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Rule of Law Issues in International Investment Disputes and Proposals for Multilateral Appellate Review
Challenges and Opportunities for UNCITRAL

Rule of Law Issues in International Investment Disputes and Proposals for Multilateral Appellate Review: Challenges and Opportunities for UNCITRAL

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Abstract

This thesis will evaluate investor-State dispute settlement (ISDS) and proposals for multilateral appellate review from an international rule of law (IRoL) and domestic rule of law (DRoL) perspective. Many problems have been identified in international investment law (IIL), but this thesis will focus on problems inherent in ISDS. These issues relate to matters such as access to justice, fairness, arbitrariness, transparency, appellate review, equality, State sovereignty, correctness, predictability, independence, impartiality, legal order, human rights, and sustainability. The content of an IRoL is contentious, but it will be argued that its defining characteristics can be linked to all these formal and substantive issues. Although the content of the DRoL is contested, it has been endorsed numerous times domestically and internationally in both primary and secondary sources, yet the concept of an IRoL and its implications for the IIL system needs deeper examination. This thesis will examine the potential content of an IRoL considering its relationship with the DRoL, and the role of State and non-State actors, to articulate an IRoL definition. Furthermore, it will investigate the extent to which existing ISDS structures reinforce or undermine an IRoL and the DRoL, with a focus on ISDS in the context of the United Nations Commission on International Trade Law (UNCITRAL). While it is not the primary site for ISDS, the focus on UNCITRAL, and in particular Working Group III, offers a point of reflection for proposed responses to some of the challenges facing IIL and principally ISDS reform. Arguably, UNCITRAL exposes problems and offers solutions attentive to the theoretical foundations of the thesis. This analysis will be used to explore the case for creating multilateral appellate review to address some of the existing problems in ISDS. In this context, the thesis will focus on what analysis of UNCITRAL policy making offers to this discussion regarding ISDS, the RoL, and the potential for multilateral appellate review.

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Author’s declaration

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's Regulations and Code of Practice for Research Degree Programmes and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author.

SIGNED: Alexander F Nunn

DATE: 16 December 2021

Contents

Chapter 1: Introduction

The phrase 'international investment law' (IIL) should reflect various important concepts such as ordered governance, legally binding norms, and legitimate coherence. This is especially important considering the rapid evolution of globalisation and the rising power of multinational corporations (MNCs), within an international system that seeks to maintain peaceful coexistence and cooperation between States.[1] Firstly, globalisation enhanced the significance of IIL, as it encouraged interaction between nationals of different countries. Secondly, the rise in cross-border collaboration and foreign direct investment (FDI) was assisted by the increasing presence of MNCs in the global order. Third, peaceful coexistence and cooperation between States encouraged investment in foreign States with protections that prevented investors losing property without an acceptable remedy.

Although in practice indirect expropriation has increased, explicit expropriation has diminished,[2] and despite some wars and tensions,[3] these have not significantly destabilised global peace and security affecting investment. These developments suggest that IIL *should* be a predictable and stable system. However, the current system of international investment does not reflect these developments or the evolving international society. Instead, IIL is complex, characterised by fragmentation of overlapping and conflicting international regulatory regimes which compete to prevail as the 'legitimate' regulatory framework for international investment.[4] These international regulatory regimes can be prone to inconsistency and incorrectness and lack appellate review.

It might be expected, with reference to a common understanding of the rule of law (RoL), that a universal, unified, multilateral international investment agreement/treaty exists that identifies the laws and dispute settlement procedures that should be followed in IIL to promote clarity and coherence. In the absence of such a treaty, bilateral investment treaties (BITs) and international investment agreements (IIAs) created by States have proliferated that commonly allow investors recourse to investment treaty arbitration in investor-State dispute settlement (ISDS) when rules in BITs/IIAs are potentially breached by host States.[5] In the absence of a centralised, multilateral judicial authority that oversees the implementation and interpretation of IIL, different ISDS mechanisms have

[1] Charter of the United Nations, art 1.
[2] Action or ability to use the property in a certain way may be limited. i.e restrictions on second properties, taxation, labour or environmental standard that imposes extra costs on an investor.
[3] Wars in Syria, Yemen, and Afghanistan, and tensions, such as between North Korea and other States, Russia and other States, US and other States, Israel and Palestine, etc.
[4] Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, International Law Commission, 13 Apr 2006, UN Doc A/CN.4/L.682, [8] 11.
[5] UNCTAD, World Investment Report 2019 – Special Economic Zones, p 17; 'International Investment Agreements Navigator' (UNCTAD Investment Policy Hub, 31 December 2020) <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 14 May 2021.

emerged.[6] ISDS can occur in different arbitration settings containing different adjudicators and rules, while different IIAs dictate the rules governing the parties. This is problematic as each arbitration setting and adjudicator can have differing opinions and each IIA can have similar and slightly differing worded laws/standards,[7] which could lead to incoherence among and between IIL disputes, since similar disputes can be arbitrated differently resulting in differing awards.[8]

The International Centre for Settlement of Investment Disputes (ICSID),[9] and the United Nations Commission on International Trade Law (UNCITRAL),[10] are multilateral systems that regulate ISDS, but they are not universal. UNCITRAL has no dedicated institution associated with the administration of arbitration unlike ICSID, common terms like 'investment' can be different in each system and each IIA,[11] and not all States are members of these systems. Enforcement of awards issued by UNCITRAL and ICSID are reliant on the domestic institutions of States.[12] Awards can be set aside after judicial review domestically rather than internationally in UNCITRAL and ICSID,[13] and the grounds to set aside awards may not be considered appellate review. This all raises questions as to whether the formal and substantive RoL and the DRoL and an IRoL can be reinforced. As a starting point before explaining these concepts below, the DRoL aims to achieve justice within State borders, while an IRoL aims to achieve justice beyond State boundaries. The formal RoL focuses on the sources of the law, while the substantive RoL focuses on the content of the law.[14]

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[6] 'Investment Dispute Settlement Navigator' (UNCTAD Investment Policy Hub, 31 December 2020) <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 14 May 2021.

[7] Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Hague: Kluwer Law International 2009); Christopher Greenwood, 'Unity and Diversity in International Law', in Mads Andenas & Eirik Bjorge (eds), *A Farewell to Fragmentation* (CUP 2015) 53.

[8] *CME v Czech Republic*, UNCITRAL, Partial Award of 13 September 2001, and, *Lauder v Czech Republic,* UNCITRAL, Final Award of 3 September 2001.

[9] International Centre for Settlement of Investment Disputes (ICSID) (Signed on 18th March 1965, entry into force 14 October 1966) 575 UNTS 159.

[10] United Nations Commission on International Trade Law (UNCITRAL), UN GA Res 2205 (XXI) of 17 December 1966.

[11] See, Salini Test derived in *Fedax v Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction of 11 July 1997, [43], and laid out in *Salini SpA v Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 31 July 2001, and applied in *Patrick Mitchell v Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award of 1 November 2006, [33] created a test for investment. However, part of it was rejected in *LESI SpA v Algeria*, ICSID Case No. ARB/05/3, Award of 12 November 2008, *Saba Foakes v Turkey*, ICSID Case No. ARB/07/20, Award of 14 July 2010, [110], and, *Malaysian Historical Salvors v Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction of 17 May 2007.

[12] ICSID Convention (1965) op. cit., art 54; New York Convention (NYC) on the Recognition and Enforcement of Foreign Arbitral Awards (signed on 10th June 1958, entered into force on 7th June 1959) 330 UNTS 38, art I, III

[13] NYC (1958), op cit, art V; ICSID Convention (1965) op. cit., additional facility, arts 3, 19, 52, see, Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) 18 Journal of World Investment & Trade 585; Rob Howse, 'Designing a Multilateral Investment Court: Issues and Options' (2017) 36(1) Yearbook of European Law 209; Christian Tams, An Appealing Option? The Debate about an ICSID Appellate Structure (2006) Essays in Transnational Economic Law No. 57.

[14] Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 92.

The rationale of ISDS has been criticised for prioritising the protection of investments over the State's right to regulate in matters of public policy.[15] Concerns have been raised in cases where the outcome of ISDS could cause interference with State sovereignty.[16] In part, these concerns stem from the organisation of IIL and ISDS; in the absence of a unified system, fragmentation and complexity may exist between different international regulatory regimes handling disputes. Fragmentation and complexity could arise from the divergent ad hoc arbitral tribunals hearing ISDS, the composition of which varies from case to case,[17] as well as the interpretation of rules which can yield different outcomes on similar issues.[18] Furthermore, there are thousands of IIAs/BITs between different States containing similar investor protections and the negotiations and application of these agreements have the potential to entrench inequalities between States and lead to unfair and unjust agreements.[19] Moreover, there have been over 1,000 registered ISDS cases.[20] The procedures adopted by tribunals in ISDS have been criticised on the grounds of transparency,[21] arbitrator conflicts of interests,[22] access to third parties, and independence and impartiality,[23] whilst case awards have raised questions of internal inconsistency and uncertainty.[24]

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[15] Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A human rights perspective* (Routledge 2016); Chrispas Nyombi and Tom Mortimer, 'Tackling the legitimacy crisis in international investment law through progressive treaty-making practices' (2017) 20(5) International Arbitration Law Review 162; *Bear Creek Mining Corporation v Peru*, ICSID Case No. ARB/14/21, Award of 30 November 2017, [226]-[228] [736]; *Aguas del Tunari, SA v Bolivia*, ICSID Case No. ARB/02/3, Petition by NGOs and people to participate as an intervening party or amici curiae of 29 August 2002, [1].

[16] Chrispas Nyombi and Tom Mortimer (2017) op. cit.; Lone Wandahl Mouyal (2016), op. cit.

[17] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd Edn, OUP 2012).

[18] *CME v Czech Republic* (2001) op. cit., and, *Lauder v Czech Republic* (2001), op. cit.; *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005, and, *LG&E Energy Corporation, LG&E Capital Corporation and LG&E International Incorporation v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006.

[19] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013); Lauge Poulsen, 'The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis' (2010) 30 Northwestern Journal of International Law & Business 101, 126-129; 'International Investment Agreements Navigator' (UNCTAD 2020), op. cit.

[20] 'Investment Dispute Settlement Navigator' (UNCTAD 2020), op. cit.

[21] Including lack of accessibility to information.

[22] Hong-Lin Yu, 'Transparency issue in the amendment of ICSID arbitration rules - public right to information vs public confidence?' (2018) 21(4) International Arbitration Law Review 94; Eric Gottwald, 'Levelling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?' (2007) 2 American University International Law Review 237; Gus Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law', in Thomas Wälde and Stephan Schill (eds), *International Investment Law and Comparative Public Law* (OUP 2010).

[23] Gus Van Harten, *The Trouble with Foreign Investor Protection* (OUP 2020); James Thuo Gathii, 'Reform and Retrenchment in International Investment Law' (January 13, 2021); Nicolás Perrone, 'Making Local Communities Visible: A Way to Prevent the Potentially Tragic Consequence of Foreign Investment' in A. Santos, C. Thomas & D. Trubek, *World Trade and Investment Law Reimagined* (CUP, 2019) 171-180.

[24] *CME v Czech Republic* (2001) op. cit., and, *Lauder v Czech Republic* (2001), op. cit; *CMS v Argentina* (2005) op. cit., and, *LG&E v Argentina* (2006) op. cit.

This thesis will evaluate ISDS and procedural proposals for multilateral appellate review from an international rule of law (IRoL) and domestic rule of law (DRoL) perspective. It will contribute to a growing body of scholarship that interrogates the substantive and procedural challenges facing IIL and ISDS. These issues relate to procedural matters including access to justice and the ways in which claims are heard, and the substantive fairness of decisions, including recognition of State sovereignty, the importance of transparency, equality, and the prevention of arbitrariness, and the scope for protection of human rights and sustainability. This means the thesis will focus on the option of procedural reform of ISDS rather than substantive reform, whilst considering issues relevant to both the formal and substantive interpretations of the DRoL and an IRoL. By analysing contemporary debates in IIL and ISDS through the lenses of an IRoL and the DRoL, this thesis offers an original contribution to the scholarship. The contentious nature of what constitutes an IRoL is disputed, but this thesis will demonstrate that the defining characteristics of an IRoL can be linked to certain well-established formal and substantive issues, including those relevant to a DRoL. This thesis will examine the scope of an IRoL, in light of its relationship with the DRoL. The purpose of this analysis is to examine the extent to which existing ISDS structures reinforce or undermine an IRoL and the DRoL, with a view to exploring whether further adherence to the RoL can help respond to the challenges facing ISDS and the developments needed for ISDS to further reinforce the RoL.

There are many different settings for ISDS and, while ICSID remains the primary site for ISDS, this thesis focuses on ISDS in the context of UNCITRAL. Since 2017, UNCITRAL's Working Group III (WGIII) has been tasked with the mandate of firstly evaluating ISDS concerns and lastly identifying and evaluating potential reforms and solutions to recommend to the Commission.[25] As such, this thesis analyses the ongoing discussions taking place in WGIII up until February 2021 in order to better assess the merits of reform proposals and, in particular, the proposal for multilateral appellate review. This analysis offers important insights into proposed responses to some of the challenges facing IIL and principally ISDS reform. More generally, including the case for creating a multilateral appellate review mechanism with capable adjudicators to address some of the existing problems in ISDS, which are not limited to dispute settlement in UNCITRAL. As such, the thesis builds on existing scholarship by assessing the diverse ways in which the creation of a multilateral review mechanism in ISDS might reinforce or undermine an IRoL and the DRoL.

The purpose of this chapter is to set out the thesis. This chapter will outline the current problems and controversies of IIL with the focus on ISDS which relate to the RoL. The first part explains the

[25] Possible reform of ISDS: Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (ISDS Reform), Thirty-eighth session, Vienna, 14–18 October 2019, [1], <http://undocs.org/A/CN.9/WG.III/WP.166> accessed 11 November 2020.

conceptual underpinnings of this thesis which is the RoL. The second part pinpoints elements of the RoL that this thesis will pay close attention to such as transparency, equality, and the prevention of arbitrariness. It will also pinpoint elements of the RoL that have tensions within ISDS like State sovereignty, equality, human rights and sustainability, and appellate review. The third part brings together the discussion of this chapter into a structure that will be presented in the rest of the thesis which will investigate IIL through the lens of the RoL with a focus on ISDS.

1.1: Conceptual Underpinnings: the Rule of Law

The RoL provides an interesting reference point for evaluating ISDS and proposals for its reform, including proposals for multilateral appellate review, which are the focus of this thesis. The RoL is a contested concept, none more so than the elements that are included within the RoL.[26] This thesis conceptualises the RoL in the English tradition and identifies formal, procedural and substantive approaches. While the RoL is predominantly concerned with procedural fairness, much of the critical literature on this subject also distinguishes between a merely formal understanding of the RoL and that which is more sensitive to its context and significance.[27] The substantive RoL is more controversial and contested than the formal RoL. While each theoretical approach to the RoL may differ, there are some shared understandings between them.[28] What is generally accepted is that the RoL exists, benefits, and attains significance in domestic and international society.[29]

The contestation of the RoL is further expanded following assertions that there are two distinct concepts of RoL: the DRoL and an IRoL. Although an IRoL has been described, like the DRoL, as 'a charmed concept, essentially without critics or doubters',[30] the very existence of an IRoL has been questioned in the literature.[31] Moreover, even if an IRoL is accepted as a discrete concept, the content of an IRoL may not be as established as that of the DRoL. While the DRoL has been defined and

[26] Brian Tamanaha (2004), op. cit.,3; Thomas Carothers, Promoting the Rule of Law Abroad, Carnegie Endowment for International Peace, Rule of Law Series, N0 34, Working Paper of January 2003, p3; Judith Shklar, 'Political Theory and the Rule of Law', in Alan Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1; *Bush v Gore* (2000) 531 US 98.
[27] Brian Tamanaha (2004) op. cit., 92; Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 EJIL 315, 316-317.
[28] Brian Tamanaha (2004) op. cit., 92.
[29] ibid, 1-3.
[30] Velimir Zivkovic, 'Pursuing and Reimagining the International Rule of Law Through International Investment Law' (2020) 12 Hague Journal of the Rule of Law 1, 2; Ian Hurd, 'The International Rule of Law: Law and the Limit of Politics' (2014) 28 E&IA 39, 39.
[31] Richard Collins, 'The Rule of Law and the Quest for Constitutional Substitutes' (2014) 83 Nordic Journal of International Law 87; Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity' (2016) 65 ICLQ 277, 278, 288.

endorsed on numerous occasions in both primary sources in domestic[32] and international contexts,[33] and secondary sources,[34] the concept of an IRoL and its implications for the IIL system needs deeper interrogation. As there is no universally accepted definition of IRoL, I adopt the phrase '*an* IRoL' rather than '*the* IRoL' in this thesis to reflect the diverse and often ambiguous framing of this concept by scholars in IIL.[35] Here I shall briefly set out what might be understood by an IRoL and consider its relationship with a DRoL. This is important as an IRoL 'commands a broad appeal'.[36] Furthermore, it is necessary to contextualise the international and domestic systems[37] affording special consideration to principles of equality, State sovereignty, and human rights and sustainability, and the role of State and non-State actors since they are the parties in ISDS. In conducting a RoL analysis of ISDS, this thesis will pay special attention to the RoL elements of transparency, equality, and the prevention of arbitrariness, which interlink between each other and connect to other formal and substantive elements of the DRoL and an IRoL.

It seems that the elements making up the DRoL and an IRoL are similar, but what may be different lies in their application and purpose. It has been argued that 'the role of international law is to reinforce, and on occasions to institute, the rule of law internally'.[38] As such, an IRoL could reinforce the DRoL since requiring access to international dispute resolution at an IRoL could have a palpable impact on the scope of justice within the DRoL by, for example, exposing potential problems in relation to access to justice, and unequal treatment before the law in domestic systems. By recognising the link between an IRoL and the DRoL, this thesis will argue that the two concepts may be symbiotic and co-determinative, 'each acknowledging the existence and validity of the other'.[39]

There could also be differences between the DRoL and IRoL, as what happens in domestic law may not necessarily be accepted at the international level.[40] The DRoL aims to achieve justice within a

[32] Constitutional Reform Act 2005, s 1, s 17; *R v Secretary of State for the Home Department, Ex Parte Pierson* [1998] AC 539, 591 (Lord Steyn); *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [69]-[73].
[33] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Preamble; European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, adopted at its 86th plenary session (Venice, March 2011); Treaty on European Union (Consolidated Version), Preamble, arts 2, 21.
[34] Albert Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan 1885) Pt II; Tom Bingham, *The Rule of Law* (Penguin 2010); Brian Tamanaha (2004) op. cit.; Robert McCorquodale (2016) op. cit., 279-284.
[35] Velimir Zivkovic (2020) op. cit.; Ian Hurd (2014) op. cit., 39.
[36] Velimir Zivkovic (2020) op. cit., 2.
[37] *Elettronica Sicula SpA (ELSI) (United States v Italy)* ICJ Judgment of 20 July 1989, [124].
[38] James Crawford, 'International Law and the Rule of Law' (2003) 24 Adelaide Law Review 3, 8.
[39] ibid, 10.
[40] *ELSI* (1989) op. cit., [124]; Sean Murphy, 'The ELSI Case: An Investment Dispute at the International Court of Justice' (1991) 16(2) Yale Journal of International Law 391.

State's border, whereas an IRoL aims to achieve justice in a wider sphere that goes beyond and transcends State boundaries, and which interacts with a variety of both State and non-State actors. Consequently, this raises challenges for international dispute resolution systems hearing cross-border issues of justice encompassing different cultural understandings and addressing disparities between the wealth of State and non-State actors. The international system has no single unified court to hear matters relating to all aspects of international law, no one executive or legislature, and no one separation or hierarchy of powers.[41] The DRoL may be easier to pinpoint within a State territory than reaching a consensus on what an IRoL specifies beyond a State territory. Overall, the DRoL and IRoL serve different functional purposes, but have similar fundamental values that flow across.

However, what appears to be missing from common definitions of both DRoL and IRoL is recourse to an appellate review mechanism. Although international adjudication has traditionally only rarely provided for appellate review,[42] most legal systems have an appellate review mechanism, so it is strange that such an element is omitted from most definitions of the RoL. Even though certain conceptions of the RoL make reference to judicial review,[43] reference to appellate review has evaded such attention. Furthermore, predictability in laws and dispute settlement is generally accepted by academics to be an element in the RoL,[44] or at least an outcome of the RoL,[45] and hence, this thesis will argue that the availability of an appellate review mechanism can play an important role in the realisation of judicial predictability. Moreover, provided a 'bad' rule is not applied consistently,[46] a form of appellate review could further promote fairness and justice, by safeguarding against incorrect awards being left unchallenged. Appellate review, provided it does not restrict access to justice through excessive cost and time, can help ISDS awards reinforce the RoL.

[41] Robert McCorquodale (2016) op. cit., 289.
[42] Noemi Gal-Or, 'The Concept of Appeal in International Dispute Settlement' (2008) 19(1) European Journal of International Law 43; Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Grotius Publications 1991) ch VI; Giorgio Sacerdoti, 'Appeal and judicial review in international arbitration and adjudication: the case of the WTO appellate review' in Ernst Petersmann, *International trade law and the GATT/WTO dispute settlement system* (Kluwer, 1997) 245-280.
[43] James Crawford (2003) op. cit., 9-11; Robert McCorquodale (2016) op. cit., 298, 301; Venice Commission (2011) op. cit., [41].
[44] Robert McCorquodale (2016) op. cit., 284. Tom Bingham (2010) op. cit., ch 3; Venice Commission (2011) op. cit., [41]; Jeremy Waldron (2011) op. cit., 316-317.
[45] Arthur Watts, 'The International Rule of Law' (1993) 36 German Yearbook of International Law 15, 25, 41; Robert McCorquodale (2016) op. cit., 292.
[46] Lisa Diependaele, Ferdi De Ville, and Sigrid Sterckx, 'Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System' (2019) 24(1) New Political Economy 37, 44-45; Thomas Schultz, 'Against Consistency in Investment Arbitration' in Zachary Douglas, Joost Pauwelyn, and Jorge Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory Into Practice* (OUP 2014).

1.2: The relevance of RoL to ISDS

ISDS avoids both the potential for political influence/nationalism found in a host State court that would favour host States and restrict investor claims in the domestic setting, and the aggressive historical methods of diplomatic protection and treaties of capitulation that could favour the most powerful in the international setting.[47] International remedies between foreign investor and State could be a more suitable approach than domestic remedies. I will argue that the IIL dispute resolution body should continue to operate separately to domestic courts, albeit subject to certain reforms reflecting the RoL. Accordingly, this thesis will examine institutions and proposals that relate to existing ISDS structures through the lens of both the DRoL and an IRoL. This means elements of the RoL relevant to ISDS will be considered in the context of ISDS institutions and proposals. Many contemporary challenges have been recognised in IIL, but this thesis will focus on problems inherent in ISDS.

