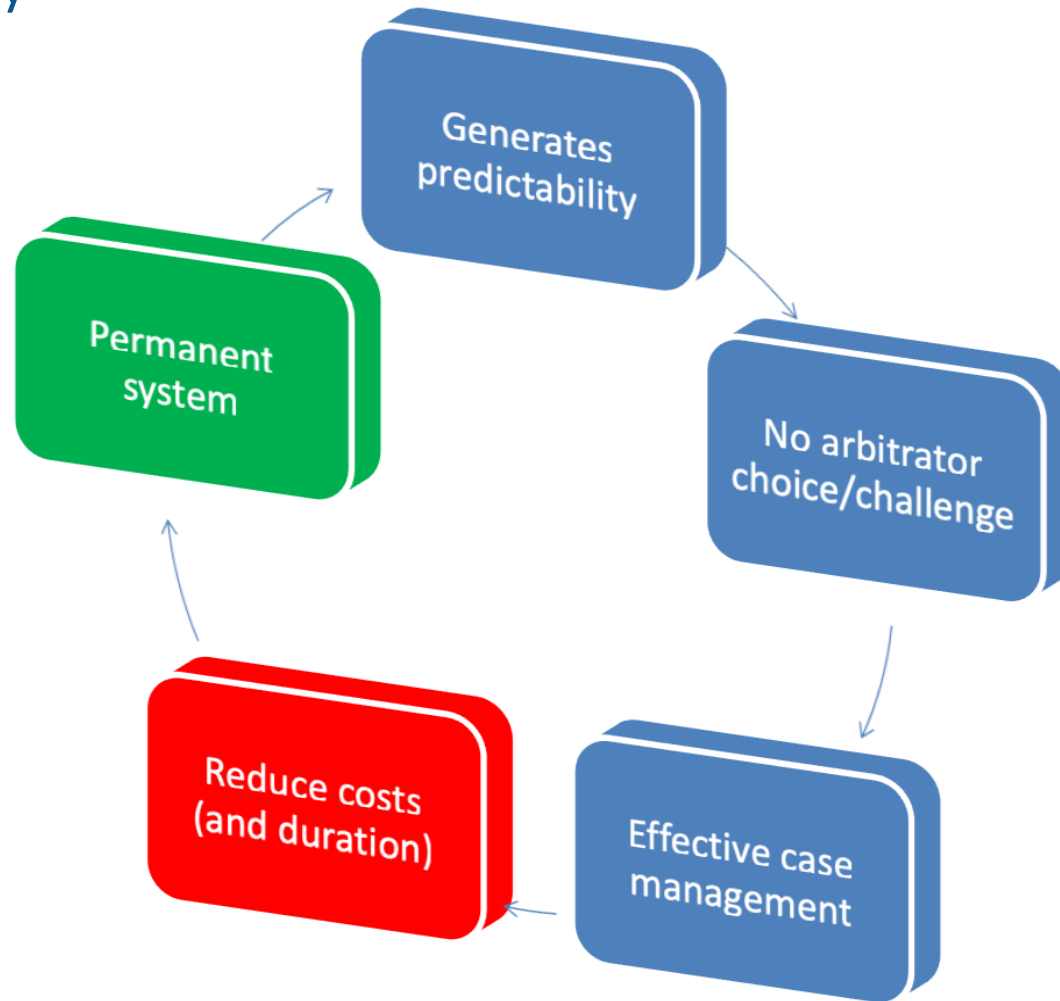
3. Concerns related to **cost** and **duration**

- ↳ Consistency and predictability end repeat litigation of established interpretations → reduce costs
- ↳ No time and costs linked to choosing arbitrators + challenges
- ↳ Permanent body better controls costs and duration
→ no perceived interest in repeat appointments
- ↳ Permanent body with broad coverage can handle multiple, parallel proceedings