There is scholarship examining the RoL in IIL, but those commentators have put forward formal versions of an IRoL,[48] whereas, the concept of an IRoL that I present in this thesis goes beyond the boundaries of the formal dimension by arguing for the substantive approach. This means my conception of the DRoL also involves advocating for a more substantive approach, which focuses on the content of the law.

There appears to be a gap in the literature for the formal and substantive version of the DRoL and an IRoL to be evaluated in ISDS. This is problematic because each has different purposes. The DRoL aims to achieve justice within State borders, while an IRoL aims to achieve justice in a wider sphere that goes beyond State boundaries and in fact across national borders, interacting with a variety of both State and non-State actors. While there is scholarship examining the DRoL and an IRoL in ISDS, the analyses tend to focus on the role of ISDS arbitrators in conceptualising the DRoL as complementary to an IRoL.[49] Arbitrators could act in this way to make awards more persuasive and legitimate.

[47] Stephan Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review' (2012) 3 Journal of International Dispute Settlement 577, 606; *Panevezys-Saldutiskis Railway Case* (Estonia v Lithuania) (1939) PCIJ Ser A/B 76, ICGJ 328, [16]; Article 1 of the International Law Commission's (ILC's) Articles on Diplomatic Protection adopted by the ILC's at its 58th session, in Report of the International Law Commission, UN GAOR, 61st Sess, Supp No 10, UN Doc A/61/10 (2006), p 16; *Mavrommatis Palestine Concessions* (1924) PCIJ Ser A, No 2, p 12; Clyde Eagleton, *Responsibility of States in International Law* (NYUP 1928); Richard Lillich, *International Law of State Responsibility for Injuries to Aliens* (UPV 1983); Rudolf Dolzer, 'Mixed Claims Commissions' (1992) 3 Encyclopedia of Public International Law 438.

[48] Velimir Zivkovic (2020) op. cit., 3, 5-6.

[49] Ibid.

Some RoL scholarship examining the relationship of the domestic and international systems in IIL, ISDS, and IIA may not fully consider the distinction and nuances between the DRoL and an IRoL.[50] My analysis of these two facets of the RoL offers a different perspective to Mavluda Sattorova who investigates the extent to which ISDS achieves good governance in domestic systems and does not distinguish between the DRoL and an IRoL, although she does recognise that international governance frameworks can influence and improve governance in domestic systems.[51] The DRoL and its relationship with an IRoL in ISDS requires further interrogation. For example, analysing both ICSID and UNCITRAL procedures for review of arbitral awards in light of DRoL and IRoL values is another area where this thesis differs from prior academic contributions that addressed IIL and the RoL. Furthermore, investigating whether the review functions in ICSID and the NYC reinforce the formal and substantive RoL is another area that closes a gap in the literature.[52] This focus on review mechanisms along with my push for a more substantive RoL approach to ISDS links to another interesting part of this thesis which is considering appellate review as part of the RoL, although international adjudication has traditionally only rarely provided for appellate review.[53]

Some scholarship focuses on providing a critique of RoL-related narratives in IIL rather than investigating in detail procedural and substantive reform.[54] While Sattorova does consider substantive RoL concerns, she does so more as an element of 'governance'.[55] This thesis will focus on procedural reform of ISDS through a RoL analysis that covers the different dimensions of the RoL. ISDS can raise questions relating to State sovereignty, equality, human rights and sustainability, and the role of non-State actors. These issues may fall within the RoL but may also be contested and uncertain. Unlike other significant scholarship considering the RoL and ISDS, this thesis will use the DRoL and an IRoL and their formal and substantive variants to investigate forms of regulation on ISDS, multilateral instruments and appellate mechanisms, and reform discussion at UNCITRAL WGIII, whilst paying attention to State sovereignty, equality, human rights and sustainability, and non-State actors. This thesis evaluates the extent to which ISDS reinforces the RoL and whether procedural proposals could offer greater application of the RoL.

One of the main arguments of the thesis on the RoL is that the DRoL aims to achieve justice within a State's border, whereas, an IRoL aims to achieve justice in a wider sphere that goes beyond State

[50] Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance* (Hart Publishing 2018)
[51] Ibid.
[52] NYC (1958), op cit; ICSID Convention (1965) op. cit.
[53] Noemi Gal-Or (2008), op. cit; Elihu Lauterpacht (1991), op. cit., ch VI; Giorgio Sacerdoti, in Petersmann (1997) 245-280.
[54] Mavluda Sattorova (2018) op. cit., 197.
[55] ibid, 7-8, 14-15, 24-25.

boundaries and in fact across national borders which interacts with a variety of both State and non-State actors. This means international systems reviewing the domestic system or acting in the interests of the domestic system would have to follow an IRoL. The international systems of the International Court of Justice (ICJ), European Court of Justice (ECJ), European Court of Human Rights (ECHR), and International Criminal Court (ICC) that should nourish an IRoL can respond to concerns raised in domestic systems. Improving substantive and procedural aspects of justice can highlights problems in the domestic system that are needed to reinforce the RoL such as transparency, equality, and the prevention of arbitrariness. The prevention of arbitrariness, transparency, and equality are important RoL elements in both domestic and international systems. ISDS should thus be capable of responding to RoL concerns raised in domestic systems.

While this thesis will provide commentary on many aspects of RoL, three RoL elements that this thesis examines closely are the prevention of arbitrariness, transparency, and equality. These RoL elements cannot be considered in isolation from one another or from other elements of the RoL as they are all interconnected. Furthermore, a RoL element can further both formal and substantive interpretations of the RoL in both theory and in practice.

Prevention of arbitrariness is a formal element of the RoL that links with other formal and substantive RoL elements. The prevention of arbitrariness requires predictable and fair legally enforceable laws that are authoritative, non-retrospective, and equally applied to every individual regardless of their societal position.[56] Individuals given powers such as making laws or adjudicating cases must exercise those powers fairly, in good faith, according to the purpose for which those powers were given, and without exceeding the boundaries of such powers or using them unreasonably.[57] These are categorised as formal elements of the RoL as they focus on the source of law although they link to substantive elements, like human rights and sustainable development.[58] Referable sources of law should be consistent, correct, fair, and just. Similarly, the adjudicator process should have impartiality and independence. Correctness, consistent, fairness, justice, independence, and impartiality are issues that inter-relate and work towards the prevention of arbitrariness.

[56] Albert Dicey (1885), op. cit., pt II, 110-120; Simon Chesterman, 'An International Rule of Law?' (2008) 56(2) AJCL 331, 342; James Crawford (2003), op. cit., 4, 10; *Asylum Case* (1950), op. cit., p 284; *ELSI* (1989), op. cit., [124], [128]; Velimir Zivkovic (2020) op. cit., 3-4.
[57] Tom Bingham (2010), op. cit., 66-67, 294, ch 6.
[58] International Covenant on Civil and Political Rights (ICCPR). Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), arts 3, 14, 26; UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development (UN SDGs), 21 October 2015, A/RES/70/1 (entered into force 1 January 2016), goals 5, 16.

An effective dispute settlement system is one that promotes procedural transparency, and efficiency in timescales for decision-making and costs. Therefore, preventing unnecessary delays in the procedural dimensions of arbitration is an important role in preventing arbitrariness in legal interpretation and decision-making. If a dispute system has insufficient enforcement powers, it would be unable to reinforce the RoL and may not be seen as a legitimate judicial or arbitral setting.[59] The enforcement powers of ISDS awards have been praised,[60] although ISDS awards can require acceptance from domestic systems. Recognition and enforcement of ISDS awards under the NYC and ICSID will be investigated in this thesis.[61] Furthermore, if the dispute procedure is costly and time-consuming, it may obstruct access to justice.[62] In ISDS, disputing parties may struggle with high costs associated with arbitration and the lengthy nature of the proceedings.[63] Although an appellate body may seem to add to the potential length of proceedings and thus exacerbate issues of cost and time, such a body could eventually make ISDS more consistent and help clarify IIL.[64] This would decrease the need for parties to go to ISDS to resolve disputes,[65] and it is a better option than the current circular proceedings of Article 52(6) ICSID. The procedural proposal for multilateral appellate review in enhancing the RoL in ISDS is the main focus of the thesis. However, certain other amendments, such as access to transparency, can assist ISDS to better reinforce an IRoL that can further the RoL in domestic systems.[66]

To further help prevent arbitrariness in dispute resolution, adjudicators should respect the formal RoL elements of impartiality and independence. Impartiality links to the independence of systems and in relative terms the equality of parties in the process. The independence and impartiality of IIL could be strengthened by transparency in procedures and a renewed commitment to diversity within adjudicators which could also respond to challenges of the perceived lack of representation and inclusiveness in ISDS.[67] Enhanced transparency and appointing arbitrators from diverse backgrounds

[59] Velimir Zivkovic (2020) op. cit., 9-14.
[60] ibid
[61] International Centre for Settlement of Investment Disputes (ICSID) (Signed on 18th March 1965, entry into force 14 October 1966) 575 UNTS 159; New York Convention (NYC) on the Recognition and Enforcement of Foreign Arbitral Awards (signed on 10th June 1958, entered into force on 7th June 1959) 330 UNTS 38.
[62] Tom Bingham (2010) op. cit., ch 8. See, Chapters 3.3.4 and 3.4.2.
[63] *Silverton Finance Service Inc v Dominican Republic*, UNCITRAL, Final Award of 15 March 2017, [47[, [67]; Matthew Hodgson and Alastair Campbell, 'Investment Treaty Arbitration: cost, duration and size of claims all show steady increase' (Allen & Overy, 14 December 2017) <https://www.allenovery.com/en-gb/global/news-and-insights/publications/investment-treaty-arbitration-cost-duration-and-size-of-claims-all-show-steady-increase> accessed 22 May 2020.
[64] Colin Brown, 'A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches' (2017) 32 ICSID Review 673, 684.
[65] ibid.
[66] Mavluda Sattorova (2018) op. cit., 8, 13-14.
[67] Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 European Journal of International Law 387.

could lead to fairer outcomes as views have a higher chance of being equally represented. Furthermore, provided ISDS adjudicators have relevant qualifications and expertise like in international public law, this could increase the chances of ISDS considering issues outside corporate claims like relevant human rights and sustainable investment under disciplines of international law which links to issues of correctness and consistency like when identifying relevant laws.[68]

However, actors in ISDS can play multiple roles as arbitrators, counsel, expert witnesses, and tribunal secretaries within this fragmented and ad hoc adjudicative system of ISDS.[69] Although having the same-minded individuals in all these areas of the system could increase the chance of similar decision-making taking place which could enhance consistency of awards, this revolving door practice is known as double hatting which is a conflict of interest.[70] This could impact impartiality and independence of adjudicators.[71] Double hatting, lack of transparency, and costs relate to the concerns of the closed nature of the community and its ability to engage in self-dealing.[72] Measures which foster impartial and independent adjudication like limiting arbitrators 'double hatting' and capacity for conflict of interest will help achieve appropriate access to justice and due process to parties seeking a fair hearing.[73]

Furthermore, these measures should consider for example whether the disputing parties can choose the adjudicators or whether an alternative mechanism controls appointment. The parties can exercise party autonomy by having an opportunity to equally appoint the adjudicators that they think have the expertise and experience to deliver a correct award for that dispute. However, without sufficient transparency and disclosure in the selection and appointment of adjudicators, it will be uncertain if justice and fairness is upheld and there will be suspicion of conflicts of interest. A different option which could help reduce the impact of power disparities is a random composition subject to appropriate criteria like arbitrator qualifications. Furthermore, in dispute settlement there would

[68] Some commentators argue human rights are fenced out of IIL and instead focus on investor rather than parties impacted by investment, see, James Thuo Gathii (2021) op cit., 23.
[69] Malcolm Langford, Daniel Behn, and Runar Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 Journal of International Economic Law 301, 301.
[70] Phillipe Sands, 'Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel', in Arthur Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (New York: Brill, 2012), at 28–49; Phillipe Sands, 'Developments in Geopolitics – The End(s) of Judicialization?' 2015 ESIL Conference Closing Speech, 12 September 2015.
[71] *Telekom Malaysia Berhad v Ghana*, PCA Case No. 2003-03, UNCITRAL, Settled; *Consortium R.F.C.C. v Morocco*, ICSID Case No. ARB/00/6, Decision on Annulment of 18 January 2006; *Ghana v Telekom Malaysia Berhad*, Hague District Court, Challenge No. 13/2004, Petition No. HA/RK 2004.667, 18 October 2004; Challenge 17/2004, Petition No. HA/RK/2004/778, 5 November 2004.
[72] Malcolm Langford, Daniel Behn, and Runar Lie (2017), op. cit., 305.
[73] Tom Bingham (2010), op. cit., 66-67, 294, ch 9; James Crawford (2003), op. cit., 4, 10; Venice Commission (2011), op. cit., [41]; Lon Fuller, *The Morality of Law* (YUP 1964), esp ch 2; Jeremy Waldron (2011) op. cit., 316-317; Velimir Zivkovic (2020) op. cit., 5-6; Robert McCorquodale (2016), op. cit., 292.

need to be a balance between adjudicator independence and accountability since they 'are in conflict with each other: the more independent judges are, the less accountable they will be, and vice versa'.[74] Transparency could further alleviate this problem as adjudicators may be pressured into being accountable rather than maintaining independence, although transparency is a crucial element of the RoL. The selection and appointment of adjudicators to an appellate and/or two-tier system is discussed in this thesis in the context of the World Trade Organisation (WTO), the European Union (EU) agreements, and WGIII.[75]

Impartiality and independence will also enhance the possibility for the law to be fairly and justly applied which are more substantive elements. Impartial and independent adjudicators are also necessary to enhance the possibility of furthering substantive elements of the RoL in correctness and consistency of the content of awards.

In ISDS, there are examples where these RoL elements have not been implemented. For example, in *ad hoc* tribunals there have been instances of inconsistent interpretation of investor protections laws in IIAs by adjudicators, which may signal that the prevention of arbitrariness, consistency, correctness, justice, fairness, equality, independence, impartiality, human rights, and sustainable development may be limited in ISDS. In *CME v Czech Republic*[76] and *Lauder v Czech Republic,*[77] two different tribunals hearing these cases with virtually identical facts, under two separate but almost indistinguishable BITs, came to opposite conclusions. Although these cases were decided only a few days apart, one tribunal in *CME* awarded $353 million against the Czech Republic, while the other tribunal in *Lauder* awarded no financial compensation. The London Tribunal, which arbitrated Mr Lauder's claim under the US-Czech Republic BIT, held that although the Czech Republic breached its obligations under the BIT, these infringements could not justify compensation. However, the Stockholm Tribunal arbitrating CME's claim, a company controlled by Mr Lauder in the Netherlands, under the Netherlands-Czech Republic BIT argued the same facts and violation as in the above corresponding proceedings, but this tribunal held it was justified for the Czech Republic to compensate the claimant. Commentators have called this the 'ultimate fiasco in international investment arbitration'.[78]

[74] Olof Larsson, Theresa Squatrito, Øyvind Stiansen, and Taylor St John, 'Selection and Appointment in International Adjudication: Insights from Political Science', (Academic Forum on ISDS Concept Paper 2019/10, 17 September 2019), 4, <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/larsson-selection-and-appointment-isds-af-10-2019.pdf> accessed 1 February 2021.
[75] See Chapters 4 and 5.
[76] CME v Czech Republic (2001), op. cit.
[77] Lauder v Czech Republic (2001), op. cit.
[78] Isabelle Buffard, James Crawford, Alain Pellet, and Stephan Wittich, *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hefner* (Martinus Nijhoff Publishers 2008) 116.

Another example of where ISDS awards limit these RoL elements (such as consistency) is found in the context of the Argentine economic crisis where US investors bought claims due to the suspension of the US producer price index for gas transportation. The awards were inconsistent on the application of Article XI of the Argentina-US BIT and its relationship with the stricter Article 25 International Law Commission Articles on State Responsibility.[79] *CMS v Argentina*[80] focused more on Article 25 and found no state of necessity, while *LG&E v Argentina*[81] focused more on Article XI and found necessity. Some commentators argued *LG&E* contravened other awards that found no state of necessity,[82] like *Enron v Argentina,*[83] and *Sempra v Argentina*,[84] and criticised the annulment decision in *CMS v Argentina*,[85] for lacking reference to the prevailing case law. While earlier case law should not be automatically disregarded,[86] as this would limit the RoL element of consistency and predictability, there is no formal system of *stare decisis* in IIL.

The annulment proceedings in these cases are indicative of further failure to reinforce elements of the RoL such as fairness. Annulment in *CMS v Argentina*[87] failed, but the committee found two manifest errors of law (based on interpretation and application of BIT provision), which would have been challenged if the committee had substantive powers under Article 52 ICSID. The committee argued that the tribunal through substituting customary international law for the language in the BIT, failed to examine whether the conditions laid down by Article XI of the BIT were fulfilled. This was a defective application of Article XI, but nonetheless it was still an application of the BIT so there had been 'no manifest excess of powers' and no basis for annulment. However, the committee in *Enron v Argentina*[88] allowed annulment based on the tribunals failure to apply the applicable law (Article XI of BIT), and *Sempra v Argentina*[89] allowed annulment as the tribunal failed to fully apply either Article 25 or XI and failed to explain its reasoning. These applications of annulment acted unequally on investors seeking enforcement. Nevertheless, subtle divergences in interpreting and applying either essentially

[79] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), art 25; Report of the International Law Commission on the Work of its Fifty-Third Session UN General Assembly Official Record, 56th Session, Supplement No 10, UN Doc A/56/10 (2001), at 43.
[80] *CMS v Argentina* (2005), op. cit., [320]-[321].
[81] *LG&E v Argentina* (2006), op. cit., [257]. Damages were subtracted during the state of necessity period (between 1 December 2001 and 26 April 2003) from the full amount and period
[82] Isabelle Buffard, James Crawford, and others (2008), op. cit., 118.
[83] *Enron v Argentina*, ICSID Case No. ARB/01/3, Award of 22 May 2007, [191]-[214].
[84] *Sempra v Argentina*, ICSID Case No. ARB/02/16, Award of 28 September 2007, [325]-[397].
[85] *CMS v Argentina*, ICSID Case No. ARB/01/8, Decision on Annulment of 25 September 2007, [101]-[137].
[86] Isabelle Buffard, James Crawford, and others (2008), op. cit., 118.
[87] *CMS v Argentina*, (2007), op. cit., [121]-[137].
[88] *Enron v Argentina*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic of 30 July 2010, [406]-[407].
[89] *Sempra v Argentina*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award of 29 June 2010, [218]-[223]

similar treaty terms or the same law can cause inconsistent legal reasoning which acts contrary to the RoL and can challenge the perceived legitimacy of ISDS and the IIL system. These case examples indicate how more substantive powers of appellate review in ISDS could give adjudicators the opportunity to clarify IIL and help ISDS react to inconsistency, incorrectness, inequality, and unfairness. For this to work, the adjudicators themselves must be capable of reinforcing the RoL. Transparent procedures are necessary to help protect independence and impartiality and to enable human rights and sustainable development to be adequately considered.

Access to justice is cast into doubt if awards are not consistent and correct, and the adjudicators are not impartial and independent. More substantive aspects of the RoL, such as issues of human rights and sustainable development and environmental protections arising in ISDS also require consistent treatment.

In *Bilcon v Canada*,[90] the investor won after the government rejected the investor operations due to environmental concerns, as the tribunal rejected the community core values criteria implemented by Canada even though it acted to protect the environment. There was concern that the tribunal failed to adequately balance the investors' legitimate expectations with public policy concerns of sustainable development in its decision-making. The environmental factor of the blasting operation may not have been considered enough. Too much focus may have been put on the community core values criteria not being included in other measures when public policy changes are needed, for example, to adhere to the sustainable development goals (SDGs).[91] In *Bear Creek Mining Corporation v Peru*,[92] the investor won after the local community protested about the mining exploration due to mistrust with the investor and the exploration impacting the environment, with the majority of arbitrators arguing it was up to the State to establish consultation with the local community. However, the dissenting arbitrator argued the investor must also seek consultation and gain the trust of the local population regarding the investment project and that failure to do so meant less damages should be awarded in the indirect expropriation claim.[93] Consequently, the arbitrator argued the International Labour Organization (ILO) Convention 169 concerning Indigenous and Tribal Peoples had legal effects on not just States but foreign investors to respect and provide consultation to indigenous communities under

[90] *Bilcon of Delaware et al v Canada*, PCA Case No. 2009-04, Award on Damages of 10 January 2019, [400]; *Bilcon of Delaware et al v Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability of 17 March 2015, [734]-[738].
[91] UN SDGs (2015), op. cit.
[92] *Bear Creek Mining Corporation v Peru*, ICSID Case No. ARB/14/21, Award of 30 November 2017, [226]-[228] [736].
[93] *Bear Creek Mining Corporation v Peru*, ICSID Case No. ARB/14/21, Award of 30 November 2017, Partial Dissenting Opinion Professor Philippe Sands QC, [4]-[6], [7]-[13], [36]-[37], [39]-[40]. For example, the areas that protested most had no employment opportunities and less dialogue in the mining project and these areas would receive no financial benefit to the project, see paragraphs [17]-[40].

Article 15. These non-economic issues are related to human rights and issues of sustainability and CSR discussed in this thesis that struggle to gain attention alongside the rights of investors contained in IIAs within ISDS.[94] However, all these rights should apply equally in international law regardless of whether it is a rich investor seeking protection or an indigenous individual. In ISDS, there is a risk that people do not receive equal protections under international law, contrary to the prevention of arbitrariness.

To have an opinion on whether awards are legally correct, consistent, fair and just, there must be transparency, which includes access to information or freedom of information. Transparency also links to more formal elements of clear and accessible laws and relates to the exchange of documents and public access to information.[95] Arbitrariness can be prevented by established legal rules that are transparent to parties from the outset so consequences for the conduct of each party are clear in advance. Transparency is also needed to further access to justice and due process.[96] Consequently, transparency is both a formal and substantive element of the RoL that links to other RoL elements. Transparency can link to human rights, sustainability, and CSR, as transparency can help build strong institutions that protect rights and principles and achieve justice.[97] Similarly, enhancing transparency could make it more accessible for the public to ensure recognition of the legitimate public interest in ISDS.[98] This means transparency could bring fairness and efficiency to ISDS.[99] The thesis will evaluate the extent transparency is realised in ISDS, and for example, consider the UNCITRAL Transparency Rules and the Mauritius Convention in Chapter 3.[100]

[94] See Chapters 2.7 and 2.8.
[95] Joseph Raz, in Raz (1979), op. cit., ch 11; Lon Fuller (1964), op. cit., esp ch 2; Jeremy Waldron (2011), op. cit., 316-317; Tom Bingham (2010), op. cit., 66-67, 294, ch 3.
[96] UN SDGs (2015), op. cit., Goal 16.
[97] 'Peace, Justice and Strong Institutions' (UN) <https://www.un.org/sustainabledevelopment/peace-justice/> accessed 10 November 2018; Rafael Peels, Anselm Schneider, Elizabeth Echeverria and Jonas Aissi, 'Corporate Social Responsibility (CSR) in International Trade and Investment Agreements: implications for states, businesses and workers' (Conference Paper, 2015) <https://www.global-labour-university.org/fileadmin/GLU_conference_2015/papers/Peels_et_al.pdf> accessed 3 August 2020; Clair Gammage and Tonia Novitz (eds), *Sustainable Trade, Investment, and Finance: Towards Responsibility And Coherent Regulatory Frameworks* (Edward Elgar 2019) 8.
[98] Resolution adopted by the United Nations General Assembly, Report of the United Nations Commission on International Trade Law on the work of its forty-sixth session, 68th Plenary Meeting, 16 December 2013. (68/109), 1; UNCITRAL Arbitration Rules (2013) 1; United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention), 69th Session, 7 November 2014 (69/496), (adapted 10th December 2014, enforceable 18th October 2017), 1.
[99] Resolution adopted by the United Nations General Assembly (2013), op. cit., 1
[100] UNCITRAL Arbitration Rules (2013), UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration Official Records of the United Nations General Assembly, Official Records of the United Nations General Assembly, Report of the United Nations Commission on International Trade Law, 8-26 July 2013, 68th Session, Supplement No.17 (A/68/17), Ch III (entered into force 1 April 2014) (hereinafter UNCITRAL Arbitration Rules (2013) UTR); United Nations Convention on Transparency in Treaty-based Investor-State

Moreover, transparency can help uncover whether there are laws that seek to protect independence and impartiality and whether the adjudicators are impartial and independent in practice. There should also be transparency in developments like the making of laws or institutions through negotiations and how those developments are applied in practice.[101] Transparency is needed to measure the impacts of laws and their application on equality. The relationship between transparency and equality will be explored at various junctures of thesis.[102]

Equality is both a formal and substantive RoL element,[103] and links to the principle of non-discrimination. There is demand for equal laws which includes equality before the law and equality in the application of the law.[104] This means that laws and awards should be equally consistent and correct and equally fair and just. Further links to equality exist as adjudicators should be equally impartial and independent. Additionally, laws and awards for every individual should be equally accessible, clear, non-retrospective, supreme, and legal. Moreover, all individuals should have equal responsibilities and rights under the law such as being equally protected by human rights, and have equal opportunities to have access to justice and due process. Also, any individual, who chooses to violate fixed rules, should be held accountable before courts for the implications of breaching those rules equally compared to any other individuals that violate those same fixed rules. This corresponds to the prevention of arbitrariness.

These relate to actors having the same treatment which represents formal equality. Substantive equality looks to the results of that treatment. Formally speaking, any individual should be equally free to have or pursue whatever item or activity they want without discrimination. However, substantively speaking, only some individuals have the required money to buy the more expensive items or activities. In ISDS, formally speaking, a capital importing State and a capital exporting State party to an IIA should equally respect the IIA provisions. However, due to disparities in the average wealth of citizens between States, one State may have more foreign investors that they need to respect subject to the IIA compared to the other State party to the IIA.

Arbitration (Mauritius Convention), 69th Session, 7 November 2014 (69/496), (adapted 10th December 2014, enforceable 18th October 2017), 1.

[101] Venice Commission (2011), op. cit., [41].

[102] This includes evaluating organisations in Chapter 2.5, ICSID and UNCITRAL in Chapter 3; the MAI, WTO, and EU agreements in Chapter 4; and inclusiveness of WGIII sessions in Chapter 5.

[103] Tom Bingham (2010), op. cit., 66-67, 294, ch 5.

[104] Simon Chesterman (2008), op. cit., 336; Friedrich Hayek, *The Political Ideal of the Rule of Law* (National Bank of Egypt 1955) 34; Joseph Raz, in Raz (1979), op. cit., ch 11. Raz provided an institutionalist theoretical standpoint; Robert McCorquodale (2016), op. cit., 292; Tom Bingham (2010), op. cit., ch 4-5; Albert Dicey (1885), op. cit., Pt II, 120; Velimir Zivkovic (2020) op. cit., 5-6

As such formal and substantive equality could create some tensions and conflicts between RoL elements. There is a need for impartial adjudicators to create fairness in the proceedings. However, treating everyone in an identical manner could be problematic when the parties have different financial capabilities and expertise. The party with the best resources is more likely to present the best arguments and have a higher chance of winning the dispute. This could be seen as States with more economic and academic resources are more likely to defend an ISDS claim than States with fewer resources.[105] Furthermore, investor protections contained in IIAs give rich foreign investors more rights and better mechanisms to enforce rights through ISDS than domestic investors and average citizens creating inequality.[106] These rich individuals represent a very small class which suggests they should not require protection against sovereign States who are responsible for their citizens.[107] Equality is investigated throughout the thesis.[108]

This thesis will focus on the above RoL elements when examining ISDS in terms of cost and enforcement of procedures, consistency and correctness of awards, and selection and appointment of adjudicators. This corresponds to the ongoing discussions in WGIII sessions that list these as ISDS concerns.[109] As discussed above the elements of the RoL are interconnected so for example, 'enforcement' and 'cost and time' could be linked to 'access to justice' and 'consistency/certainty'; and 'appointment/selection of adjudicators' to 'sovereignty' and 'sustainability'. The EU argues 'concern as regards the costs of the system is linked to the concern as regards the lack of predictability which is in turn linked to the concerns with the methods of arbitrator appointments which is in turn linked to the concerns with arbitrators' independence and impartiality'.[110] This thesis aims to assess whether a multilateral appellate body could help alleviate some of these concerns. As such, this thesis will focus on the elements of ISDS currently under review in UNCITRAL.

The focus of the thesis on procedural reform in response to RoL concerns in ISDS reflects the discussion of WGIII. However, 'prominent procedural and substantive aspects of international investment law strongly align with the international rule of law requirements',[111] which suggest substantive reform is also necessary for IIL to adequately reinforce an IRoL. These connections seem unacknowledged in

[105] Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' (2014) 25(4) EJIL 1147, 1166-1168.
[106] Gus Van Harten (2020) op cit., 133-136.
[107] ibid, 2-4.
[108] It is specifically discussed in Chapters 2.4 and 2.5 in the context of sovereign equality There is also legal assistance at the WTO discussed in Chapters 2.5.2 and 4.3 for developing States.
[109] This is evaluated further in Chapter 5.
[110] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., 10.
[111] Velimir Zivkovic (2020) op. cit., 1.

WGIII to date.[112] Procedural issues of arbitrator selection and appointment also relate to more substantive issues of interpretation and consideration of law and outcome of decisions. There is a link with substantive standards as by changing who hears investor-State disputes by including criteria regarding knowledge of international public law issues could lead to a better acknowledgement of public policy space issues and State sovereignty. These public policy issues include human rights and environmental considerations which are necessary for victims of investor abuses like indigenous communities to claim to have any chance of accessing justice. Similarly, creating an appellate mechanism within a unified two-tier system may improve the consistency and certainty of IIL. This could help resolve ISDS concerns that can relate to the RoL.

State sovereignty could be limited by the ISDS, since it allows foreign investors to question the respondent government's policies and actions which may reflect the democratic preferences of millions of citizens through a long and costly foreign arbitral tribunal process.[113] ISDS is adjudicated in a private environment even though it is a public matter that has implications for the citizens of States.[114] The current system of ISDS could favour investors and investments,[115] meaning that IIL will be 'geared to promote the narrow interests of the rich' and put 'corporate profit before human rights and the environment'.[116] Arbitral awards requiring State payment of large compensation sums to private actors (the investor),[117] could limit the State's ability to be 'responsible for the well-being of its people',[118] for example, through advancing social and economic development that improves citizens' quality of life and standard of living. Furthermore, this could deter other States from

[112] James Gathii (2021) op. cit.,1-7; Gus Van Harten (2020) op cit., 139-140.
[113] It offers a platform for a foreign individual to directly criticise State actions and for another foreign individual to agree with the criticism and demand the State pays million/billions of dollars, see, Gus Van Harten (2020) op. cit.
[114] Gus Van Harten, 'A Case for International Investment Court', Inaugural Conference of the Society for International Economic Law (16 July 2008), pp.5–9; Andreas Follesdal, 'The Principle of Subsidiarity as a Constitutional Principle of International Law' (2013) 2 Global Constitutionalism 37.
[115] Gus Van Harten, *Sovereign Choices and Sovereign Constraints* (OUP 2013) 72; Louis Wells, 'Backlash to Investment Arbitration: Three Causes', in: Claire Balchin, Liz K Chung, Asha Kaushal and Michael Waibel (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) 341–352; Nigel Blackaby, 'Public Interest and Investment Treaty Arbitration', in: Albert Van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions, (*Kluwer Law International, 2003) 355; David Collins, *Performance Requirements and Investment Incentives Under International Economic* Law (Edward Elgar Publishing 2015) 203-204; Malcolm Langford, Daniel Behn, and Runar Lie (2017), op. cit., 301, 305.
[116] Muthucumaraswamy Sornarajah, 'Starting Anew in International Investment Law' (2012), Vale Columbia Center on Sustainable International Investment, Columbia FDI Perspectives No.74, p.2; Pia Eberhardt and Cecilia Olivet, "Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an Investment Arbitration Boom" (Brussels, Amsterdam: Corporate Europe Observatory, 2012), p.7.
[117] David Gaukrodger and Kathryn Gordon, 'Investor-state dispute settlement: A scoping paper for the investment policy community', OECD Working Papers on International Investment, No 2012/3, OECD Investment.
[118] *CME v Czech Republic*, UNCITRAL, Final Award of 14 March 2003, (Separate Opinion of Sir Ian Brownlie), [74]

instigating beneficial measures or changes in policy, such as implementing human rights and environmental considerations that could impact an investor's investment,[119] or in other words, the narrow interests of the rich.[120] It has been questioned why a small class of rich individuals should have these rights when the majority do not.[121] This thesis will investigate whether ISDS institutions uphold both the DRoL and an IRoL from the principle of State sovereignty.

It follows that upholding the principle of equality could be another challenge facing IIL.[122] As discussed above, inequalities may not only be prevalent in the current system of ISDS, which may unduly favour the interests of investors, but also in IIL and agreements, which have the potential to perpetuate inequalities through ISDS. IIAs constructed by States only provide investor protection provisions and partially recognise State responsibilities.[123] As a result of this inherent power asymmetry, IIAs could favour developed States compared to least developed countries/States (LDCs) based on the imbalances from their distribution of income. For example, investors from developed States are more likely to invest in other States when compared with investors from LDCs.[124] Moreover, the purpose of IIAs is to encourage foreign investment therefore they can be designed to favour investors heavily, for example, through strong investor protections.[125] The concept of sustainability will be introduced to emphasise the promotion of sustainable investment in IIL rather than just any investment. Developing States and LDCs generally reject strong investor protections,[126] but can sign IIAs with richer States[127] to 'gain a competitive advantage over other developing States or LDCs in the pursuit of capital'.[128] The

[119] Chrispas Nyombi and Tom Mortimer (2017) op. cit., 167; Pia Eberhardt and Cecilia Olivet (2012) op. cit., 7.
[120] Muthucumaraswamy Sornarajah (2012) op. cit., 2
[121] Gus Van Harten (2020) op. cit.
[122] Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' (2014) 25(4) EJIL 1147. For example, in ISDS respondents are commonly non-developed States, and tribunals are disproportionately more likely to rule against these States.
[123] There is no protection for the State and investors have limited responsibilities
[124] UNCTAD, 'World Investment Report 2016: Investor Nationality: Policy Challenges' 22 June 2016, New York/Geneva, UN, p36; 'GDP per capita, current prices' (International Monetary Fund) <https://www.imf.org/external/datamapper/NGDPDPC@WEO/ADVEC/OEMDC/LBY/WEOWORLD/EGY/PIQ/CMQ/CBQ/NAQ/CAQ/AS5/SSA/EDE> accessed 18 December 2018. All 3 of the Africa regions are in the bottom 5 for GDP per capita in 2018. 24 out of the bottom 27 States for GDP per capita were African, while the States that the international Monetary Fund considered advanced economies dominated the top of the list.
[125] Chrispas Nyombi and Tom Mortimer (2017) op. cit.; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Hague: Kluwer Law International 2009) 46-48, 57-58; Kenneth Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis Journal of International Law & Policy 157, 175–177, 179; UNCTAD, International Investment Rule-Making (2007) TD/B/COM.2/EM.21/2; Kate Miles (2013) op. cit., 89.
[126] Andrew Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Virginia Journal of International Law 639, 642–3, 671–4, 688; Kate Miles (2013) op. cit., 90.
[127] Developed or Emerging State.
[128] Kate Miles (2013) op. cit., 90; See also, Andrew Newcombe and Lluís Paradell (2009) op. cit., 48-49; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 43; Zachery Elkins, Andrew Guzman, and

extent to which inequalities exist in BITs and the impact on ISDS will be examined in this thesis. It will also investigate whether equality is applied in ISDS institutions in line with both the DRoL and an IRoL.

A further issue confronting IIL is how effective protection can be given to human rights and environmental considerations. It will be shown that such protection could be limited by IIL, especially through the ISDS process since even though these considerations have become a crucial feature of international law, not all ad hoc tribunals take them into consideration in the context of local communities impacted by an investor's investment.[129] For example, the International Convention on Civil and Political Rights (ICCPR),[130] and the International Convention on Economic Social and Cultural Rights (ICESCR),[131] are relevant to IIL, and arbitrators can interpret investment provisions in light of these instruments. Yet, ad hoc tribunals do not always take these instruments into account, which draws into question the arbitrator's expertise.[132] This links to the selection and appointment of adjudicators in ISDS, which this thesis will assess.

State measures that could negatively impact an investor's investment may improve the human rights of the citizens of that State or protect the environment. However, an issue in IIL linked to human rights reflects the struggle of the international legal system to accommodate non-State actors effectively.[133] International law has developed from a State-centric vision of the global political economy and, therefore, frames legal rules in the context of State-to-State relations. However, non-state actors and institutions have assumed a more prominent role in the global order and can influence norm and rule creation at the international level. Non-State actors in IIL are the investors that commonly, but not

Beth Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties 1960–2000' (2006) 60 International Organization 811.

[129] Nicolás Perrone in Santos and others (2019) op. cit.

[130] International Covenant on Civil and Political Rights (ICCPR). Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). This treaty has 172 State parties as of August 2018.

[131] International Covenant on Economic, Social and Cultural Rights (ICESCR), Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). The ICESCR aims to protect rights such as the right to; health, education, an adequate standard of living and labour rights. This treaty has 168 State parties as of August 2018.

[132] There is also the Declaration on the Rights of Indigenous People, GARes61/295 of 13 September 2007, which needs to be highlighted in ISDS since some disputes include indigenous people, i.e *Bear Creek Mining v Peru* (2017) op. cit., and, *Chevron v Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II of 30 August 2018.

[133] See the non-binding CSR laws, The Organisation for Economic Co-operation and Development (OECD) Declaration and Decision on International Investment and Multinational Enterprises (1976) 15 ILM 967; Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO, 279th Sess, November 17 2000, in 41 ILM 187 (2002), available at "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy" <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf> accessed 16 May 2016; United Nations Global Compact (31 January 1999); Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN4/Sub2/2003/12/Rev2 (2003); United Nations Guiding Principles on Business and Human Rights (2011).

always, operate through their multinational corporations (MNCs). International law has not evolved in a way to give other non-State actors protection and agency through rules, obligations, and laws like it does for States. Moreover, the international rules detailing non-State actor respect for human rights and the environment are not binding on MNCs and place the responsibility for protection of these rights on States.[134] This thesis aims to discover how the system of ISDS responds to those challenges and will assess whether the DRoL and an IRoL can be reinforced through this process with a focus on non-State actors.

ISDS should ensure a balance reflective of the RoL between State and investor interests, and this thesis explores whether this balance can exist through both the lens of the DRoL and an IRoL. The existing system of bilateral dispute resolution may struggle to produce the required legal certainty for future arbitral cases,[135] and this potential fragmentation and conflict of arbitral decisions made in numerous arbitral tribunals may create unnecessary complexities and uncertainty.[136] Apart from ad hoc arbitration, the thesis also investigates the scope for multilateral dispute resolution. In the past there was discussion of creating a multilateral instrument in the Multilateral Agreement on Investment (MAI), which the thesis will investigate. The ISDS institutions that will be considered also for the purposes of the analysis are the multilateral systems of ICSID and UNCITRAL, alongside initiatives taken by the EU to promote a standing multilateral system.[137] This thesis will focus more on UNCITRAL.

While it is not the primary site for ISDS, the focus on UNCITRAL, with reference to WGIII, offers a point of reflection for proposed responses to some of the challenges facing IIL and principally ISDS reform. Given the mandate of UNCITRAL, as a UN agency, promoting justice and equality is important, which

[134] United Nations Guiding Principles on Business and Human Rights (2011) 3.
[135] Stephan Schill (2012) op. cit., 606.
[136] The tribunals hearing the cases of, *CMS v Argentina* (2005) op. cit., and, *LG&E v Argentina* (2006) op. cit.; *Enron Corporation and Ponderosa Assets LP v Argentina*, ICSID Case No. ARB/01/3, Award of 22 May 2007 [191]-[214]; *Sempra Energy International v Argentina*, ICSID Case No. ARB/02/16, Award of 28 September 2007, [325]-[397], had different interpretation of whether the Argentine financial crisis constituted a state of necessity.
[137] Comprehensive Economic and Trade Agreement Between Canada and the European Union, (CETA) (Signed on 30 October 2016, Provisionally Effective 21 September 2017), art 8.29; Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, OJ L 11, 14 January 2017, [6i]; Jansen Calamita (2017) op. cit.; Free Trade Agreement between the European Union and the Socialist Republic of Vietnam EU-Vietnam, Investment Protection Agreement (published 24 September 2018) (Signed 30 June 2019) (EU-Vietnam); Joint press statement by EU Trade Commissioner Cecilia Malmström and Minister of Industry and Trade Tran Tuan Anh on the occasion of the signing of the Free Trade Agreement and the Investment Protection Agreement between Viet Nam and the EU, Hanoi, Vietnam 30 June 2019; European Union, 'Proposal for Investment Protection and Resolution of Investment Disputes, Transatlantic Trade and Investment Partnership' (EU published 12 November 2015) (TTIP Draft Proposal) (Signed 30 June 2019); Possible reform of ISDS: Submission from the European Union and its Member States, United Nations Commission on International Trade Law Working Group III (ISDS Reform), Thirty-seventh session, New York, 1–5 April 2019, <https://undocs.org/A/CN.9/WG.III/WP.159/Add.1> accessed 18 November 2020.

reflects the inquiry of this thesis. A purpose of creating UNCITRAL was to increase peaceful State participation and cooperation in international trade especially for developing States, by enhancing access to international trade, limiting domestic trade restrictions, and creating model international trade law in certain sectors.[138] Increasing and encouraging trade is similar to the purpose of IIAs/BITs,[139] and since UNCITRAL supposedly puts a focus on developing States it will be investigated whether it could respond to potential inequalities existing in the ISDS.

All States that are members of the UN are eligible to be elected members of UNCITRAL since it is a UN agency, and if they are not currently sitting members they are nonetheless encouraged to attend UNCITRAL sessions, as are invited non-State actors, held by the Commission and its subsidiaries such as the Working Group.[140] UNCITRAL attracts openness and encourages participation both from diverse States and non-State actors, which should invite a variety of opinions and debates that can be analysed by the thesis through the lens of the RoL. This thesis will evaluate the extent to which UNCITRAL delivers an inclusive forum for participants and debates. Furthermore, it will be helpful to investigate the significance of UNCITRAL as a UN agency in ISDS. UNCITRAL has created a variety of arbitration rules that are used in ISDS,[141] and sought to reinforce the RoL in the Transparency Rules 2013.[142] This thesis will explore the extent to which transparency is truly realised in the ISDS setting and whether its arbitration rules advance the RoL.

The UN references the RoL when engaging in peacekeeping operations that can address the promotion of justice and protection of human rights.[143] Moreover, UNCITRAL is committed to promoting the RoL at domestic and international levels.[144] The RoL is important for IIL and ISDS,[145] and it has been suggested that the role and work of UNCITRAL must ensure promotion of the RoL and sustainable development.[146] The RoL is a significant part of the thesis in its quest to explore ISDS, and UNCITRAL has also had presentations and discussions on 'strengthening the rule of law through access to justice',

[138] UNCITRAL (1966) op. cit., preamble.
[139] In my view, such transactions must be sustainable.
[140] Report of the United Nations Commission on International Trade Law, 57th plenary meeting, GA RES 36/32, 13 November 1981, [9].
[141] UNCITRAL Arbitration Rules (1976); UNCITRAL Arbitration Rules (2010); UNCITRAL Arbitration Rules (2013)
[142] Official Records of the United Nations General Assembly, 68th Session, Supplement No.17 (A/68/17), Ch III.
[143] Robert McCorquodale (2016) op. cit., 285.
[144] Report of the United Nations Commission on International Trade Law, Forty-seventh session, 7-18 July 2014
[145] 'Enabling environments for rules-based business, investment, and trade. Remarks by Norine Kennedy' (UNCITRAL) <http://www.uncitral.org/pdf/english/whats_new/2014_07/rule_of_law_briefing_presentations/UNCITRAL_ICC_speech_071614.pdf> accessed 27 July 2019, p 4-5.
[146] 'Statement by the Chair of the 46th session of UNCITRAL, Mr. Michael Schoell, to the Commission at its 47th session under agenda item 15' (UNCITRAL)<http://www.uncitral.org/pdf/english/whats_new/2014_07/rule_of_law_briefing_presentations/statement_by_the_Chair_of_the_46th_session.pdf> accessed 27 July 2019.

although these have focused more on domestic systems.[147] UNCITRAL has the potential to expose problems and offer solutions attentive to the theoretical foundations of the thesis.[148]

One such problem is the issue of appellate review. Even though there is currently no appellate review mechanism for IIL and ISDS, there have been appellate review developments in international economic law. Multilateral appellate review mechanisms exist in international trade law. Arguably, the most significant is the multilateral WTO and its dispute settlement mechanism, which includes an Appellate Body (AB).[149] The WTO is now at the centre of the international trade law system and addresses some investment disputes under, for example, the General Agreement on Trade in Services and Trade Related Investment Measures. The potential ongoing legitimacy crisis at the WTO,[150] and the standstill of its AB with fascinating developments thereafter,[151] provides an intriguing backdrop to the inclusion of appellate review in ISDS.