Permanent body protects right to regulate



Permanent body reduces costs



3. Main features of the Multilateral Investment Court

Design features

**First instance and
appeal mechanism**

**Full-time salaried
adjudicators
appointed by the
treaty parties for
fixed non-renewable
terms**

**High qualifications
and ethical
requirements,
geographical and
gender diversity**

**Robust appointment
procedures based on
best international
practices**

**Effective
enforcement
procedures**

**Open to all
interested countries**

**Applicable to
existing and future
international
treaties ("opt-in"
mechanism)**

**Allocation of costs
among treaty
parties based on
level of development**

**Advisory Centre for
investment law to
assist developing
countries**

**Transparency and
third party access**

**Improved access for
SMEs**

**Structured dialogue
between court and
treaty parties**

Design features

- First instance and appeal mechanism reviewing errors of law and manifest errors of fact
 - ✓ **Consistency and predictability**
 - ✓ **Correctness**
- Full-time salaried adjudicators appointed by the Treaty Parties for fixed long non-renewable terms
 - ✓ **Judicial independence and impartiality**
 - ✓ **Enhanced legitimacy**
 - ✓ **Consistency and predictability**
- High qualifications and ethical requirements (no outside activities) and representativeness requirements (regional and gender)
 - ✓ **Judicial independence and impartiality**
 - ✓ **Diversity**
 - ✓ **Accountability**

Design features

- Robust appointment procedures based on best international practices and requiring a significant majority of votes of the Treaty Parties
 - ✓ **Judicial independence and impartiality**
 - ✓ **Transparency**
 - ✓ **Inclusiveness**
 - ✓ **Legitimacy**
- Case assignment on a random basis
 - ✓ **Judicial independence and impartiality**
- Fixed salaries comparable to those paid to adjudicators in other international courts
 - ✓ **Judicial independence and impartiality**
 - ✓ **Removal of perceived case-specific incentives that may impact on costs and duration**

Design features

- System financed by Treaty Parties based on the level of development
 - ✓ **Reduction of costs for States and investors**
 - ✓ **Justice as a public good**
- Enhanced transparency and third-party access (UNCITRAL Transparency Rules)
 - ✓ **Transparency and participation**
 - ✓ **Accountability**
- Structured dialogue between court and Treaty Parties (binding interpretations)
 - ✓ **Accountability**
- Procedural rules covering specific issues (3rd party funding etc)
 - ✓ **Effectiveness**
 - ✓ **Equity**

Design features

- Effective alternative dispute resolution
 - ✓ **Reduction of costs**
- Advisory centre for developing countries
 - ✓ **Access to Justice**
 - ✓ **Reduction of costs**
- Special provisions for SMEs
 - ✓ **Access to Justice**
 - ✓ **Reduction of costs**
- Effective enforcement procedures (self-standing and/or based on New York or ICSID Conventions)
 - ✓ **Effectiveness**
- Applicable to State-to-State dispute settlement

4. Why other reform options do not address the identified concerns

Code of conduct

- Does **NOT** address concerns related to **consistency and correctness** ➔ ad hoc system remains in place
- Does **NOT** fix ethics and diversity concerns related to **adjudicators**
 - Adjudicators would still be appointed by the disputing parties ad hoc for a specific dispute
 - Disputing parties will keep appointing arbitrators with a known predictable profile
- Does **NOT** address concerns related to **cost and duration**
 - Cost of challenges
 - Perceived pressure of reappointment has an impact on case management

Strengthened appointment methods through appointing institutions or rosters

➤ Do **NOT** address concerns related to **consistency and correctness** ➔ ad hoc system remains in place

➤ Do **NOT** fix all ethics and diversity concerns related to **adjudicators**

➤ If appointments are made by parties, concerns remain

➤ If appointments are made by appointing institutions, still concerns related to ad hoc system remain

➤ Even with pre-established roster, adjudicators would have other activities ➔ risks of conflict of interests

➤ Do **NOT** fix all concerns related to **cost and duration**
(only partial reduction of length of proceedings, if an institution chooses arbitrators from a pre-established roster)

Mechanisms for Treaty Party interpretations

- Can **NOT** fix by itself concerns related to **consistency and correctness**
 - depends on agreement of Treaty Parties
 - ad hoc system remains in place
- Does **NOT** address ethics and diversity concerns related to **adjudicators** ➔ ad hoc party-appointment system remains in place
- Does **NOT** address concerns related to **cost and duration**

Ad hoc appeal

- ↳ Can **NOT** fix by itself concerns related to **consistency and correctness**
 - ↳ given the ad hoc nature of appeal tribunals, their conclusions on correctness may be more easily disregarded or rejected by other appeal tribunals and first instance tribunals
- ↳ Does **NOT** address ethics and diversity concerns related to **adjudicators** → ad hoc party-appointment system remains in place
- ↳ Does **NOT** address concerns related to **cost and duration**
 - ↳ compared to a permanent appellate mechanism, additional time would be spent constituting ad hoc appeal tribunals

Standing appellate mechanism



Does **NOT** fully fix concerns related to **consistency and correctness**



Bulk of problems arises at first instance



In the same two-tier permanent institution there will be a greater degree of deference towards an appeal mechanism as compared to that likely to be displayed by ad hoc tribunals



The possibility of remand is very difficult with ad hoc first instance tribunals given they will already be disbanded and may have other commitments after delivering their award



Does **NOT** address ethics and diversity concerns related to **adjudicators** at first instance

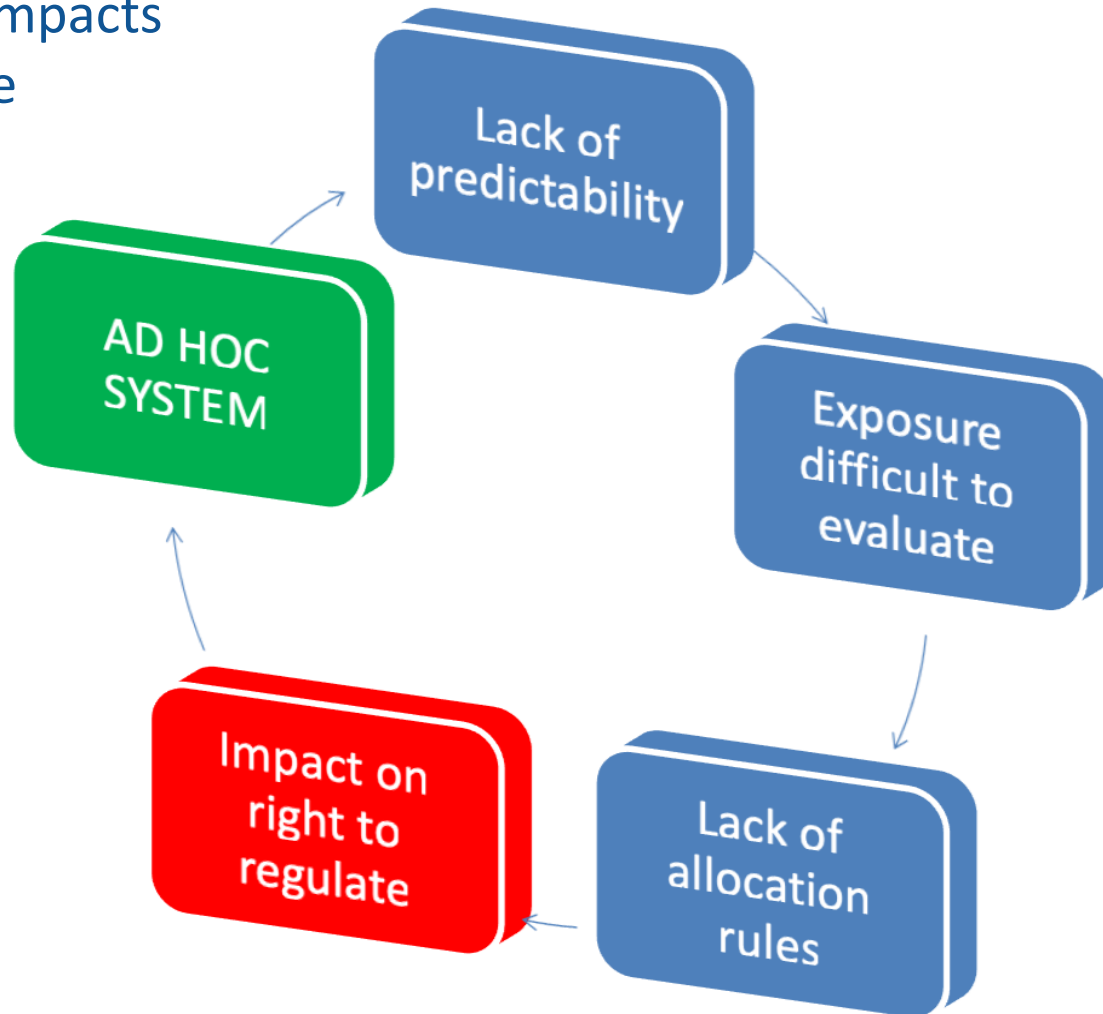


Does **NOT** address concerns related to **cost and duration** at first instance

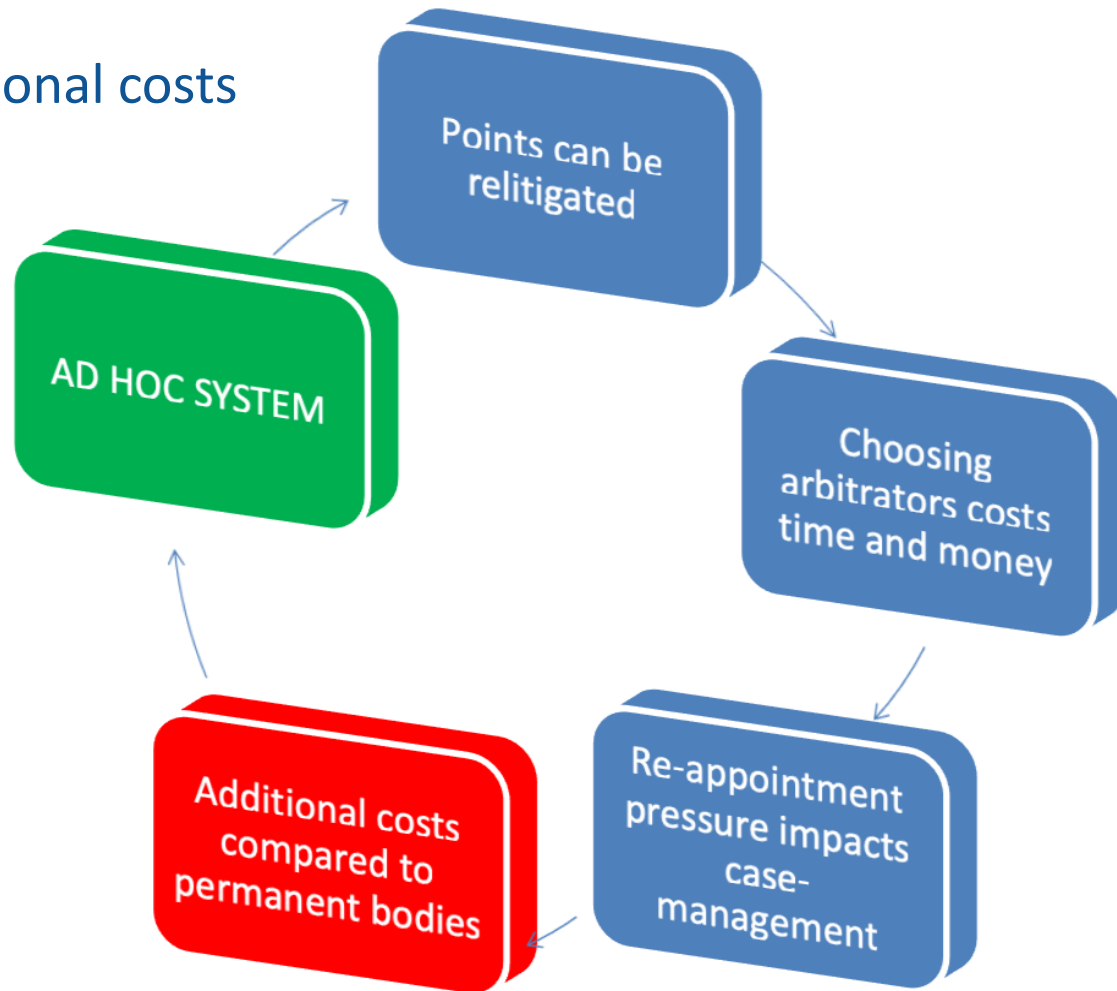


Cannot consolidate cases under same or different treaties

Ad hoc system impacts right to regulate



Ad hoc system generates additional costs



5. Open architecture

Open architecture

- Open to all countries who choose to use standing mechanism – positive consent from each country necessary
- Would operate between 2 countries when both have chosen to use the standing mechanism and agreed that it applies to the treaty between them
- A certain level of **flexibility** could be built into a standing mechanism:
 - Some countries might want to use a standing mechanism only for State-to-State dispute settlement (and not ISDS)
 - Some countries might want to use only the appellate instance of a two-tier standing mechanism
 - Some countries might want to use only first instance and not appeal of a standing mechanism

Open architecture

- Structure can include rules on specific issues, e.g.:
 - third-party funding
 - reflective loss
 - damages
- Would require ratification and positive opt-in for specific treaties. Examples of “opt-in” model:
 - UNCITRAL Mauritius Convention on Transparency in ISDS
 - Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the “BEPS Convention”)



Thank you

EU and Member States' papers:

Interlinked nature of concerns:

<https://undocs.org/en/A/CN.9/WG.III/WP.145>

Reform option-permanent mechanism:

<https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1>

European Commission, DG TRADE, Multilateral Investment Court project:

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>