UNCITRAL is currently inviting States to explore potential reforms for ISDS with the objective of recommending proposals to the Commission. This gives the thesis a contemporary focus to explore ISDS debates and developments. UNCITRAL WGIII has already identified concerns of consistency,[152] the independence and impartiality of arbitrators,[153] selection and appointment of arbitrators,[154] the

[147] 'Rule of Law Briefing' (UNCITRAL) <http://www.uncitral.org/uncitral/en/data/whats_new/2014_07_rule-of-law-briefing.html> accessed 27 July 2019.
[148] Jansen Calamita (2017) op. cit.; Rob Howse (2017) op. cit.; Christian Tams (2006), op. cit.
[149] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization (1994) 1867 UNTS 154, 33 ILM 1144, signed on 15 April 1994 (entered into force 1 January 1995).
[150] Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein, and Michelle Zang, *The Legitimacy of International Trade Courts and Tribunals Studies on International Courts and Tribunal*s (CUP 2018); Michelle Zang, 'When the multilateral meets the regionals: regional trade agreements at WTO dispute settlement' (2019) 18(1) World Trade Review 33.
[151] Joint Statement by the European Union and Canada on an Interim Appeal Arbitration Arrangement, European Commission Press Release of 25 July 2019; 'Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to The General Council' (11 December 2018) WT/GC/W/752/ Rev.2.
[152] Possible reform of ISDS: Consistency and related matters, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (ISDS Reform), Thirty-sixth session, Vienna, 29 October–2 November 2018, <https://undocs.org/en/A/CN.9/WG.III/WP.150> accessed 16 March 2020
[153] Possible reform of ISDS: Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (ISDS Reform), Thirty-sixth session Vienna, 29 October–2 November 2018, <https://undocs.org/en/A/CN.9/WG.III/WP.151> accessed 16 March 2020.
[154] Possible reform of ISDS: Arbitrators and decision makers: appointment mechanisms and related issues, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (ISDS Reform) Thirty-sixth session Vienna, 29 October–2 November 2018, <https://undocs.org/en/A/CN.9/WG.III/WP.152> accessed 16 March 2020.

cost and time of ISDS,[155] and third-party funding,[156] which arguably should be remedied.[157] However, other issues may have received less attention by WGIII that might raise questions of inclusivity,[158] which will be investigated by the thesis. Nonetheless, these identified concerns are relevant to the proposal for the creation of a multilateral standing appellate review mechanism. There have been numerous reform discussions on appellate review,[159] multilateral instrument,[160] and adjudicators.[161] The thesis will assess whether the discussions of WGIII reinforce both the DRoL and an IRoL.

1.3: The structure of the thesis

This thesis will be divided into four main parts. Chapter 2 further sets out the theoretical and methodological foundation of the thesis. In this chapter, the formal and substantive RoL and the relationship between the DRoL and an IRoL with reference to the issues raised above, will be explored further. The formal and substantive RoL elements that this thesis will focus on are the prevention of

[155] Possible reform of ISDS: Cost and duration, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (ISDS Reform), Thirty-sixth session Vienna, 29 October–2 November 2018, <https://undocs.org/en/A/CN.9/WG.III/WP.153> accessed 16 March 2020.

[156] Possible reform of ISDS: Third-party funding, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (ISDS Reform), Thirty-seventh session, New York, 1–5 April 2019, <https://undocs.org/en/A/CN.9/WG.III/WP.157> accessed 16 March 2020.

[157] Possible reform of ISDS (October 2019), op. cit., [1]; Report of Working Group III (ISDS Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), United Nations Commission on International Trade Law, Fifty-second session, Vienna, 8–26 July 2019, [135] [138] <https://undocs.org/A/CN.9/964> accessed 11 November 2020.

[158] Gus Van Harten (2020) op. cit.; James Gathii (2021) op. cit.; Nicolás Perrone in Santos and others (2019) op. cit.; Muthucumaraswamy Sornarajah, 'An International Investment Court: panacea or purgatory?' (Colombia Centre for Sustainable Investment: Columbia FDI Perspectives, Perspectives on topical foreign direct investment issues No. 180 August 15, 2016); Lisa Sachs, Lise Johnson, Brooke Guven, Jesse Coleman, and Ladan Mehranvar, 'The UNCITRAL Working Group III Work Plan: Locking in a Broken System?' (Columbia Centre on Sustainable Investment, 4 May 2021) <https://ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system> accessed 10 May 2021.

[159] Possible reform of ISDS, Appellate and multilateral court mechanisms, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (ISDS Reform), Thirty-eighth session (resumed), Vienna, 20–24 January 2020, <https://undocs.org/en/A/CN.9/WG.III/WP.185> accessed 19 November 2020; Report of Working Group III (ISDS Reform) on the work of its resumed thirty-eighth session, United Nations Commission on International Trade Law Working Group III (ISDS Reform) Resumed, thirty-eighth session, Vienna, 20–24 January 2020, <https://undocs.org/en/A/CN.9/1004/Add.1> accessed 16 November 2020; Possible reform of ISDS, Appellate mechanism and enforcement issues, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (ISDS Reform) Fortieth session, Vienna, Online, 8–12 February 2021, <http://undocs.org/en/A/CN.9/WG.III/WP.202> accessed 19 February 2021.

[160] Possible reform of ISDS, Multilateral instrument on ISDS reform, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (ISDS Reform), Thirty-ninth session, New York, 30 March–3 April 2020, <https://undocs.org/en/A/CN.9/WG.III/WP.194> accessed 1 March 2021.

[161] Report of Working Group III (ISDS Reform) on the work of its resumed thirty-eighth session (2020), op. cit., [96]; Possible reform of ISDS, Draft code of conduct, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (ISDS Reform), Fortieth session, Vienna, Online, 8–12 February 2021, <http://undocs.org/en/A/CN.9/WG.III/WP.201> accessed 5 March 2021; Possible reform of ISDS, Selection and appointment of ISDS tribunal members, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (ISDS Reform), Fortieth session, Vienna, Online, 8–12 February 2021, <http://undocs.org/en/A/CN.9/WG.III/WP.203> accessed 5 March 2021.

arbitrariness, transparency, and equality, since they have links between each other and connections with other formal and substantive elements of the RoL. The chapter will also set out RoL elements which intersect with ISDS, but which currently cause controversies in IIL such as State sovereignty, equality, and human rights and sustainability. Elements of the RoL will be analysed with reference to their formal and substantive application, articulation, and understanding in the domestic and international system.

Chapter 3 examines whether the RoL is reinforced through the current rules and institutions that regulate ISDS. An analysis of IIAs/BITs, UNCITRAL and ICSID will inform this discussion. The discussion on IIAs/BITs will investigate their interaction with State sovereignty, equality, and sustainability, and this thesis will briefly consider the inconsistent application of investor protections through a RoL analysis. This chapter will investigate UNCITRAL as a UN agency and ICSID as part of the World Bank and focus on aspects related to dispute resolution for ICSID and the New York Convention (NYC) which is used to enforce ISDS awards outside the ICSID Convention. Both offer some opportunity to review awards under Article 52 and Article V respectively. It is intriguing that these reviews seem to occur in the different settings of the domestic and international system and thus raises issues relating to the DRoL and an IRoL. The thesis will investigate the settings of these reviews and whether these provisions can offer reviews capable of reinforcing the formal and substantive RoL.[162] Moreover, this chapter will explore whether these Conventions can be amended or utilised to enforce and recognise awards made in an international system incorporating an appellate review mechanism. Additionally, this chapter will investigate the capacity of individuals acting as arbitrators in ISDS proceedings to reinforce or undermine the RoL. As part of this analysis, the thesis will explore the regulations governing the appointment of arbitrators and discuss some of the concerns that have been raised by scholars about the selection and appointment of adjudicators in ISDS.

Chapter 4 evaluates whether developments that relate to multilateral appellate review will reinforce or diminish the RoL in the context of IIL. This will entail investigation of the MAI, WTO AB, and EU free trade agreements (FTAs). This chapter will evaluate the MAI to give insights into why a multilateral mechanism failed that could have contributed to replacing the bilateral nature of IIL which brings complexities and fragmentation. The purpose of considering the strengths and weaknesses of how other appellate review mechanisms operate and function in law systems with similarities to IIL, like in trade with the WTO AB, is to inspect the extent to which this dispute mechanism furthers the RoL. It will provide insights in how to incorporate an appeals system in IIL that reinforces the RoL. The

[162] As noted above analysing both ICSID and UNCITRAL procedures for review of arbitral awards in light of RoL values is one contribution the thesis makes from prior literature.

inclusion of the investment court system (ICS) in recent EU FTAs that are far-reaching in their scope could provide further insights. They notably include potential establishment of a multilateral appellate mechanism. This is relevant to Chapter 5 as the EU is pushing for the ICS to develop into a globally reaching multilateral investment court at UNCITRAL WGIII.

The final substantive analysis is presented in Chapter 5, which inspects UNCITRAL WGIII material available up until February 2021.[163] Chapter 5 examines the RoL dimensions of the ongoing discussions taking place at WGIII. This includes WGIII's inclusivity of participation for State and non-State actors, identified concerns in ISDS, and reform proposals. Reform proposals on appellate review and/or an investment court, a multilateral instrument, and adjudicators will be closely analysed. These proposals are important as they correspond to whether appellate review, preferably within a multilateral two-tier system containing adjudicators capable of reinforcing an IRoL is how ISDS should be reformed. Chapter 6 is the conclusion.

In this introductory chapter I have outlined the current key issues of ISDS and how the RoL might impact those issues. In the next chapter we begin to look in greater depth at the DRoL and an IRoL along with their various formal and substantive aspects and how they interact in ISDS.

[163] The intended submission was scheduled for September 2021, but was delayed due to covid-19.

Chapter 2: Normative Foundations of ISDS: The Significance of the Rule of Law

2.1 Introduction

The aim of the chapter is to provide the theoretical and methodological foundations of the thesis, in particular focusing on the concepts and elements of the rule of law (RoL) relevant to investor-state dispute settlement (ISDS). In this chapter, the concepts of the domestic RoL (DRoL) and an international RoL (IRoL) will be analysed with reference to their formal and substantive elements, exploring the dynamics of their interaction. These elements include transparency, equality, and the prevention of arbitrariness. Their application can interlink between one another and with other elements of the RoL. The RoL was introduced in Chapter 1, and will be examined in further depth here.

The RoL is a globally important and respected concept in diverse legal systems.[1] International investment law (IIL) concerns sovereign States that acquire differing power and bargaining positions and non-State actors which interact with domestic citizens. This draws into question RoL values of equality between different actors and the protection of human rights and sustainability. A rights-sensitive approach should be adopted, as both the DRoL and an IRoL reference the importance of safeguarding rights, which investors or States could violate through their actions and practices. Evaluating the RoL exposes the complexities and challenges of governing IIL and ISDS, which will be seen in later chapters.

Embedding a form of appellate review process within the ISDS with appropriate adjudicators could protect against the possibility of arbitrariness and protect the legitimacy of ISDS by improving clarity, coherence, diligence, correctness, consistency, predictability, certainty, justice, and fairness of ISDS awards. It could also provide access to justice, transparency, equality, independence, and impartiality, and protect human rights and sustainability. These elements are crucial to both the formal and substantive versions of the DRoL and an IRoL. These RoL elements must be examined when critically reflecting on the proposal to create a form of multilateral appellate review. This is because for example, when considering enforcement and cost and time of appellate review, the procedure would need to be accessible for the disputing parties to participate while being capable of resolving disputes through legitimate means. This means it would need to provide access justice, fairness, consistency, and correctness within dispute settlement. Similarly, in the selection and appointment of adjudicators the procedure would expect to consider their integrity and their expertise and qualifications. This offers opportunities for the dispute settlement to have independence and impartiality, to have clarity

[1] 'United Nations and the Rule of Law' (United Nations) <https://www.un.org/ruleoflaw/> accessed 11 March 2018; Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004), 3.

of proceedings, to adhere to sustainability and human rights, and to respect State sovereignty. These issues all link to transparency, equality, and the prevention of arbitrariness, and the success of their implementation into an appellate review mechanism could help ISDS reinforce the RoL.

This Chapter will build upon the RoL analysis in Chapter 1. It will provide further evaluation of the formal and substantive variations of the DRoL and an IRoL and explore the relationships between some of their elements. There will be focus on the RoL elements of the prevention of arbitrariness, transparency, and equality which this thesis introduced in Chapter 1. These elements will connect to discussion relating to access to justice for parties seeking to protect their economic and social rights, including cultural concerns and sustainable development. The three RoL elements on which I focus also can be linked to further RoL issues like fairness, correctness, consistency, justice, impartiality, and independence. The last section of this chapter considers why adherence to the DRoL and IRoL does not require abolition of ISDS but does suggest that its reform is advisable. The next chapter will consider how extant ISDS and other institutions address these RoL challenges and their sufficiency. The aim of this chapter is to provide the theoretical and methodological foundations of the thesis concerning the ways in which RoL is significant for ISDS.

In the sections that follow, the concepts of the DRoL and an IRoL will be defined and the symbiotic relationship of these two (contested) concepts will be explored. The purpose of this analysis is to articulate the values and principles that underpin IIL and ISDS with a view to demonstrating why a multilateral appellate review mechanism should constitute a core part of ISDS. In doing so, this thesis will consider the prevention of arbitrariness, transparency, and equality which link with one another and other elements of the RoL as discussed in Chapter 1. This means the thesis will evaluate the DRoL and an IRoL with a focus on the prevention of arbitrariness, transparency, and equality and consider other elements that link with these elements such as sovereign equality and human rights which can raise tensions in ISDS.

2.2 The DRoL and an IRoL and the Formal and Substantive RoL

The effect of ISDS in domestic and international affairs should be considered through principles significant to IIL such as the RoL, since its interpretation may differ at the domestic and international level. I will present two conceptions of the RoL: the DRoL and an IRoL. From an English law perspective the RoL has been described as 'an unqualified human good'.[2] Crawford argues, '[i]f it is a 'human good', the rule of law is simultaneously a legal, formal virtue, a virtue that legal systems should and may have'.[3] He questioned Lon Fuller's argument that 'the RoL is a necessary internal virtue of any

[2] E P Thompson, *Whigs and Hunters: The Origins of the Black Act* (1977) 266; Simon Chesterman, 'An International Rule of Law?' (2008) 56(2) AJCL 331, 331.
[3] James Crawford, 'International Law and the Rule of Law' (2003) 24 ALR 3, 4.

functioning legal system, something a legal system has to have even to exist',[4] since systems like Gaddafi's Libya have laws even though the RoL is absent.[5] However, considering Gaddafi's Libya no longer exists, legal systems without the RoL may not be sustainable, and since most sustainable systems have a RoL, the RoL could be necessary. Academics have questioned the RoL arguing it is used to describe only good political and legal systems,[6] excessive usage of the RoL has caused it to be meaningless,[7] or its definition is uncertain.[8] This could be because politicians sometimes refer to the RoL when attempting to gain trust and justify objectives.[9] However, the RoL exists, benefits, and attains significance in domestic and international society,[10] and has been promoted on numerous occasions in important primary sources in domestic[11] and international capacities,[12] and secondary sources.[13]

The origins of RoL derive from the normative position that no one is above the law. Although Aristotle referred to supremacy of the law over citizens including law makers,[14] Fuller referred to no man being above the law whatever their high position,[15] and Blackburn referred to impartiality of the judiciary in disputes.[16] In the common law tradition, the DRoL definition is sourced from Dicey, who identified

[4] Ibid, 4; James Crawford, *Chance Order, Change: The Course of International Law* (Brill 2014) 344-345; Lon Fuller, *The Morality of Law* (YUP 1964) 39.
[5] James Crawford (2014), op. cit., 344-345; James Crawford (2003), op. cit., 4-5.
[6] Joseph Raz, 'The Rule of Law and its Virtue', in Raz, *The Authority of Law: Essays on Law and Morality* (OUP, 1979) 210; John Finnis, *Natural Law and Natural Rights* (OUP 1980) 270.
[7] Judith Shklar, 'Political Theory and the Rule of Law', in Alan Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1; *Bush v Gore* (2000) 531 US 98.
[8] Brian Tamanaha (2004), op. cit., 3; Thomas Carothers, Promoting the Rule of Law Abroad, Carnegie Endowment for International Peace, Rule of Law Series, N0 34, Working Paper of January 2003, p3
[9] 'Brexit: Buckland says power to override Withdrawal Agreement is 'insurance policy'' (BBC, 13 September 2020) <https://www.bbc.co.uk/news/uk-politics-54137643> accessed 13 September 2020; 'EU budget blocked by Hungary and Poland over rule of law issue' (BBC, 16 November 2020) <https://www.bbc.co.uk/news/world-europe-54964858> accessed 16 November 2020.
[10] Brian Tamanaha (2004), op. cit., 1-3.
[11] Constitutional Reform Act 2005, s 1, s 17; *R v Secretary of State for the Home Department, Ex Parte Pierson* [1998] AC 539, 591 (Lord Steyn); *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [69]-[73].
[12] European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, adopted at its 86th plenary session (Venice, March 2011); Treaty on European Union (Consolidated Version), Preamble, arts 2, 21; *Elettronica Sicula SpA (ELSI) (United States v Italy)* ICJ Judgment of 20 July 1989, [124] [128]; *Asylum Case (Colombia v Peru)* ICJ Judgment of 20 November 1950, p 284.
[13] Albert Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan 1885), pt II; Tom Bingham, *The Rule of Law* (Penguin 2010); Brian Tamanaha (2004), op. cit.; Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity' (2016) 65 ICLQ 277, 279-284; James Crawford (2003), op. cit.; Simon Chesterman (2008), op. cit.
[14] Aristotle, *Aristotle's Politics and Athenian Constitution*, edited and translated by John Warrington (JM Dent 1959) book III, s 1287, p 97.
[15] Lord Denning quoting Dr Fuller's, Gnomologia: Adagies and Proverbs (1733) in *Gouriet v Union of Post office Workers* [1977] QB 729, 762, 943.
[16] *The Mersey Docks and Harbour Board' Trustees: William, Gibbs and Others* (1866) LR I HL 93, 110 (Justice Blackburn).

three characteristics of law which enables it to serve as a constraint on political power.[17] The first characteristic is the absolute supremacy or predominance of law as opposed to the influence of arbitrary power.[18] Dicey argued discretionary government power must be executed within the law. Dicey extensively referred to arbitrariness. He advocated for the prohibition of arbitrariness in issuing privileges, discretionary authority given to governmental power, and decision-making processes, as all individuals are only ruled by the law and can only be punished by a proven breach of the established laws before the ordinary courts. In other words, the absolute supremacy of the law over government power is paramount for the DRoL.

The second characteristic is equality before the law.[19] Dicey argued that equality formally means that no person is above the law. It is the 'equal subjection of all classes to the ordinary law administered by the ordinary law courts',[20] therefore State officials cannot be immune from the law. The third characteristic is enforcement before the courts.[21] Dicey believed court decisions are more relied on in England than other European States,[22] and controversially argued this third characteristic of the DRoL is a 'special attribute of English institutions'.[23] However, his English and foreign comparisons were later shown to be misleading.[24] Moreover, although currently English law operates in a common law setting while other European States have civil laws, judges can influence the interpretation of legislation and constitutional principles. Thus, the court is significant for all RoL systems.

Overall, the conventional definition(s) of DRoL can be described as requiring that any individual, who chooses to violate fixed rules, will be held accountable before courts for the implications of breaching those rules equally compared to any other individuals that violate those same fixed rules. This corresponds to the prevention of arbitrariness. Although Dicey's concept of the DRoL is contested,[25] it has been influential.[26] Preventing arbitrariness could also be a foundation of an IRoL, as shown by some decisions at the international court of justice (ICJ), even though the existence of an IRoL has been questioned.[27]

[17] Albert Dicey (1885), op. cit., pt II.
[18] ibid, pt II, 110-113.
[19] ibid, pt II, 114-115.
[20] ibid, pt II, 120.
[21] ibid, pt II, 115-120.
[22] ibid, pt II, 115-120.
[23] ibid, pt II, 115.
[24] Tom Bingham (2010), op. cit., 4-5.
[25] ibid, 5.
[26] James Crawford (2003), op. cit.; James Crawford (2014), op. cit.; Simon Chesterman (2008), op. cit.
[27] Richard Collins, 'The Rule of Law and the Quest for Constitutional Substitutes' (2014) 83 Nordic Journal of International Law 87; Robert McCorquodale (2016), op. cit., 288.

The *Asylum case* outlined 'asylum cannot be opposed to the operation of justice' with the exception of when 'arbitrary action is substituted for the rule of law'.[28] The *ELSI case* further emphasised the importance of arbitrariness by separating it as a distinct category independent of unlawfulness.[29] The chamber in *ELSI* described arbitrariness as 'a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety'.[30] The chamber using this definition determined that the Italian actions were not arbitrary since the mayor's act: was legal (the mayor had power to requisition ELSI), had reason (there was social and economic unrest at the threat of ELSI liquidation) and was appealable (the requisition order by the mayor was successfully appealed to the Italian courts).

This definition implies arbitrariness concerns due process and requires an assessment of whether mechanisms exist to correct potential arbitrary acts. Moreover, it is unclear why the act should cause 'shock' or 'surprise' and what acts would satisfy this definition. Unsurprisingly, this definition has been seen as troubling, too narrow, and inconsistent with both domestic and international systems.[31] Furthermore, the *Asylum case* contextualised a very narrow definition of an IRoL suggesting it is dominated by arbitrariness. However, in my view, the RoL includes more than just arbitrariness in both the DRoL and an IRoL. Although ICJ awards can contribute towards an IRoL,[32] ISDS and the ICJ are different legal settings governed by different substantive rules and procedures.[33]

The RoL underpins the EU's governance frameworks and the EU's RoL Report included the prohibition of arbitrariness as an element of the RoL but also legality (including a transparent, accountable and democratic process for enacting law), legal certainty, access to justice before independent and impartial courts (including judicial review of administrative acts), respect for human rights, and non-discrimination and equality before the law.[34] Although the Report highlighted the domestic application of the RoL, for example with reference to governments and single States,[35] the EU operates in the international system contributing to an IRoL. Crawford's and Chesterman's domestically focused

[28] *Asylum Case* (1950), op. cit., p 284.
[29] *ELSI* (1989), op. cit., [124].
[30] ibid, [128]. Moreover, the ICJ indicated '[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law.'
[31] Sean Murphy, 'The ELSI Case: An Investment Dispute at the International Court of Justice' (1991) 16(2) YJIL 391, 433, 451.
[32] Vienna Convention on the Law of Treaties (VCLT), (signed on 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, preamble. ICJ awards can be constitutive of international law and be considered general principles of international law. i.e standards of equitable treatment and protection against arbitrary measures, see, Sean Murphy (1991) op. cit., 445-446.
[33] The ICJ does not regulate ISDS in IIL; instead that is the function of institutions like ICSID and UNCITRAL. Moreover, ICJ cases deal with State-State disputes, whereas, IIL deal with ISDS.
[34] Venice Commission (2011), op. cit., [41].
[35] ibid, 15.

RoL definitions include arbitrariness and other elements that can link to arbitrariness. Chesterman's could be 'summarised as a government of laws, the supremacy of laws, and equality before the law',[36] while Crawford's includes 'absence of arbitrary power; the general non-retrospectivity of the laws; the subjection of government to laws, whatever their content; and the independence of the judiciary which must be established by law'.[37] Their definitions express a formal concept of the RoL,[38] whereas the EU's definition is a substantive one.[39]

There could be three approaches towards the RoL: the formal, procedural and substantive. This thesis will focus on the formal and substantive theories as they appear to receive more attention in the literature, and formal understandings of the RoL commonly include procedural dimensions. Formal understanding of the RoL could be considered thin while substantive understandings of the RoL could be considered thick.[40] This is because according to Tamanaha, 'formal theories focus on the proper sources and form of legality whereas substantive theories also include requirements about the content of the law' i.e justice, but there can be overlap between them.[41] Formal approaches may focus on legality encompassing qualities such as accessibility, predictability, publicity, and generality of law.[42]

The procedural approach emphasises the processes and institutions in the legal system, including dispute resolution mechanisms, that administer the formal principles of law.[43] McCorquodale believed Waldron's RoL definition which included legal constraints on those in authority, clarity and predictability of laws, independent courts, and legal equality, amounted to a summarised definition of the formal and procedural approaches.[44] Similarly, the formal understanding of the RoL from Joseph Raz and Lon Fuller includes prospective, general, clear, public and relatively stable law coupled with more procedural elements of an independent judiciary that can conduct judicial review.[45]

Formal conceptions could focus more on the 'mechanical' aspects of the law by putting forward the compliance of legal rules with certain system-internal requirements, without passing judgment on the

[36] Simon Chesterman (2008), op. cit., 342.
[37] James Crawford (2003), op. cit., 4, 10.
[38] Simon Chesterman (2008), op. cit., 333. Chesterman admitted his definition was formal, and Crawford's definition seems from the eye formal.
[39] Venice Commission (2011), op. cit., [35]-[41].
[40] Velimir Zivkovic, 'Pursuing and Reimagining the International Rule of Law Through International Investment Law' (2020) 12 Hague Journal of the Rule of Law 1, 5; Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance* (Hart Publishing 2018) 21-23.
[41] Brian Tamanaha (2004), op. cit., 92.
[42] Lon Fuller (1964), op. cit., esp ch 2.
[43] Brian Tamanaha (2004), op. cit.; Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 EJIL 315, 316-317.
[44] Jeremy Waldron (2011), op. cit., 316-317; Robert McCorquodale (2016), op. cit., 282.
[45] Velimir Zivkovic (2020) op. cit., 5.

substance of those rules.[46] Substantive conceptions use formal approaches as a starting point, but could go beyond them by considering specific values or rights which could improve laws.[47] Substantive approaches could also reference more egalitarian and anti-authoritarian ideals, such as freedom, deliberative democracy, and individual rights.[48] McCorquodale moves away from the formal and procedural paradigms to advance the substantive approach, which includes the 'protection of human rights in it on the basis that the rule of law must adhere to principles of justice'.[49] Tamanaha also places justice within the substantive RoL.[50]

The formal aspect of the RoL could concern the sources of law.[51] Meanwhile, the substantive RoL engages with the content of the law.[52] This means formal RoL elements include the prevention of arbitrariness, legality, supremacy of law, independent and impartial courts, formal equality, non-retrospectivity of the laws, clear, accessible, and predicable laws, and access to justice and due process.[53] Substantive RoL elements include human rights, transparency, substantive equality, fairness, justice, correctness, and consistency.[54] This thesis draws attention to three RoL elements specifically the prevention of arbitrariness, transparency, and equality, whilst acknowledging their connections with each other and between other formal and substantive RoL elements. There is interaction with many RoL elements that are required for appellate review to work.

These RoL elements and the other interconnected RoL elements link into discussion within the thesis. The proposal for appellate review should at the very least reinforce consistency, correctness, justice, and fairness.[55] These outcomes could be even greater if establishing a multilateral two tier system.[56]

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[46] Ibid, 5.
[47] Ibid, 5.
[48] Mavluda Sattorova (2018), op. cit., 22-23.
[49] Robert McCorquodale (2016), op. cit., 282.
[50] Brian Tamanaha (2004), op. cit., 92.
[51] ibid
[52] ibid
[53] Simon Chesterman (2008), op. cit., 342; James Crawford (2003), op. cit., 4, 10; Albert Dicey (1885), op. cit., pt II, 110-120; *ELSI* (1989), op. cit., [124]-[128]. *Asylum Case* (1950), op. cit., p 284; Lon Fuller (1964), op. cit, ch 2; Jeremy Waldron (2011), op. cit, 316-317; Velimir Zivkovic (2020), op. cit, 5-6.
[54] Venice Commission (2011), op. cit., [41]; Robert McCorquodale (2016), op. cit., 282, 293; Tom Bingham (2010), op. cit., 66-67, 294.
[55] Possible reform of investor-State dispute settlement (ISDS): Appellate and multilateral court mechanisms, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session (resumed), Vienna, 20–24 January 2020, [8], <https://undocs.org/en/A/CN.9/WG.III/WP.185> accessed 19 November 2020; Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China: Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session, Vienna, 14–18 October 2019, p 4, <https://undocs.org/A/CN.9/WG.III/WP.177> accessed 19 November 2020.
[56] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, United Nations Commission on International Trade Law Working Group III (Investor-State

Such system should have legally binding awards that are consistently enforced,[57] and the process shall not be costly or time-consuming as to impede access to justice.[58] However, the success of such a system in reinforcing these RoL elements would depend on the adjudicators that would be appointed who should act in the public interest and reinforce independence and impartiality. An impartial and independent judiciary could enable awards to be seen as consistent, correct, just, and fair. These proposals are interlinked and systematic, since 'concern as regards the costs of the system is linked to the concern as regards the lack of predictability which is in turn linked to the concerns with the methods of arbitrator appointments which is in turn linked to the concerns with arbitrators' independence and impartiality'.[59] These concerns and RoL elements can all be linked to the prevention of arbitrariness. For example, it would be arbitrary for an appellate review mechanism to be created in which it was not accessible for disputing parties to access justice, or where a dispute was not intended to be resolved through careful consideration of laws and facts.[60]

Furthermore, transparency is required for opportunities to inspect whether full consideration has taken place.[61] Transparency can also reveal the extent to which ISDS has proceeded in a timely manner. Access to awards can ensure that they can be scrutinised in terms of their fairness, such that reasons given are consistent with the outcomes. Transparency would further enable a check on the qualifications and capacity of any arbitrators or adjudicators. A multilateral instrument alongside appellate review could address these RoL issues and further reinforce predictability, and clear and accessible laws or procedures.

The substantive IRoL could be served within the negotiating forum for the creation of a multilateral instrument to reinforce inclusiveness and diversity. Equality could be furthered in ISDS by allowing not only rich foreign investors a voice but also providing local communities access to ISDS which could reinforce access to justice and due process.[62] ISDS could do more in recognising the right of States to

Dispute Settlement Reform), Resumed, thirty-eighth session, Vienna, 20–24 January 2020, [22] <https://undocs.org/en/A/CN.9/1004/Add.1> accessed 16 November 2020.

[57] Albert Dicey (1885), op. cit., pt II, 115-120; Noemi Gal-Or, 'The Concept of Appeal in International Dispute Settlement' (2008) 19(1) European Journal of International Law 43, 59-61.

[58] Tom Bingham (2010), op. cit., ch 8.

[59] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-seventh session, New York, 1–5 April 2019, p 10, <https://undocs.org/A/CN.9/WG.III/WP.159/Add.1> accessed 18 November 2020.

[60] Albert Dicey (1885), op. cit., pt II, 110-120; *Asylum Case* (1950), op. cit., p 284; *ELSI* (1989), op. cit., [124], [128].

[61] Tom Bingham (2010), op. cit., ch 3.

[62] Nicolás Perrone, 'Making Local Communities Visible: A Way to Prevent the Potentially Tragic Consequence of Foreign Investment' in A Santos, C Thomas & D Trubek, *World Trade and Investment Law Reimagined* (CUP, 2019), 171-173, 179; Gus Van Harten, *The Trouble with Foreign Investor Protection* (OUP 2020), 133-136; James Gathii, 'Reform and Retrenchment in International Investment Law' (January 13, 2021), 24-25.

regulate which should reinforce state sovereignty and if the regulation is for legitimate public policy objectives then human rights, environmental considerations, and sustainability could be reinforced.[63] The ability for ISDS to consider more international public law interests like human rights and sustainability comes down to the adjudicators. The adjudicators would have to be capable of reinforcing the RoL for that to work such as having relevant expertise or experience to respect both the economic claims and also social and cultural values.[64] Appellate review could act as a safeguard to ensure the RoL is reinforced in ISDS. A two-tier system could enhance its ability to act as a safeguard, but the ability of the adjudicators to reinforce the RoL is dependent on the system in which they operate. This means the selection and appointment of adjudicator would need to be transparent to increase the likelihood of successful candidates equally representing diversity and avoiding conflict of interests and arbitrary outcomes.[65]

The elements included within Chesterman's and Crawford's DRoL definition are identical to their IRoL definition.[66] This means their IRoL definition is also formal. However, differences lie in their application, articulation, and understanding in the domestic and international systems.[67] Chesterman presented three possible meanings of an IRoL, favouring RoL principles interacting between States and non-State actors.[68] He argues that 'the rule of law is promoted: as a tool with which to protect human rights, promote development and sustain peace'.[69] Thus, he believes a 'functionalist understanding of how and why the rule of law is used as distinct from the formal understanding of what it means'.[70] This interpretation of an IRoL is reflected in the United Nations (UN) which considers the 'Rule of Law and Human Rights', the 'Rule of Law and Peace and Security', and the 'Rule of Law and Development'.[71] Velimir Zivkovic argues an IRoL has three relevant relationships: State to State, State and individuals/non-state entities, and international institutions/law and individuals.[72] These

[63] Robert McCorquodale (2016), op. cit., 292; James Thuo Gathii (2021) op cit., 23; Gus Van Harten (2020) op cit., 8.
[64] Stephan Schill (2011) op, cit., 883, 888-889; Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 European Journal of International Law 387, 402; Michael Waibely and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' (January 2017), p8, <http://www.yanhuiwu.com/documents/arbitrator.pdf> accessed 20 August 2022.
[65] Sergio Puig (2014), op. cit; Malcolm Langford, Daniel Behn, and Runar Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 Journal of International Economic Law 301.
[66] James Crawford (2003), op. cit., 4, 10; Simon Chesterman (2008), op. cit., 342, 359.
[67] James Crawford (2003), op. cit., 10-11; Simon Chesterman (2008), op. cit., 359-360.
[68] Simon Chesterman (2008), op. cit., 355-356.
[69] ibid, 359.
[70] ibid, 359.
[71] 'United Nations and the Rule of Law' (UN), op. cit.; Charter of the United Nations; UN General Assembly, Universal Declaration of Human Rights (UDHR), 10 December 1948, 217 A (III), Preamble; Declaration on the Rule of Law at the National and International Levels 2012 made at the High-Level Meeting on the Rule of Law at the National and International Levels, 30 November 2012, Sixty-seventh session, Agenda item 83, General Assembly Resolution A/RES/67/1.
[72] Velimir Zivkovic (2020) op. cit., 7.

relationships all have connections to IIL.[73] IIAs are State-State made obligations that establish treatments between State and foreign investors. Foreign investors have enforceable international legal rights and procedural standing against the host State in ISDS if a violation of an IIA occurs.

Zivkovic presents a formal IRoL definition.[74] He suggests that an IRoL requires 'supremacy of international law and respect for obligations under it; non-arbitrary behaviour; clarity, consistency and predictability in the promulgation and application of law; equality of subjects before international law; peaceful settlement of disputes, including through impartial adjudicative processes; and, respect for due process of law and procedural fairness'.[75] Zivkovic argued this definition has normative neutrality and would be supported by ICJ practice, international instruments, and other doctrines and documents (such as NGO positions).[76] Although a thin IRoL definition would attract wider support and less controversy,[77] '[t]he formalistic definition also ignores any elements of justice as part of the international rule of law',[78] especially substantive justice,[79] even though primary documents refer to justice under an IRoL.[80] The UN Sustainability Goals desire to '[p]romote the rule of law at the national and international levels and ensure equal access to justice for all'.[81] It is this richer conception of the IRoL on which this thesis draws when examining the potential of multilateral appellate review for ISDS.

Chesterman may relate the substantive approach with political goals, but as political goals are not within his understanding of the RoL, he appears to ignore the substantive RoL.[82] Thus, Chesterman favours the formal legality aspect of the RoL, 'yet legality by itself does not create an international rule of law' according to McCorquodale.[83] McCorquodale argues that 'an effective legal order must provide for the enforcement of legal obligations'. He criticised Chesterman for omitting the settlement of disputes from his RoL definition.[84] Interestingly, Chesterman referred to protecting human rights, promoting development, and sustaining peace which is identical to Chapter 1 of the UN charter,[85] yet

[73] Ibid, 8.
[74] Velimir Zivkovic (2020) op. cit., 5-6.
[75] Ibid, 5-6.
[76] Ibid, 5.
[77] Ibid, 6.
[78] ibid, 289. This could be because the concept of justice differs considerably from one State to another and thus could make the formal IRoL more appealing.
[79] Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 11-12.
[80] Secretary-General of the United Nations (UN), UN General Assembly, 67th session, Agenda Item 83, High-Level Meeting on the Rule of Law at the National and International Levels, Declaration of the Rule of Law, UN Doc A/67/PV.3; UN Security Council Resolution 1599 (28 April 2005), [3].
[81] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development (UN SDGs), 21 October 2015, A/RES/70/1 (entered into force 1 January 2016), Goal 16.
[82] Simon Chesterman (2008), op. cit., 333, 360.
[83] Robert McCorquodale (2016), op. cit., 289.
[84] ibid, 289.
[85] Simon Chesterman (2008), op. cit., 359.

failed to expressly recognise the importance of settling international disputes by peaceful means written in the same chapter.[86] Crawford overcomes the limitations of Chesterman's approach by expressly recognising 'the independence of the judiciary which must be established by law',[87] which portrays a mechanism for the 'settlement of disputes by law and an independent dispute settlement body'.[88]

McCorquodale distinguishes his version of an IRoL from the formal concepts presented by Chesterman, Crawford, and Zivkovic. McCorquodale's IRoL definition includes 'legal order and stability; equality of application of the law; protection of human rights; and the settlement of disputes before an independent legal body'. [89] A noticeable difference between their definitions is McCorquodale's inclusion of human rights and access to justice for human rights. McCorquodale criticised scholars that omitted the protection of human rights from IRoL definitions.[90] A purpose of the UN is 'promoting and encouraging respect for human rights',[91] and the Universal Declaration of Human Rights (UDHR) emphasises 'it is essential,……..that human rights should be protected by the rule of law'.[92] Every UN State is party to at least one human rights treaty,[93] and some human rights are considered either, *erga omnes* obligations,[94] *jus cogens* norms,[95] or customary international law.[96]

Chesterman did not explicitly articulate human rights within his conception of an IRoL, but did present how human rights could tacitly appear in his definition.[97] He argued 'certain human rights concerning the right to life and freedom of the person, for example, might be seen as essential aspects of a government of laws; non-discrimination may similarly be seen as an essential aspect of equality before the law'.[98] Furthermore, Chesterman's definition incorporates the UDHR in 'prohibiting arbitrary

[86] Charter of the United Nations, ch 1.
[87] James Crawford (2003), op. cit., 4, 10.
[88] Robert McCorquodale (2016), op. cit., 289.
[89] Robert McCorquodale (2016), op. cit., 292.
[90] ibid, 293-296.
[91] Charter of the United Nations, art 1(3).
[92] UDHR (1948), op. cit., preamble; Declaration on the Rule of Law at the National and International Levels 2012 made at the High-Level Meeting on the Rule of Law at the National and International Levels (2012), op. cit.
[93] Charter of the United Nations, Preamble, art 1; 'UN Human Rights Treaty Ratifications (UN) <https://indicators.ohchr.org/> accessed 14 July 2019.
[94] *Erga Omnes* obligations are rights that are owed towards all; *Barcelona Traction, Light and Power Company* (Judgement: Secondary Phase) [1970] ICJ Rep 3 [33]-[34].
[95] *Jus Cogens* Norms, also known as a peremptory norm, are rights that must be followed and cannot be derogated from; VCLT (1969), op. cit., arts 53, 64. Art 53.
[96] Customary international law are general principles accepted as law; Statute of the International Court of Justice, art 38 (b).
[97] Simon Chesterman (2008), op. cit., 344, 359.
[98] ibid, 344.

deprivation of liberty,[99] requiring fair trials by independent and impartial tribunals,[100] and protecting equality before the law'.[101]

Chesterman's definition as discussed above does not expressly outline international dispute resolution, but similarly it tacitly appears as 'the qualification that independence of the judiciary is only part of what is implied by supremacy of the law'.[102] In my view, its importance in the RoL deserves its own heading, since providing remedies for wronged parties is common in many Covenants and Conventions, a part of customary international law,[103] and 'it is this element of the international rule of law that enables all human rights to be protected through affording access to justice for every human right.'[104] Dispute resolution helps provide justice and fairness for wronged parties including enforcing human rights.[105] Chesterman criticised substantive theories as including too many elements in the RoL as to make it meaningless,[106] as for example, countless human rights exist.[107] Similarly, Zivkovic argued the 'inclusion of human rights can blur the still often-emphasized distinction between them and the rule of law'.[108] In my view, not all human rights are part of the RoL since it would blur the difference between the RoL and human rights,[109] but that to protect all human rights, transparent access to justice must be an essential value of the RoL.[110]

Bingham categorised his substantive RoL definition into eight qualities:[111]

(1) Accessibility of the Law: the law must be accessible and, to the greatest extent possible, be intelligible, clear and predictable;[112]

[99] UDHR (1948), op. cit., arts 3, 8, 9, 12, 29(2).
[100] ibid, arts 10-11.
[101] Ibid, arts 6-7; Simon Chesterman (2008), op. cit., 344.
[102] Simon Chesterman (2008), op. cit., 344.
[103] International Covenant on Civil and Political Rights (ICCPR). Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), arts 2(3), 14; Convention on the Rights of the Child, Adopted by GARes44/25 of 20 November 1989. Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 2(1); UDHR (1948), op. cit., art 10.
[104] Robert McCorquodale (2016), op. cit., 294.
[105] ibid, 284.
[106] Simon Chesterman (2008), op. cit., 332, 340-342. He used scholars such as, Judith Shklar in Hutchinson and Monahan (1987), op. cit. to support his argument.
[107] Simon Chesterman (2008), op. cit., 333, 340-342. He used, Joseph Raz, in Raz (1979), op. cit., 210-211, to support his argument.
[108] Velimir Zivkovic (2020) op. cit., 6.
[109] Robert McCorquodale (2016), op. cit., 283.
[110] Tom Bingham (2010), op. cit., 66-67, 294.
[111] ibid.
[112] ibid ch 3.

(2) Law not Discretion: queries of legal right and liability should be ordinarily resolved by application of the law and not through exercising discretion;[113]

(3) Equality Before the Law: the law should be applied equally to all (formal equality), excluding in circumstance when objective differences justify divergence (substantive equality);[114]

(4) The Exercise of Power: public officers and Ministers employed from all levels must exercise the powers given to them, fairly, in good faith, for the purpose in which those powers were given, and without exceeding the boundaries of such powers or using them unreasonably;[115]

(5) Human Rights: the law must accord sufficient protection of human rights;[116]

(6) Dispute Resolution: there must be a mechanism provided to resolve legal civil disputes that the parties themselves cannot resolve which is without both restrictive and excessive cost or delay;[117]

(7) A Fair Trial: judicial and other adjudicative procedures must be fair and independent;[118]

(8) The Rule of Law in the International Legal Order: the State must obey its obligations in international law.[119]

Although this RoL definition is broad, its elements are defined, unlike Chesterman's who tacitly but not explicitly includes elements.

Crawford and Chesterman could be criticised for equating the DRoL with an IRoL and then drawing distinctions between the findings of the international system and RoL on that basis, since the domestic and international system operate differently. The diversity of the global order is such that an IRoL cannot and should not be modelled on the DroL.[120] McCorquodale argued that his IRoL definition is consistent with the DroL concepts but not dependant on domestic institutions and systems,[121] although most of concepts of the RoL that he analysed were interpreted with the focus on domestic systems.[122] McCorquodale criticised academics that applied the DroL in the international system to

[113] ibid, ch 4.
[114] ibid, ch 5.
[115] ibid, ch 6.
[116] ibid, ch 7.
[117] ibid, ch 8.
[118] ibid, ch 9.
[119] ibid, ch 10.
[120] Ian Hurd, 'The International Rule of Law: Law and the Limit of Politics' (2014) 28 E&IA 39, 39.
[121] Robert McCorquodale (2016), op. cit., 292.
[122] ibid, 284.

claim that an IRoL did not exist, since it is a limited approach which would only expose States' international legal obligations.[123]

It seems that the elements making up the DRoL and an IRoL are similar. This includes arbitrariness, transparency, and equality; but what may be different lies in their application and purpose. In IIL there have been concerns that the current international setting of ISDS fails to complement or advance the DRoL. Some commentators have suggested that increased deference to domestic policy-making,[124] or domestic courts,[125] can resolve this issue. However, these academics seem to have disregarded that an IRoL and the DRoL could be inter-connected. It has been argued that 'the role of international law is to reinforce, and on occasions to institute, the rule of law internally'.[126]

However, for this to work the international system reviewing the domestic system or acting in the interests of the domestic system would have to follow an IRoL. As such, an IRoL could reinforce the DRoL since the requirement to protect human rights and provide access to arbitration in tribunals at an IRoL could have a palpable impact on the scope of both substantive and procedural justice within the DRoL. For example, improving substantive and procedural aspects of justice is more likely to expose potential corruption as well as problems in the time it takes to access justice, or unequal treatment before the law in domestic systems. By recognising the link between an IRoL and the DRoL, this thesis will argue that the two concepts may be symbiotic and co-determinative, 'each acknowledging the existence and validity of the other'.[127]

Further, diversities of cultures and backgrounds in different States could formulate alternative and a wider RoL understanding than for example a western RoL interpretation. Additionally, an IRoL could consolidate divergent DRoL interpretations. While appreciations of reasons for particular variations of the DRoL could inform an IRoL since international law can be influenced and derived from domestic law.[128] For example, domestic appellate systems could help inform the development of international appellate systems.[129] The application of appellate review principles in the DRoL to the international

[123] ibid, 291.
[124] Ahmad Ghouri, 'What Next for International Investment Law and Policy?: A Review of the UNCTAD Global Action Menu for Investment Facilitation' (2018) 15(2) MJIEL 190, 193, 203, 211, 213.
[125] Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law (2018) 112(3) ASIL 361; Anthea Roberts (2018), op. cit., 417-418.
[126] James Crawford (2003), op. cit., 8.
[127] James Crawford (2003), op. cit., 10.
[128] HLA Hart, *The Concept of Law* (2nd edn, OUP 1994); Ernst-Ulrich Petersmann, 'International Rule of Law and Constitutional Justice in International Investment Law and Arbitration' (2009) 16(2) IJGLS 513,515; Steven Neff, *Hugo Grotius on the Law of War and Peace: Student Edition* (CUP 2012); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005).
[129] Noemi Gal-Or (2008), op. cit., 55-60.

system could create a more effective IRoL.[130] This connection can occur in dispute settlement, since decisions made in the international system will impact the domestic system as that is where the decision is commonly interpreted and enforced (or reacted upon in some way to appease international tension), and the domestic system can impact the international system since domestic decisions can act persuasively to influence future international decisions. Thus, the DRoL can be furthered not only by domestic courts and authorities, as some academics seem to believe, but through international awards based on an IRoL that will apply to domestic systems impacting the DRoL.

There could also be differences between the DRoL and IRoL since an IRoL has been defined by some scholars as a *relative*, rather than *absolute,* concept that may not yet be fully actualised.[131] One possible explanation for the lack of consensus on what constitutes an IRoL could be that academics have applied their own perception of the DRoL to the international system.[132] An IRoL would also have to consider States and non-State actors like organisations and corporations that operate in the international system. The DRoL aims to achieve justice within a State's border, whereas, an IRoL aims to achieve justice in a wider sphere that goes beyond State boundaries and in fact across national borders which interacts with a variety of both State and non-State actors. Consequently, this raises challenges for tribunals hearing cross-border issues of justice encompassing different cultural understandings and addressing disparities in resources such as wealth, power, information, technology, and expertise, between States and non-State actors.

The international system has no single binding court, no unified executive or legislature, and no clear hierarchy of powers.[133] This means the DRoL may be easier to pinpoint within a State territory than reaching a consensus on what an IRoL specifies beyond a State territory although it is still possible. Two awards made outside the domestic system that should be following an IRoL could have frictions when both applied in the domestic system.[134] In addition, what happens in domestic law may not necessarily be accepted at the international level.[135] The element of prohibition of arbitrariness appears across various conceptions of the RoL but what one domestic system defines as arbitrary may not correlate to what the international system defines as arbitrary.[136] Different domestic and

[130] Ibid, 55-60, 64.
[131] Robert McCorquodale (2016), op. cit.
[132] ibid.
[133] ibid, 289.
[134] *United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v Estonia*, ICSID Case No. ARB/14/24, Award of 21 June 2019, [541].
[135] *ELSI* (1989), op. cit., [124]; Sean Murphy (1991) op. cit.
[136] *ELSI* (1989), op. cit., [128]; *Asylum Case* (1950), op. cit., p 284.

international systems can reach different conclusions.[137] In other words, the DRoL and an IRoL serve different functional purposes, but have similar fundamental values that flow across.

However, what appears to be missing from common definitions of both the DRoL and an IRoL is recourse to an appellate review mechanism. Most legal systems have an appellate review mechanism,[138] so it is strange that such a basic element in the judicial process is omitted from many RoL conceptions. Even though certain conceptions of the RoL refer to judicial review,[139] reference to appellate review evades such attention. Furthermore, predictability in laws and dispute settlement is generally accepted by academics to be an element in the DRoL and an IRoL,[140] or at least an outcome of the RoL.[141] Although international adjudication has traditionally only rarely provided for appellate review,[142] the availability of an appellate review mechanism can play an important role in the realisation of judicial predictability. Moreover, provided a 'bad' rule is not applied consistently,[143] it could further promote fairness and justice, by enabling 'bad' decisions to be challenged.

Appellate review could protect the legitimacy of ISDS by increasing the likelihood of correct awards being made. This is imperative as the financial stakes in ISDS are so high,[144] and it involves sovereign States responsible for their citizens and investors responsible for their employees. The right balance must be sought between States' right to regulate for the benefit of its citizens and investors' protecting

[137] *United Utilities v Estonia* (2019), op. cit., [541].
[138] Elihu Lauterpacht, *Aspects of the Administration of International Justice* (CUP 1991) 99.
[139] James Crawford (2003), op. cit., 9-11; Robert McCorquodale (2016), op. cit., 298, 301; Venice Commission (2011), op. cit., [41]; Tom Bingham (2010), op. cit., ch 8-9; Jaemin Lee, 'Mending the Wound or Pulling It Apart? New Proposals for International Investment Courts and Fragmentation of International Investment Law' (2018) 39 NJIL&B 1, 27, 34-35.
[140] Jaemin Lee (2018) op. cit., 5, 19, 23; Jeremy Waldron (2011), op. cit., 316-317; Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' (2014) 25(4) EJIL 1147, 1163-1164; Robert McCorquodale (2016), op. cit., 284; Tom Bingham (2010), op. cit., ch 3; Venice Commission (2011), op. cit., [41]; Thomas Schultz, 'Against Consistency in Investment Arbitration' in Zachary Douglas, Joost Pauwelyn, and Jorge Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory Into Practice* (OUP 2014) 297.
[141] Arthur Watts, 'The International Rule of Law' (1993) 36 GYIL 15, 25, 41; Robert McCorquodale (2016), op. cit., 292.
[142] Noemi Gal-Or (2008), op. cit; Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Grotius Publications 1991) ch VI; Giorgio Sacerdoti, 'Appeal and judicial review in international arbitration and adjudication: the case of the WTO appellate review' in Ernst Petersmann, *International trade law and the GATT/WTO dispute settlement system* (Kluwer, 1997) 245-280.
[143] Lisa Diependaele, Ferdi De Ville, and Sigrid Sterckx, 'Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System' (2019) 24(1) New Political Economy 37, 44-45; Thomas Schultz, in Douglas, Pauwelyn, and Viñuales (2014), op. cit.
[144] *Unión Fenosa Gas, SA v Egypt*, ICSID Case No. ARB/14/4, Award of the Tribunal of 31 August 2018 [10.143]-[10.145]. Award of $2 billion was issued; *Occidental Petroleum Corporation, Occidental Exploration and Production Company v Ecuador*, CSID Case No. ARB/06/11, Decision on the Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules) of 30 September 2013, [19] [25]. Ecuador had to pay $2.3 billion. Award represented almost 9% of Ecuador's 2012 annual budget, 59% of its 2012 annual budget for education and 135% of its annual healthcare budget.

their property which could enhance the economy and contribute to sustainable development. An adverse award against the responded might deter other States from addressing environmental and human right concerns.[145] Similarly, an adverse award against the claimant could deter other investors from seeking justice after being seriously wronged,[146] and prevent the RoL being checked within the abusive State.[147]

Additionally, provided appellate review is not overburdened and costly, an extra set of bright minds clarifying contentious and complex cases could enhance legal certainty and allow extra scrutiny of awards which should decrease the chances of errors. ISDS involves cross-border transactions with lengthy and difficult factual and legal issues presented in different languages. Human error may occur and added protection can respond to this complexity.[148] It can at least prevent the chances of arbitrariness occurring which is a foundation of both the DRoL and an IRoL.[149] Appellate review could act as a safeguard to help ensure ISDS reinforces the DRoL and an IRoL, and to reduce the incidence of arbitrariness in decision making in investment disputes.

Appellate review is warranted as a means to harmonize an increasingly fragmented international jurisprudence and law.[150] IIL has been argued to be fragmented,[151] which suggests appellate review would benefit ISDS. The effectiveness of appellate review to achieve RoL objectives such as promoting fairness and justice is reliant on its instructional design.[152] This includes providing access to justice and transparent procedures as well as finality.[153] The effectiveness of appellate review is also reliant on the ability of its adjudicators to reinforce the RoL which means qualifications for selection and appointment is relevant.[154] Application of the prevention of arbitrariness, transparency, and equality

[145] Carolina Moehlecke, 'The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty' (2020) 64(1) ISQ 1, 2-3, 7-10; Office of the High Commissioner for Human Rights, Human Rights and Trade, 5th WTO Ministerial Conference, Cancun, Mexico, 10-14 September 2003, p 17.
[146] V.V Veeder, 'The Necessary Safeguards of an Appellate System' [2005] TDM 6, 6.
[147] Thomas Schultz and Cédric Dupon (2014), op. cit.
[148] *Oded Besserglik v Mozambique*, ICSID Case No. ARB(AF)/14/2, Award of 28 October 2019. No one realised the BIT was not in force until towards the end of the proceedings. Thus, millions were spent over nothing. This case should never have been brought before a tribunal (claimant's counsel fault), approved and registered (ICSID's fault), heard (tribunal's fault), and untimely defended (respondent's counsel fault).
[149] Albert Dicey (1885), op. cit., Pt II, 110-120; *Asylum Case* (1950), op. cit., p 284; *ELSI* (1989), op. cit., [124]-[128]; James Crawford (2003), op. cit.; Simon Chesterman (2008), op. cit.; Robert McCorquodale (2016), op. cit.
[150] Noemi Gal-Or (2008), op. cit., 45.
[151] Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, International Law Commission, 13 Apr 2006, UN Doc A/CN.4/L.682, [8] 11.
[152] Noemi Gal-Or (2008), op. cit., 60-64.
[153] ibid, 60-64.
[154] ibid, 60-64.

links to the effectiveness of appellate review to reinforce the DRoL and an IRoL (see Chapters 3.5, 4.3, 4.4, and 5).

2.3 Rule of Law Domestically and Internationally: Equality and State Sovereignty

Within the definitions of the DRoL and an IRoL, there appears to be insufficient reference to the importance of State sovereignty and its impact on the international and domestic systems. Chesterman said that a proposed structural difference between international and domestic systems is 'the horizontal organisation of sovereign and quasi-sovereign entities as opposed to the vertical hierarchy of subjects under a sovereign',[155] without exploring the significance of State sovereignty in the DRoL and an IRoL and their formal and substantive variations. For example, substantively speaking, some States have more power than others in the international system (see Section 2.5). The RoL internationally and domestically although similar could derive from different historical and political foundations. The international focus could be the conduct of States, whereas, the domestic focus could be the hierarchy and actions of people in a particular society. The RoL in a domestic context could address problematic concerns associated with an overly powerful centralized authority whose political system should administer laws that are: stable, public, transparent, consistent, known in advance, applied equally to citizens and government, and interpreted equally among all citizens regardless of their specific situation and societal position.[156] Zivkovic argues that the main purpose of the domestic system is to stop the arbitrary exercise of governmental power, while internationally there is no dominant sovereign or central power,[157] and that an IRoL is more politically informed than the DRoL.[158] Although some States and international organisations are more powerful than others, for example the US and UN, there are many different systems of international law and many different States and kinds of non-State actors operate within these different international systems.

Scholars writing from different philosophical positions have a shared view on the significance of the RoL for governance and regulating power. For example, Chesterman outlined the above requirements as 'regulating government power, implying equality before the law, and privileging judicial process',[159] while Hayek indicated 'the laws must be general, equal, and certain'.[160] Raz emphasised 'clear, stable, and equal laws are essential for a legal system to provide effective guidance to citizens on how their

[155] Simon Chesterman (2008), op. cit., 358.
[156] Tom Bingham (2010), op. cit., ch 4; Gianluigi Palombella and Neil Walker, *Relocating the Rule of Law* (Hart 2009).
[157] Velimir Zivkovic (2020) op. cit., 3-4.
[158] ibid, 3.
[159] Simon Chesterman (2008), op. cit., 336.
[160] Friedrich Hayek, *The Political Ideal of the Rule of Law* (National Bank of Egypt 1955) 34.

behaviour will be judged',[161] and McCorquodale includes 'legal order and stability; equality of application of the law'.[162] Bingham specifies 'law not discretion' and 'equality before the law',[163] and even the traditional RoL definition by Dicey portrays the 'supremacy of law' and 'equality before the law'.[164] It is an interesting discovery that all of these academics, albeit writing from different theoretical backgrounds, outlined the significance of equality in the RoL.

However, the RoL in an international context may fail to place the same amount of importance on equality even though the elements within the DRoL and an IRoL are supposedly similar.[165] One explanation for this distinction is that States have the sovereignty to directly choose what laws they accept to be bound by and what laws to reject. They can choose the legal or international obligations they wish to adopt and administer their own unique reservations and interpretations to modify treaty obligations. Consequently, States can have *unequal* legal and international obligations, as some States are bound by specific laws, whereas, others are not, and vice versa. According to the UN there are 195 States in the world, 193 of these States are UN members,[166] However, most legal and international obligations do not acquire this almost universal State approval and acceptance.

The International Criminal Court (ICC) has 123 State parties, with notable ratifications from Brazil, Canada, France, Germany, Japan, and the United Kingdom, whereas, there are notable absentees like China, India, Russia and the United States.[167] Many UN human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR),[168] have some States which ratify and some States which do not, and the States that do ratify can create unique reservations.[169] Therefore, each State can acquire unique legal obligations compounded by its past statements and actions. The Permanent Court of International Justice (PCIJ) in the *Lotus case* argued that 'international law governs relations

[161] Joseph Raz, 'The Rule of Law and its Virtue', in Raz*, The Authority of Law: Essays on Law and Morality* (OUP, 1979), ch 11. Raz provided an institutionalist theoretical standpoint.
[162] Robert McCorquodale (2016), op. cit., 292.
[163] Tom Bingham (2010), op. cit., ch 4-5.
[164] Albert Dicey (1885), op. cit., Pt II, 120.
[165] James Crawford (2003), op. cit., 10; Simon Chesterman (2008), op. cit., 342, 359; Robert McCorquodale (2016), op. cit., 284, 292.
[166] 'Growth in United Nations Membership, 1945-present' (United Nations) <http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html> accessed 10 April 2018. The exception being the State of Palestine and the Holy See, which are only classified as observers, see, 'Non-member States' (United Nations) <http://www.un.org/en/sections/member-states/non-member-states/index.html> accessed 10 April 2018.
[167] 'International Criminal Court (ICC) <https://www.hrw.org/topic/international-justice/international-criminal-court> accessed 10 April 2018.
[168] ICCPR (1966), op. cit., art 3. This treaty has 173 State parties as of August 2021.
[169] Other international treaties and conventions include: Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by GARes34/180 of 18 December 1979. Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); Convention on the Rights of the Child (1989), op. cit.; Around 1/3 of UN States have submitted to ICJ's compulsory jurisdiction; These reservations can include state of emergency issues like terrorism or domestic disorder.

between independent States. The rules of law binding upon States therefore emanate from their own free will.'[170] Thus, as Hurd emphasised, 'in domestic law, the identity of the actor should not enter into the assessment of how law regulates the act; in international law, it must.'[171] Rather, the IRoL is built upon the expectation that all state actors protect erga omnes obligations, jus cogens norms, and customary international law.[172]

IIL can act as an interface between domestic, regional, and international regulations, so complexity can exist. Although investors are considered citizens or legal persons under the domestic law of States which suggests the DRoL should apply, IIL may nevertheless be more suited to follow an IRoL. IIL is an international concept which facilitates sovereign States and MNCs operating across State borders. The DRoL is still relevant however as an IRoL and the DRoL could be symbiotic.[173] Enforcement of ISDS awards commonly occurs in domestic systems,[174] as well as the alleged breach, therefore both the DRoL and an IRoL are important.

2.4 State Sovereignty

While some scholars seem to ignore or disregard the significance of an IRoL,[175] they advance the argument for the sovereign State to have more domestic control in IIL disputes and policies. IIAs allow investors to question a State's sovereign action in a foreign arbitral tribunal, and the inability for States to bring claims against investors under IIAs could be a powerful tool for changing sovereign minds.[176] If the tribunal considers the State breached its obligations under an IIA then it would order that State to pay substantial uncapped sums of compensation to investors, which would probably come from its citizens through taxpayers' money, even if it was trying to promote sustainable development, human rights, and environmental considerations. This could result in the State being fined substantial sums and the citizens of that State paying the cost. However, compliance with global constraints, like international legal commitments and obligations, assists peaceful international cooperation.

[170] *The Case of the SS Lotus (France v. Turkey)*, Judgment of 7 September 1972, PCIJ Series A, no 10, at p 18
[171] Ian Hurd, 'The International Rule of Law: Law and the Limit of Politics' (2014) 28 E&IA 39, 42.
[172] VCLT (1969), op. cit., arts 53, 64, 71.
[173] James Crawford (2003), op. cit., 10.
[174] International Centre for Settlement of Investment Disputes (ICSID) (Signed on 18th March 1965, entry into force 14 October 1966) 575 UNTS 159, art 54; New York Convention (NYC) on the Recognition and Enforcement of Foreign Arbitral Awards (signed on 10th June 1958, entered into force on 7th June 1959) 330 UNTS 38, art I, III.
[175] Sergio Puig and Gregory Shaffer (2018) op. cit.; Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112(3) ASIL 410; Ahmad Ghouri (2018), op. cit.
[176] Gus Van Harten (2020) op cit., 100.

The jurisdictional principle of subsidiarity indicates that regulation should take place at the local level, unless there are justifiable grounds for a more central level to intervene.[177] Thus, in accordance with the relationship between State sovereignty and international law, a State attains the prima facie authority to determine its actions, unless there are reasonable grounds for international law to restrict State actions. Since States create and consent to international laws/institutions through their customary actions,[178] a primary source of international law,[179] it could better determine solutions than an internationalised body.[180] However, ISDS could be an example of when international intervention is reasonable given the RoL issues of impartiality and independence in domestic judicial systems between foreign investor and the State executive and the need to maintain international peace with the investor's home State (see Section 2.8). IIAs/BITs could offer a mechanism for States to consent to investment intervention in ISDS. However, IIAs/BITs could be problematic (see Chapter 3.2.1) and there are concerns subsidiarity can be abused to justify restrictions on State sovereignty.[181]

State sovereignty is highly regarded by citizens of States. The 2016 political shifts in the UK and US, signalling rising levels of nationalism, demonstrate a desire to 'take back control' for Brexit and 'America First' in the Trump Presential election when faced with international constraint that restricted State sovereignty in domestic and international policies/decisions.[182] While these slogans reinforce political sovereignty, they also touch upon the significance of the State losing its power and authority independently from international organisations and actors. ISDS and IIL must respect State

[177] Mattias Kumm, 'Sovereignty and the Right to Be Left Alone: Subsidiarity, Justice-Sensitive Externalities and the Proper Domain of the Consent Requirement in International Law' (2016) 79 L&CP 239, 239.
[178] Statute of the International Court of Justice, art 38 (b); *North Sea Continental Shelf Case, Germany v Denmark and the Netherland*s [1969] ICJ 1.
[179] Statute of the International Court of Justice, art 38.
[180] This could make subsidiarity justifiable as a matter of positive international law.
[181] Andreas Follesdal, 'The Principle of Subsidiarity as a Constitutional Principle of International Law' (2013) 2 Global Constitutionalism 37.
[182] 'Dreaming of sovereignty' (The economist, 19 March 2016) <https://www.economist.com/news/britain/21695056-talk-taking-back-power-may-be-delusional-more-democracy-not-dreaming-sovereignty> accessed 12 March 2018; Steven Phillips, 'We voted for Brexit to keep parliament sovereign – we won't be gagged' (The Guardian, 11 October 2016) <https://www.theguardian.com/commentisfree/2016/oct/11/we-voted-brexit-keep-parliament-sovereign-wont-be-gagged> accessed 12 March 2018; Paul Bremmer, 'Trump: The National-Sovereignty Candidate' (WND, 25 March 2016) <http://www.wnd.com/2016/03/trump-the-national-sovereignty-candidate/> accessed 12 March 2018; Nigel Farage, 'NIGEL FARAGE: Why we must vote LEAVE in the EU referendum' (Express, 21 June 2016) <https://www.express.co.uk/comment/expresscomment/681776/nigel-farage-eu-referendum-brexit-vote-leave-independence-ukip> accessed 27 January 2018; Greg Jaffe and Karen DeYoung, 'In Trump's U.N. speech, emphasis on sovereignty echoes his domestic agenda' (Washington Post, 19 September 2017) <https://www.washingtonpost.com/world/national-security/in-trumps-un-speech-an-emphasis-on-sovereignty-jostled-with-threats-of-intervention/2017/09/19/98a7a13e-9d3b-11e7-8ea1-ed975285475e_story.html?utm_term=.6fbc1aa120b4> accessed 27 January 2018.

sovereignty and the State's rights to regulate for the public benefit to avoid a public nationalistic backlash.[183]

Yet State compliance is crucial for an IRoL, as anarchy would occur if States failed to honour their self-imposed obligations, agreements, and laws.[184] Some academics consider State compliance as an element of the RoL.[185] If States failed to comply with their IIAs and ISDS awards, the purpose of IIL would be undermined. However, compliance in IIL is often difficult to pinpoint since it is fragmented and complex. Along with IIAs/BITs, there are the institutions of ICSID and UNCITRAL, tribunal rules like the International Chamber of Commerce (ICC), and other relevant regulatory regimes like the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and perhaps the WTO.

A lack of multilateral coherence means inequalities could arise when resourceful States interpret the law to their advantage.[186] This suggests a centralised, multilateral and unified mechanism should exist. However, the interpretation of an IRoL can lead to conflicts between the RoL elements of State sovereignty and equality. States have the sovereignty to make their own decisions, which do not necessarily have to operate consistently. There will be States that opt-in and States that will opt-out of multilateral mechanisms. States may have different obligations within a multilateral mechanism, such as whether to enable multilateral dispute resolution and/or multilateral appellate review (see Chapter 5.5.).

2.5 Sovereign Equality in the International Political Economy

Formal and substantive equality in the international system could be important to both the DRoL and an IRoL,[187] and Zarate's interpretation of the RoL rests on the concept of sovereign equality.[188] However, Zarate's interpretations are outdated as they focused on making comparisons with pre-WW1 conferences and decommissioned courts and Covenants in times of dominant colonialism and limited international protection of human rights. Thus, how do existing systems capable of providing dispute resolution like the UN, WTO and World Bank address sovereign equality in shaping ISDS reform? In this section, a brief overview of these settings will be presented to serve as comparators

[183] Related to this is NGO pressure on the MAI discussed at Chapter 4.2.
[184] William Bishop, 'The International Rule of Law' (1961) 59 Michigan Law Review 553, 555; DD Eisenhower argued for the rule of law over force, see, 'On This Day: Law Day' <https://www.c-span.org/classroom/document/?8078> accessed 16 September 2021.
[185] Tom Bingham (2010), op. cit., ch 10.
[186] Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008).
[187] James Crawford (2014), op. cit.
[188] Jose Zarate, 'Legitimacy concerns of the proposed multilateral investment court: Is democracy possible' (2018) 59(8) Boston College Law Review 2765.

to ISDS. Assessing the treatment of sovereign equality in these dispute settlement fora is an important step towards understanding what value a multilateral appellate review mechanism can bring to IIL.

2.5.1 United Nations

The UN indicates it 'is based on the principle of the sovereign equality of all its Members'.[189] However, structural formal inequalities exist as China, France, Russia, UK and the US, have more powers than the other UN members. These 'P5',[190] have permanent seats on the UN Security Council,[191] which is responsible for maintaining international peace and security.[192] All UN members must accept and perform its decisions.[193] However, only another 10 States work alongside the P5 members in the Security Council and this membership is temporary, lasting two years with five seats opening every year.[194] The remaining 188 UN member States battle for elections to obtain one of the ten seats available.[195] Over 60 States have never been on the Security Council. This means around 1/3 of UN member States are yet to participate in the decision-making process.[196] Consequently, States have grouped together to support each other's election campaigns.

Temporary membership is very difficult to obtain and indicates the privileges the P5 have over other UN States. This is compounded by the fact the P5 have an exclusive and special ability to veto.[197] A veto prevents the adoption of any substantive draft Council resolution, regardless of its level of international support.[198] Moreover, the election of judges to the ICJ is decided by the UN Security Council and General Assembly.[199] Thus, some academics argue the P5 will 'always have a judge from

[189] Charter of the United Nations, art 2(1). The UN is one of the most powerful organisations in the world.
[190] Also referred to as the 'Big 5', or 'Permanent 5'.
[191] 'United Nations Security Council: Current Members' (UN) <http://www.un.org/en/sc/members/> accessed 29 April 2018.
[192] Ibid.
[193] ibid.
[194] ibid.
[195] ibid.
[196] ibid.
[197] United Nations Charter, art 27(3).
[198] A recent veto was when the US vetoed a resolution that would prevent any State from having an embassy in Jerusalem. In 2018, the US opened an embassy in Jerusalem; Kambiz Foroohar, 'Jerusalem Embassy Vote Draws First U.S. Veto at UN Under Trump' (Bloomberg 17 December 2017) <https://www.bloomberg.com/news/articles/2017-12-17/un-to-vote-on-resolution-rejecting-trump-jerusalem-embassy-move> accessed 21 May 2018; Ashley Turner, 'After US embassy makes controversial move to Jerusalem, more countries follow its lead' (CNBC 17 May 2018) <https://www.cnbc.com/2018/05/17/after-us-embassy-move-to-jerusalem-more-countries-follow-its-lead.html> accessed 21 May 2018.
[199] Statute of the International Court of Justice, art 4(1).

their own State'.[200] However, this has not always been the case,[201] and the ICJ has included representation from least developed States.[202]

To rectify these formal inequalities, the UN could be modernised to reflect the 21st century and not the post-World War 2 period. There have been proposals for States in the G4 and at least one African Union member State to become permanent members, and to establish a guaranteed regional balance of non-permanent members.[203] However, there is a 'uniting for consensus' movement[204] made up of a number of States led by Italy which reject these proposals.[205] Increasing permanent members does not eliminate inequality; rather, it merely enhances the number of States that have more privileges over other States.

2.5.2 World Trade Organisation

The WTO generally provides formal mechanisms of unanimity and consent, except for *reverse consensus* in the Dispute Settlement Body (DSB), which is necessary as the losing party may not accept an award it did not have to follow. The General Agreement on Tariffs and Trade (GATT) DSB, which pre-dated the existing mechanism under the WTO, did not employ reverse consensus and this limited the system's authority. For example, the EU evaded liability in the GATT DSB over its import regulations of bananas in the absence of reverse consensus by continuously blocking the adaption of panel reports during 1993-1994 to avoid the issuing of an inevitable unfavourable award against it.[206] However, when the WTO replaced GATT and implemented reverse consensus, the EU could no longer block the panel report resulting in the issuing of EU concessions at the WTO DSB.[207] Thus, although

[200] Jose Zarate (2018) op. cit., 2786.
[201] The UK in January 2020 did not have a judge in the ICJ, and the French representative may have sympathies towards Egypt being their birth place, see, 'Current Member' (International Court of Justice, 2019) <https://www.icj-cij.org/en/current-members> accessed 21 November 2019.
[202] On January 2020, the ICJ president was not from the P5, but from the least developed State of Somalia, and there was another judge from the least developed State of Uganda, see, ibid
[203] 'UN Security Council – Profile' (BBC, 24 August 2017) <http://www.bbc.co.uk/news/world-11712448> accessed 29 April 2018; 'G4 Nations Bid for Permanent Security Council Seat' (Global Policy) <https://www.globalpolicy.org/component/content/article/200-reform/41186.html> accessed 29 April 2018.
[204] Also known as the 'coffee club'.
[205] Ayca Ariyoruk, 'Players and Proposals in the Security Council Debate 2005' (CUNRE, 3 June 2005) <https://centerforunreform.org/2005/06/03/players-and-proposals-in-the-security-council-debate-2005/> accessed 16 September 2021; Lalit Jha, 'G4 Countries Seek Early Reform of UN Security Council' (The Wire, 21 September 2017) <https://thewire.in/external-affairs/g4-countries-seek-early-reform-of-un-security-council> accessed 16 September 2021.
[206] *EEC - Import regime for bananas,* DS38/R, Report of the Panel of 11 February 1994; *EEC – Member States' Import Regimes for Bananas*, DS32/R, Report of the Panel of 3 June 1993; Disputes questioning the validity of import regulations on bananas by the EU and its members from States in various continents like Guatemala.
[207] *EC- Bananas III (European Communities — Regime for the Importation, Sale and Distribution of Bananas)*, G/AG/W/18/Add.1; G/L/63/Add.1; G/LIC/D/2/Add.1; G/TRIMS/4/Add.1; S/L/17/Add.1; WT/DS27/98, Mutually Agreed Solution notified of 12 November 2012.

State parties have less flexibility in accepting decisions and policies,[208] reverse consensus provides a more equitable and fairer trading system as the rules apply to all State parties, irrespective of their economic strength, which suggests 'right perseveres over might'.[209]

Yet the WTO has been described as a 'rich man's club'.[210] Developing State orientated coalitions,[211] such as the Organisation of African, Caribbean and Pacific States (OACPS),[212] and the G90,[213] raise questions of a substantive power asymmetry.[214] There are coalitions like the Friends of Ambition group (NAMA),[215] and the Friends of A-D Negotiations group (FANs)[216] unrelated to only poorer regions that share common objectives on specific trading of goods.[217] However, developed States normally join trade coalitions while regional coalitions normally contain developing States and Least Developed Countries (LDCs). Trade coalitions could act to improve States' shared interests like economic enhancement, while regional coalitions without aims or objectives in the trading of goods lacks purpose in an organisation that trades goods.

The WTO aims to increase the participation of developing States in world trade,[218] and incorporates provisions that increases developing States' trading opportunities and safeguards their interests. The Special and Differential Treatment (SDT) provisions[219] offer developing States special non-reciprocal rights against developed States in certain circumstances such as domestic market protection from

[208] In theory WTO members still have some control over the outcomes since the dispute settlement is part of the General Council to adopt the dispute bodies reports, unlike in ISDS. However, negative consensus is needed to reject it and this is unlikely to occur as the winner of the dispute would also need to reject it.
[209] Julio Lacarte-Muro and Petina Gappah, 'Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench' (2000) 3(3) Journal of International 395, 401; It seems the WTO replaced the General Agreement on Tariffs and Trade (GATT) system of diplomatic norms into a more legalistic architecture.
[210] Nick Mathiason, 'Poor rattle doors of WTO club' (The Guardian, 14 September 2003) <http://www.theguardian.com/business/2003/sep/14/wto.politics> accessed 1 January 2018; James Salzman, 'Labor Rights, Globalization and Institutions: The Role and Influence of the Organization and Development' (2000) 21 Mich J Int'l L 769, 776-777.
[211] 'Groups in the negotiations' (WTO, 18 December 2017) <https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm> accessed 30 April 2018. There are 25 active coalitions.
[212] The Organisation of African, Caribbean and Pacific States (OACPS) group consists of African, Caribbean and Pacific States.
[213] G90 is made up of the African Group, the ACP, and least-developed States.
[214] Others include the Asian developing members group, and the African Group.
[215] The Friends of Ambition group (NAMA) aims to maximize tariff reductions and achieve real market access.
[216] The Friends of A-D Negotiations group (FANs) want more disciplines on the use of anti-dumping measures.
[217] Others include the Tropical products group that aims for enhanced market access for tropical products, and the Cairns group that aims for agricultural trade liberalization.
[218] General Agreement on Trade in Services (GATS), Article IV.
[219] The other most known ways to counter the power asymmetry are the Committee on Trade and Development, and the WTO Secretariat.

imports.[220] Similarly the Enabling Clause[221] and waivers[222] allow developed member States to offer trade benefits to developing States like non-reciprocal preferential treatment, such as no/low duties on import products originating from developing member States. Equally, developing States could create reciprocal preferential regional trade agreements between other developing States. [223] Developing States obtaining more favourable treatment than developed States may represent formal inequalities. But it does respond to substantive inequalities in resources like the time it takes to implement regulations under domestic political and legal structures.[224]

Greater resources can act favourably in dispute resolution to form better case arguments.[225] The Advisory Centre on WTO Law (ACWL) seeks to address potential substantive inequalities between disputing parties with free advice and training for developing States.[226] Although acquiring ACWL membership and legal support has financial attachments, the cost of ACWL membership and support depends on a States' resources.[227] Support for LDCs is much cheaper than for other developing States, and membership and disputing third party representation costs can be free for LDCs.[228]

2.5.3 World Bank

The World Bank was established in 1944 and its current goals are stated as ending extreme poverty and promoting shared prosperity. [229] It consists of five institutions: International Bank for Reconstruction and Development (IBRD); [230] International Development Association (IDA); [231]

[220] GATT, Article XVIII.
[221] Also known as the Generalized System of Preferences. Under GATT the Enabling Clause was called 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries'.
[222] Waivers go beyond legal provisions explicitly outlined in WTO agreements. The General Council under procedures in Article IX:3 of the Agreement Establishing the WTO, can grant waivers. Recent examples include the United States' Caribbean Basin Economic Recovery Act (CBERA), EC/France Trading Arrangements with Morocco, and the Canadian Tariff Treatment for Commonwealth Caribbean Countries (CARIBCAN).
[223] As of 25 January 2018, there were 284 Regional Trade Arrangements (RTAs) in force, see, 'Regional trade agreements' (WTO) <https://www.wto.org/english/tratop_e/region_e/region_e.htm> accessed 29 April 2018.
[224] Article 66 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)
[225] Bernard Hoekman and Petros Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (2000) 23(4) Blackwell Publishers Ltd 527, 532.
[226] 'The Services of the ACWL' (Advisory Centre on WTO Law), 2, 8, 23, <http://www.acwl.ch/download/ql/Services_of_the_ACWL.pdf> accessed 25 August 2021.
[227] ibid, 6, 21-22.
[228] The estimated full costs in Swiss francs for consultations, panel processing, and appellate body proceedings for: category A States (Chinese Taipei, Hong Kong, and China) is 276,696; Category B States (such as Colombia, Egypt, and India) is 207,522; Category C States (such as Guatemala, Jordan, Kenya, and Peru) is 138,348; and LDCs (such as Angola, Haiti, Malawi, Nepal, and Zambia) is 34,160.
[229] 'Who are we' (World Bank) <http://www.worldbank.org/en/who-we-are> accessed 26 August 2021; 'What we do' (World Bank) <http://www.worldbank.org/en/about/what-we-do> accessed 26 August 2021.
[230] International Bank for Reconstruction and Development. This has 189 State parties.
[231] International Development Association. This has 173 State parties.

International Finance Corporation (IFC);[232] Multilateral Investment Guarantee Agency (MIGA);[233] and ICSID. The World Bank operates on a Shareholder model.[234] Member States are the shareholders electing one Board of Governor each and one alternate governor.[235] The World Bank outlines that according to the Articles of Agreement the Board of Governors are the ultimate decision-making body of the Work Bank as it has all powers on all matters like policy, finance, and membership, which means the World Bank is owned by its State members.[236] However, in practice this is not entirely true. The Board of Governors delegates powers to the Executive Directors except certain powers like permanently suspending the Bank's operations.[237] Despite containing 189 State members, the World Bank has only 25 executive directors.[238]

States possessing the resources to obtain the most shares in the bank acquire their own executive director,[239] while other directors are supposed to represent multiple States although States can have different aims/objectives.[240] Similarly, the common voting power of each member State is subject to the amount of shares it holds.[241] In the IBRD as of 21 March 2020 the US holds 15.44% of the voting power,[242] compared to 0.53% in an equal voting system. Furthermore, 6 States have 39.67% of voting rights,[243] and 10 States have over 50% while 179 States have less than half.[244] A system that gives States influence based on their contributions might reinforce formal equality, but it does not reinforce substantive equality since richer nations can strongly influence decision-making. This international voting system is unlikely to reinforce the substantive version of an IRoL.

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[232] International Finance Corporation. This has 184 State parties.
[233] Multilateral Investment Guarantee Agency. This has 181 State parties.
[234] 'Organisation' (World Bank) <http://www.worldbank.org/en/about/leadership> accessed 26 August 2021.
[235] 'Boards of Governors' (World Bank) <http://www.worldbank.org/en/about/leadership/governors> accessed 26 August 2021.
[236] ibid; -, 'Member Countries' (World Bank) <http://www.worldbank.org/en/about/leadership/members#5> accessed 26 August 2021; Board of governors are the policy makers who make the major decisions, see, 'Organisation' (World Bank), op. cit.
[237] Articles of Agreement, art V, s 4(a); 'Boards of Governors' (World Bank) op. cit.
[238] 'Board of Directors' (World Bank) <http://www.worldbank.org/en/about/leadership/directors> accessed 26 August 2021.
[239] ibid; Articles of Agreement, art V, s4(b)(i). This has historically meant the USA, Japan, UK, France, and Germany are guaranteed representation; 'World Bank Executive Directors Directory' (World Bank) <http://www.bankinformationcenter.org/resources/world-bank-executive-directors-directory/> accessed 30 April 2018.
[240] 'Board of Directors' (World Bank), op. cit.; Spot EDS13 is currently shared between 23 States, see, 'World Bank Executive Directors Directory' (World Bank) op. cit.
[241] Articles of Association, art V, s3.
[242] 'IBRD Subscriptions and Voting Power of Member Countries' (World Bank, IBRD) <https://finances.worldbank.org/Shareholder-Equity/IBRD-Subscriptions-and-Voting-Power-of-Member-Coun/rcx4-r7xj> accessed 21 March 2020.
[243] ibid. US 15.44%, Japan 7.77%, China 4.78%, Germany 4.08%, UK 3.8%, France 3.8%.
[244] ibid. 38.91% + India 2.95%, Canada 2.84%, Russia 2.7%, and Saudi Arabia 2.7%. Other notable States Italy 2.57%, and Brazil 2.17%.

Low-income States can gain financial structural adjustment loans (SALs) at low or zero interest rates at the International Monetary Fund (IMF) or World Bank if they lack foreign exchange or desire structural adjustment,[245] and are offered advice and support to attract international investment.[246] The borrowing money is funded by States from emerging and advanced economies, but in administering SALs, favourable bias may have existed towards certain States.[247] Moreover, different opinions were formed on whether SALs enhanced or decreased human rights due to either enhancing standards in domestic structures and institutions or unsustainably lowering them [248] to attract investment.[249]

2.5.4 Sovereign Equality in IIL

The inequalities that exist in these international systems are reflected in current IIL and this has implications for international law, domestic law, and State policymaking. Much like the aforementioned systems, the States that hold the most resources hold an advantage in dispute proceedings in IIL. States can freely negotiate their own IIAs/BITs to its constitutional traditions and democratic preferences without regard for the equality of the other State to that agreement (see Chapter 3.2.1). The most favoured nation (MFN) clause could balance the impact of inequality in IIA/BITs by converging IIAs/BITs,[250] but such convergence is limited as it favours the most powerful investor protections which would favour capital exporting States (see Chapter 3.2.1-3.2.2). The power asymmetry between States in international institutions is further compounded by a perceived lack of the substantive RoL element of transparency in IIL which mechanisms that regulate ISDS attempt to

[245] 'IMF Lending' (IMF, 8 March 2018) <https://www.imf.org/en/About/Factsheets/IMF-Lending> accessed 17 October 2018; 'IMF Annual Report 2017' (IMF) <https://www.imf.org/external/pubs/ft/ar/2017/eng/lending.htm> accessed 17 October 2018

[246] 'IMF Annual Report 2017' (IMF), op. cit.

[247] Rodwan Abouharb and David Cingranelli, 'Human Rights and Structural Adjustments: The Importance of Selection' in Sabine Carey and Steven Poe (eds), *Understanding Human Rights Violations: New Systematic Studies* (Ashgate Publishing, 2004) 138-139; Steven Poe, Neil Tate, and Linda Keith, 'Repression of the human right to physical integrity revisited: A global cross-national study covering the years 1976–1993' (1999) 43 International Studies Quarterly 291; Axel Dreher and Nathan Jensen, 'Independent actor or agent? An empirical analysis of the impact of US interests on IMF conditions' (2007) 50(1) JLE 105; Randall Stone, 'The political economy of IMF lending in Africa' (2004) 98(4) APSR 577; Joseph Joyce, 'The economic characteristics of IMF program countries' (1992) 38 Economics Letters 237.

[248] A possible problem facing IIL in terms of sustainability is this apparent 'race to the bottom' in relaxing State domestic regulations to encourage FDI, see, Ahmad Ghouri (2018), op. cit. See Section 2.7 for more analysis.

[249] Rodwan Abouharb and David Cingranelli, *Human Rights and Structural Adjustment* (CUP 2007) 3-4, 227; James Franklin, 'IMF Conditionality, Threat Perception, and Political Repression: A Cross-National Analysis' (1997) 30(5) CPS 576; Linda Keith and Steven Poe, 2000. 'The United States, the IMF, and Human Rights' in David Forsythe (ed), *The United States and Human Rights* (UNPress 2000) 273-299; Lauren McLaren, 'The Effect of IMF Austerity Programs on Human Rights Violations: An Exploratory Analysis of Peru, Argentina, and Brazil' (1998) Paper presented at the 1998 Meeting of the Midwest Political Science Association.

[250] Stephan Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) EJIL 875, 893; Zachary Douglas, *The International Law of Investment Claims* (CUP 2009).

remedy (see Chapters 3.3-3.4). Instead of being a universal institution that clearly expresses the shared cooperative interests and goals of states and investors, IIL is a fragmented system that is vulnerable to exploitation by more powerful States and investors with superior resources to influence the outcome of IIL in IIAs and ISDS whereby contesting policies are legitimized and delegitimized accordingly.[251] This questions the concept of compliance.

Investors can only make claims in ISDS as IIL commonly designates obligations and duties on the host State, but not on the investor and its home State (see Chapter 3.2.1), which could result in bias against the respondent State in ISDS.[252] This asymmetry enables the wealthy MNCs of rich capital exporting States to put their interests over those of capital importing States and its citizens through creating asymmetry obligations between investor and host State. This could significantly limit the ability of States to conduct its administration, policy, regulation, legislation, and dispute settlement procedures, since an investor could challenge any State measure in ISDS through constitutional-like sets of protections in IIAs/BITs including those which benefit society. States have limited protection against the possibility of facing costly foreign arbitral claims and awards due to measures that dissatisfy investors especially when investor protections are interpreted broadly.[253] The fear of claims could limit or chill regulations for the public interests such as sustainable development, human rights, and environmental considerations and a successful investor claim could take these measures away which would violate the principle of non-regression,[254] found under human rights treaties.[255] In ISDS the arbitrators cannot force a States to change its laws and regulations, but it could impact other States with similar measures when that State sees it would have to pay substantial sums to keep the measure, and even just an investor claim to ISDS can take measures away.[256]

[251] This begs the question on whether an advisory centre for investment is needed, see Chapter 4.3 for discussion on WTO advisory centre.
[252] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP, 2017) 60–80; Joseph Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities' (2007) 23 AUILR 451, 506–529; Frank Garcia, Lindita Ciko, Apurv Gaurav, and Kirrin Hough 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) 18 Journal of International Economic Law 861, 869–71.
[253] Office of the High Commissioner for Human Rights (10-14 September 2003), op. cit., p 16; Abdi Aidid and Stephen Clarkson, 'Researching International Norm Diffusion: Brazilian and Latin American Resistance to Investor-State Dispute Settlement, Annual Congress of the International Studies Association', San Francisco, 6 April 2013.
[254] Office of the High Commissioner for Human Rights (10-14 September 2003), op. cit., p 17; The principle of non-regression means not lessening the human rights that have been achieved.
[255] International Covenant on Economic, Social and Cultural Rights (ICESCR), Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 5(1).
[256] In, *Ethyl Corporation v Canada*, UNCITRAL, Award on Jurisdiction of 24 June 1998, Canada took away the ban on Ethyl before the tribunal made an award, see Chapter 4.2.

The RoL in IIL requires multilevel judicial cooperation and more comprehensive judicial balancing of private rights and corresponding constitutional obligations of governments to enhance sustainable investment. Although the DRoL and an IRoL are different, they both identify human rights protections (see Section 2.2). The formal RoL supports elements capable of protecting human rights, such as equal access and enforcement before courts, and the substantive RoL can consider the protection of human rights as an element of the RoL. Domestically, human rights are commonly identified as constitutional rights or explicit citizen right guarantees. Internationally, human rights are expressed through international instruments, and overseen by international institutions to ensure that States are promoting human rights protections and to prevent inequalities in State systems. If these international human rights protections are not implemented effectively, individual rights are compromised. In IIL, investors could already receive protections in IIAs (see Chapter 3.2.2), but citizens may not, which means their human rights could be affected by foreign investors.

2.6 International Human Rights Law and the concept of Sustainability: Another view of equality

In this section I will be looking at the evolution of human rights protections under international law like civil, political, economic, social, cultural and solidarity rights. This leads into a discussion on sustainability and the ways in which that informs international law, such as the UN Sustainable Development Goals (SDGs) like how Goal 16 informs our understanding of the RoL. Human rights are not explicitly included within the SDGs, but human rights are to be regarded as implicit in the SDGs.[257] This section will consider how sustainable investment respects human rights, and their interaction with IIL.

2.6.1 Origins of International Human Rights

The citizen rights in the Magna Carta could be considered an origin for domestic human rights,[258] although reference to human rights can be made much earlier.[259] In the international system, human

[257] UN SDGs (2030) op. cit. An example is UN SDGs (2030) op. cit., Goal 16.10, which promotes protection of fundamental freedoms.

[258] The Magna Carta 1215 is an English charter originally written due to disagreements between Pope Innocent III, King John and the English barons concerning the rights of the King. Clause XXIX is similar to due process.

[259] The reforms of Urukagina of Lagash in 2350 BC could be one of the earliest known legal codes. Urukagina attempted to protect the weak from the powerful, see, Norman Yoffee, *Myths of the Archaic State: Evolution of the Earliest Cities, States, and Civilizations* (CUP 2009) 103; Also see Ancient Egypt, see, 'Egyptian Law' <https://www.britannica.com/topic/Egyptian-law> accessed 19 October 2018.

rights violations perpetuated during WW1 and WW2[260] acted as a catalyst for the codification of international human rights in soft law instruments.[261]

Many international treaties, organisations, institutions, declarations and systems were created directly after WW2. One was the UN Charter of 1945 whose purpose was to 'maintain international peace and security',[262] 'develop friendly relations amongst States',[263] 'achieve international co-operation in solving international problems',[264] and 'be a centre for harmonizing the actions of nations'.[265] Although there was limited reference to human rights in the chapters, the preamble affirmed 'faith in fundamental human rights', and equality between genders and all States.[266] However, after the Nazi atrocities were fully discovered, there was international consensus that human rights required further international protection.

Consequently, the UDHR was created.[267] The UDHR focused on freedom, equality, and dignity, but it may not be legally binding.[268] The UN Commission on Human Rights[269] was created in 1946 to safeguard fundamental rights and freedoms,[270] and after the implementation of the UDHR, it was tasked to create a human rights treaty.[271] However, in 1952 due to the increasing development of the cold war,[272] creating a unified treaty encompassing all UDHR protections seemed impossible so the commission split rights under the UDHR into two separate draft treaties.[273] Over 20 years later the

[260] This is suffering is related to death, injury, and torture, environmental devastation, destruction to infrastructure and property such as businesses, houses, and roads, and other human needs
[261] One of the leading writings and speeches of human rights came from the German Gerhard Ritter directly after the Second World War, see, Samuel Moyn, 'The First Historian of Human Rights' (2011) 116(1) AHR 58 League of Nations, Covenant of the League of Nations, 28 April 1919. Created at the Treaty of Versailles; General Treaty for Renunciation of War as an Instrument of National Policy (signed 27 August 1928, entered into force 25 July 1929) 94 LNTS 57 (Kellogg-Briand Pact); See also Locarno Treaties 1925.
[262] Charter of the United Nations, art 1(1)
[263] ibid, art 1(2)
[264] ibid, art 1(3)
[265] ibid, art 1(4); UN Charter had similar aims to the Allies Four Freedoms (speech religion, fear, want) see, Franklin Roosevelt, State of the Union Address "The Four Freedoms" (6 January 1941)
[266] 'Preamble' (United Nations) <http://www.un.org/en/sections/un-charter/preamble/index.html> accessed 22 October 2018.
[267] UDHR (1948), op. cit.
[268] The UDHR is not a treaty and only asks for 'keeping this Declaration constantly in mind', see, ibid, preamble.
[269] The UN Commission on Human Rights is now known as the UN Human Rights Council.
[270] 'Introduction' (United Nations Human Rights Council) <https://www.ohchr.org/en/hrbodies/chr/pages/commissiononhumanrights.aspx> accessed 22 October 2018.
[271] UN General Assembly, Draft International Covenant on Human rights and measures of implementation: future work of the Commission on Human Rights, 4 December 1950, A/RES/421.
[272] The Cold War was a period of geopolitical and ideology tension which began following World War II. see, Meredith Day, *The Cold War* (Britannica Educational Publishing 2017)
[273] UN General Assembly, Preparation of two Draft International Covenants on Human Rights, 5 February 1952, A/RES/543.

ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[274] came into force.

These treaties started discussion on the contested[275] notion of 'three generation of rights'.[276] The first generation are rights that States cannot negatively interfere with like civil and political rights (CPR) in the ICCPR.[277] The second is economic, social and cultural rights (ESCR) laid down in the ICESC which require positive action by States to implement.[278] The third are 'rights of solidarity' which can be found in Declarations.[279] In IIL, the protection of these rights can be claimed by investors against the State in ISDS through investor protections in IIAs. For example, the investor protection of non-discrimination is referenced in the UDHR,[280] ICCPR,[281] ICESCR,[282] and solidarity right Declarations,[283] and the SDGs.[284] However, citizens can also have these rights interfered with by investments and they do not have the same recourse to justice as IIAs are non-reciprocal. This raises issues of inequality.[285]

2.6.2 Civil and Political Rights

State citizens can use CPR when electing democratic governmental institutions. Nationalisation or raising taxes to redistribute income could be considered plausible democratic changes capable of benefiting society, but it could also damage the interests and expectations of investors who might have invested in the State due to low tax rates or property ownership guarantees. Equally, investors can use CPR to contest State measures, since investors are citizens who can make democratic and civil commercial decisions that reflect a large group of citizens. Investors could initiate, from the support of work councils, or trade unions, changes in the administering of the corporate investment and the

[274] ICESCR (1966), op. cit., art 3. This treaty has 171 State parties as of August 2021.
[275] Patrick Macklem, 'Human rights in international law: three generations or one?' (2014) 3(1) London Review of International Law 61, 62; see also, Carl Wellman, 'Solidarity, the Individual and Human Rights' (2000) 22 Human Rights Quarterly 639, 641; Daniel Whelan, *Indivisible Human Rights: A History* (UPP 2011) 210.
[276] Karel Vasak, 'A 30-year struggle; the sustained efforts to give force of law to the Universal Declaration of Human Rights' (1977) The UNESCO Courier, November 1977, 29.
[277] These are known as 'Negative Rights'.
[278] These are known as 'Positive Rights'.
[279] Declaration on the Rights of Indigenous People, GARes61/295 of 13 September 2007; Declaration on the Granting of Independence to Colonial Countries and Peoples, GARes 1514 (VX) of 14 December 1960; Rio Declaration on Environment and Development (1992) UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874.
[280] UDHR, arts 7, 23(2).
[281] ICCPR (1966), op. cit., arts 4(1), 20(2) 24(1), 26.
[282] ICESCR (1966), op. cit., arts 2(2), 10(3).
[283] Declaration on the Rights of Indigenous People (2007), op. cit., arts 2, 8(2)(e), 9, 14(2), 15(2), 16(1), 17(3), 21(1), 22(2), 24(1), 29(1), 46(2), 46(3); Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), op. cit.
[284] UN SDGs (2030) op. cit., esp goal 5.
[285] Gus Van Harten (2020), op. cit., 9-10.

corporate structure.[286] Some of the CPR that the ICCPR protects are: freedom of speech, religion, and assembly, electoral rights, and the right to life, fair trial, and due process.

The ICCPR could be binding on its State parties,[287] and this means that its provisions could be relied on by parties to ISDS.[288] The rights under the ICCPR, such as, the prevention of Genocide,[289] torture,[290] and slavery,[291] could be considered *Erga Omnes* obligations, or *Jus Cogens* Norms, or customary international law. This means the Vienna Convention on the Law of Treaties (VCLT) would make investor-State tribunals interpret IIL in accordance with them.[292] However, some ICCPR rights, such as holding opinions without reference,[293] may not fall into those categories. Concerns have been expressed that the 'widely formed reservations' in the ICCPR and its Protocols significantly limit CPR and the ICCPR may not be legally binding in dualist States.[294]

2.6.3 Economic, Social and Cultural Rights

Investors can use ESCR to challenge State measures that interfere with their investment. Enhancing safety regulations or limiting working hours could interfere with investments, but it would benefit citizens. An investment could impede State citizens ESCR through lowering welfare standards. The ICESCR aims to protect rights such as the right to: health, education, an adequate standard of living and labour rights.

It could be uncertain what human rights are classified as ESCR and which ones are legitimate core human rights when economic issues arise.[295] The principle of non-discrimination[296] is central to both

[286] Unions and councils can also be deployed to stop investor measures, such as in *Noble Ventures Incorporation v Romania*, ICSID Case No. ARB/01/11, Award of 12 October 2005.
[287] Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (OUP 1991)
[288] The word 'shall' could raise questions towards its binding nature. 'Shall' is in every Article apart from Art 3.
[289] ICCPR (1966), op. cit., art 6.
[290] ibid, art 7.
[291] ibid, art 8.
[292] VCLT (1969), op. cit., arts 53, 64.
[293] ICCPR (1966), op. cit., art 19.
[294] In a dualist State the international law is not directly applicable like in a monist State. The international law would have to be transferred into domestic law before it can be applied by the national courts; UN Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) [12].
[295] Eibe Reidel, Gilles Giacca, and Christophe Golay, *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 4-5; Oscar Schachter, 'The Evolving International Law of Development' (1976) 15 Columbian Journal of Transnational Law 1, 1.
[296] ICESCR (1966), op. cit., art 2(2). Also, equality under Art 3.

ESCRs,[297] but also CPRs[298] and its scope is open to change.[299] The wording of the ICCPR including the requirement to 'take steps' to implement measures implies that States have some discretion in implementing its rights.[300] However, the treaty translated in other language has more persuasive language like 'must', and the discretion could concern dualist States in implementing the immediately effective rights.[301] The ICESCR has historically had a weaker enforcement mechanism than the ICCPR.[302]

2.6.4 Solidarity rights

Investment projects can affect not only individual human rights but also collective (or solidarity) rights and the environment. Solidarity rights include the right to Free, Prior, and Informed Consent (for indigenous communities) protected by the Declaration on Indigenous Communities,[303] rights to self-determination protected by the Declaration on Independence,[304] and environmental considerations like a healthy environment and natural resources that have been protected in countless initiatives like the Rio Declaration.[305] Although non-binding and compliance remaining questionable,[306] the creation of these Declarations through State conduct recognises the importance of solidarity rights.[307] Other

[297] Ibid, arts 2(2), 10(3); UN Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003) [10]. See also, UN Committee on Economic, Social and Cultural Rights, General Comment Numbers 16, and 20.
[298] ICCPR (1966), op. cit., arts 4(1), 20(2) 24(1), 26.
[299] General Comment 20 in 2009 of the CESCR has added to the list of non-discrimination art 2(2) ICESCR for factors like age, nationality, and disability to be classified in the 'other status' category.
[300] ICESCR (1966), op. cit., art 2(1).
[301] Committee on Economic, Social and Cultural Rights, General Comment 3, reprinted in Compilation of General Comments and General Recommendations (2003), op. cit., [2].
[302] ICESCR (1966), op. cit., arts 16(1), 16(2)(b), 17(1)-17(2); cf the later introduction of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN General Assembly, 5 March 2009, A/RES/63/117. Discussed in Eibe Reidel, Gilles Giacca, and Christophe Golay (2014), op. cit.; An ESCR was used to argue breach of a CPR for prosecution to commence, see, AfCHPR, *Sudan Human rights Organisation and Centre on Housing Rights and Eviction v Sudan* (2010), Communication No 279/03 and 296/05; ESCR are resource dependant on the State's ability to fulfil/provide/protect, i.e provide housing, see, Maastricht Guidelines (1997), op. cit., [6]; Brian Griffey, 'The'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11(2) HRLR 275, 327.
[303] Declaration on the Rights of Indigenous People (2007), op. cit. 144 states in favour of non-binding declaration, 4 votes against and 11 absentees, see also, Agreement establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean, Madrid, 24 July 1992.
[304] Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), op. cit. 89 States voted in favour, none voted against but nine abstained. Most abstaining States used to be major colonial powers.
[305] Rio Declaration on Environment and Development (1992) op. cit.; 'The Earth Summit and Agenda 21' (UN), 6 <http://www.unesco.org/education/pdf/RIO_E.PDF> accessed 23 September 2018.
[306] UN Secretary General, Report, Implementation of the United Nations Millennium Declaration (31 July 2002), GA A/57/270, [75].
[307] 'The Earth Summit and Agenda 21' (UN), op. cit., 6.

solidarity rights include group and collective rights, intergenerational equity,[308] and economic and social development.

Solidarity rights and sustainability are interconnected. The relationship between the economy and ecology, which includes balancing economic growth with a community's right to a healthy environment and natural resources[309] causes tensions in the application of IIL. For example, these rights can conflict with an investor's investment and investors can violate them. Limiting deforestation or extraction of natural substances (gases, coal and oil) would interfere with an investor who operates in this field, but it would protect the State's natural environment for the benefit of its citizens. They have been used for defence when investor's initiate ISDS.

The right to a healthy environment was invoked in *Chevron v Ecuador*,[310] although the claim was rejected. In the earlier domestic proceedings known as the Lago Agrio case, the Ecuadorian court ordered Chevron pay $9.5billion in environmental damages, but this order was considered invalid by an international tribunal administered by the Permanent Court of Arbitration.[311] Furthermore, in *Bilcon v Canada*,[312] the respondent had to pay $7 million when its environmental sustainability protections interfered with an investor's legitimate expectation. The investment may have also impeded socio-economic development (see Chapter 1.2).[313] In *Bear Creek Mining Corporation v Peru,*[314] the Right to Free, Prior, and Informed Consent (for indigenous communities) was invoked.[315]

[308] Intergenerational equity a dynamic and democratic process bringing fairness or justice between generations.
[309] *Case Concerning Pulp Mills on the River Uruguay*, ICJ Judgment of 20 April 2010.
[310] *Chevron v Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II of 30 August 2018, pt VII, [7.30] [7.44]. This ISDS claim was due to Ecuador's court award against Chevron's alleged past oil exploration in the amazon and its environmental negligence.
[311] An international tribunal administered by the Permanent Court of Arbitration 'unanimously held that a $9.5 billion judgment rendered against Chevron in Ecuador 2011 was procured through corruption and was based on claims that had been already settled by Ecuador years earlier', see, 'International Tribunal Rules for Chevron in Ecuador Case' (7 September 2019) <https://www.chevron.com/stories/international-tribunal-rules-for-chevron-in-ecuador-case> accessed 2 December 2019; *Perenco Ecuador Limited v Ecuador,* ICSID Case No. ARB/08/6, Award dated 27 September 2019, [1022] [1023(b)]; *Perenco Ecuador Limited v Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim of 11 August 2015; *Chevron v Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II of 30 August 2018, [6.111], [10.13].
[312] *Bilcon of Delaware et al v Canada*, PCA Case No. 2009-04, Award on Damages of 10 January 2019, [400]; *Bilcon of Delaware et al v Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability of 17 March 2015, [734]-[738].
[313] *Bilcon v Canada*, (2015), op. cit., [127], [416]-[417], [477], [484]-[485]; *Bilcon v Canada* (2019), op. cit.
[314] *Bear Creek Mining Corporation v Peru*, ICSID Case No. ARB/14/21, Award of 30 November 2017, [226]-[228] [736].
[315] Other relevant cases include *Álvarez y Marín Corporación SA and others v Panama*, ICSID Case No. ARB/15/14, Final Award of 12 September 2018, (involving claims of invasion of the investors' tourism related properties by Indigenous groups) which failed on jurisdiction corruption involving investors, and *South American Silver Limited v Bolivia*, PCA Case No. 2013-15, Award of 22 November 2018, (involving claims of an investor's misconduct in its relationship with local communities near a mining project) which the investor won

Here, the Aymara indigenous communities protested against the santa ana project mining on their territories (see Chapter 1.2).[316]

The right to natural resources was the focal point in *Aguas del Tunari, SA v Bolivia,*[317] where an investor within weeks of taking control of the water supply raised water rates by over 50% meaning citizens could not afford water, and similarly in *Urbaser v Argentina*,[318] where the right to water was invoked. *Urbaser* represents one of the first instances where the tribunal had an in-depth discussion about accepting the jurisdiction of counter-claims, but this possibility may have only occurred due to the broad jurisdiction clause of the IIA. The tribunal recognized the right to water as an international human right and also as a positive right. However, the case may not mark the breakthrough of human rights obligations directly applicable to foreign investors. The tribunal could not find any obligations on the investor, although investor actions being scrutinized in the international setting for potential human rights infringements committed in the domestic setting is a good sign that can help further an IRoL. This includes preventing arbitrariness, promoting transparency, and enhancing equality. The application of these solidarity rights in ISDS could justify expanding the process of participation to include third parties and other stakeholders that are impacted by an investor's activities such as local and indigenous communities.[319] This could reinforce access to justice and fairness, and also prevent arbitrariness, promote transparency, and enhance equality.

2.6.5 Sustainability in IIL

In the modern political economy, there is an increasing awareness on the importance of *sustainable* investment. There is much academic debate surrounding the definition of sustainability, but a common definition is that sustainability comprises environmental, economic, and social, [320] dimensions.[321] IIL and ISDS can intersect with these dimensions. Without sustainable investment an

even though the indirect expropriation occurred due to the investor's poor treatment of the local communities and the environment.

[316] See also, *Álvarez y Marín Corporación S.A v Panama*, ICSID Case No. ARB/15/14, Final Award of 12 September 2018.

[317] *Aguas del Tunari, SA v Bolivia*, ICSID Case No. ARB/02/3, Petition by NGOs and people to participate as an intervening party or amici curiae of 29 August 2002, [1]. Case was settled before merits evaluated and an arbitrator questioned the corporate restructuring to make claims under BIT.

[318] *Urbaser v Argentina*, ICSID Case No. ARB/07/26, Award of 8 December 2016.

[319] Academics have argued for increased rights for local communities, see, Nicolás Perrone in Santos and others (2019), op. cit.; James Gathii (2021), op. cit.; Gus Van Harten (2020), op. cit.

[320] The word equity is sometimes used instead of social to make what is known as the 'three Es' of Environment, Economic, and Equity, see, Philip Berke, 'Does Sustainable Development Offer a New Direction for Planning? Challenges for the Twenty First Century' (2002) 17(1) Journal of Planning Literature 22, 30; Scott Campbell, 'Green Cities, Growing Cities, Just Cities? Urban Planning and the Contradictions of Sustainable Development' (1996) 62(3) JAPA 296.

[321] United Nations Report of the World Summit on Sustainable Development Johannesburg, South Africa, 26 August - 4 September 2002; Thomas Daniels, 'A Trail Across Time: American Environmental Planning From City

investment can cause overexploitation, economic loss, and interfere with local communities.[322] Sustainability as a concept may have begun with the notion of development,[323] and more recently in 2015 when the international community set out commitments under the UN Sustainable Development Goals (SDGs). The SDGs are seventeen 'interconnected' goals that should be achieved by 2030 'related to poverty, inequality, climate, environmental degradation, prosperity, and peace and justice'.[324] The SDGs came after the eight Millennium Development Goals,[325] which were criticised for not sufficiently addressing the environmental dimension in theory,[326] or practice.[327] The SDGs attempt to address this by establishing three separate goals that consider the environment in climate action,[328] life below water,[329] and life on land.[330]

Although the SDGs do not directly refer to human rights, some of the goals concern human rights such as Goal 5, Gender Equality,[331] which is protected in the preamble of the UDHR,[332] and Article 3 of both the ICCPR,[333] and ICESCR.[334] The right to development which is a policy/legal basis for sustainability recognises and compliments the UDHR,[335] ICCPR[336] and its rights,[337] and ICESCR[338] and its rights.[339]

Beautiful to Sustainability' (2009) 75(2) JAPA 178, 185; Peter Newman and Isabella Jennings, *Cities as Sustainable Ecosystems: Principles and Practices* (Island Press 2008); Katharina Helming, Marta Pérez-Soba and Paul Tabbush, *Sustainability Impact Assessment of Land Use Changes* (Springer-Verlag Berlin Heidelberg 2008); Philip Berke and Maria Manta-Conroy, 'Are We Planning for Sustainable Development? An Evaluation of 30 Comprehensive Plans' (2000) 66(1) JAPA 21, 23.

[322] Nicolás Perrone in Santos and others (2019), op. cit.

[323] UN General Assembly, Declaration on the Right to Development: resolution adopted by the General Assembly, 4 December 1986, A/RES/41/128; UN GA Resolution 1710 (XVI) of 19 December 1961, UN Development Decade, A programme for international economic co-operation (I), A/RES/1710 (XVI).

[324] UN SDGs (2030), op. cit.; 'About the Sustainable Development Goals' (UN) <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 24 September 2018.

[325] Millennium Declaration (2002), op. cit.

[326] UN Secretary General, Report, Implementation of the United Nations Millennium Declaration, Follow-up to the outcome of the Millennium Summit, 2 September 2003, GA A/58/323, 9; Elisabeth Bonanomi, *Sustainable Development in International Law Making and Trade* (Edward Elgar Publishing 2015) 39.

[327] Millennium Declaration (2002), op. cit., [75].

[328] UN SDGs (2030), op. cit., Goal 13.

[329] ibid, Goal 14.

[330] ibid, Goal 15.

[331] 'Goal 5: Achieve gender equality and empower all women and girls' (UN) <https://www.un.org/sustainabledevelopment/gender-equality/> accessed 10 November 2018.

[332] UDHR (1948), op. cit., preamble.

[333] ICCPR (1966), op. cit., art 3.

[334] ICESCR (1966), op. cit., art 3.

[335] Declaration on the Right to Development (1986), op. cit., art 9(2).

[336] ibid, arts 1(2), 9(2).

[337] ibid, arts 1(1), 6(2), 6(3).

[338] ibid, arts 1(2), 9(2).

[339] ibid, arts 1(1), 2(3), 3(3), 6(2), 6(3), 8(2).

Investment is intended to be framed around the broader agenda and in coherence of the 2030 goals.[340]

Limitations in the enforcement, monitoring, compliance, and accountability procedures of the ICCPR and ICESCR are similar to that of the SDGs. The SDGs are not legally binding',[341] some goals may lack clarity and may not be intertwined,[342] and its review framework is voluntary.[343] This means 'national ownership is key to achieving sustainable development'.[344] The goals are unlikely to be achieved by 2030,[345] which is worrying as the targets in the SDGs predecessors[346] also failed.[347] The UN requested businesses to work harder in adhering to the SDGs,[348] although the goals assign businesses limited responsibilities similar to current laws on corporate social responsibility (CSR) (see Section 2.7). Could ISDS not assist enforcement/monitoring/compliance/accountability procedures for ICR, ECSR, and solidarity rights to help realise sustainable investment?

IIL struggles to adapt to the increasing desire for protection of human rights.[349] Human rights are not always explicitly a feature of BITs/IIAs, albeit investor protections, due to their non-reciprocity in favour of investors, and investor-State tribunals may be reluctant to consider human rights for the respondent's citizens. There are examples where ISDS considers human rights to a certain extent like in *Foresti*,[350] but such examples can be assisted by domestic and international petitioning (i.e NGOs).[351] Investor protections like expropriation can be interpreted broadly to override protection of

[340] 'Sustainable Development Goals' (PRI) <https://www.unpri.org/sustainability-issues/sustainable-development-goals> accessed 6 May 2021.
[341] 'The Sustainable Development Agenda' (UN) <https://www.un.org/sustainabledevelopment/development-agenda-retired/> accessed 26 September 2018.
[342] Clair Gammage and Tonia Novitz (eds), *Sustainable Trade, Investment, and Finance: Towards Responsibility And Coherent Regulatory Frameworks* (Edward Elgar 2019) 6-8.
[343] UN SDGs (2030), op. cit., [72].
[344] ibid, [74].
[345] UN Secretary-General António Guterres, 'Private business must be a 'driving force' for securing peace, curbing climate change: Guterres' (UN, 24 September 2018) <https://news.un.org/en/story/2018/09/1020342> accessed 26 September 2018.
[346] Millennium Declaration (2002), op. cit.; Rio Declaration on Environment and Development (1992), op. cit.
[347] Millennium Declaration (2002), op. cit., 14, [75].
[348] UN Secretary-General António Guterres (2018), op. cit.
[349] VCLT, preamble.
[350] *Piero Foresti v South Africa*, ICSID Case No. ARB(AF)/07/01, Petition for Limited Participation as non-Disputing Parties in term of Articles 41(3) of 17 July 2009, [3.1]-[3.3]; *Piero Foresti v South Africa*, ICSID Case No. ARB(AF)/07/01, Award of 4 August 2010, [76]. This case concerned an alleged indirect expropriation of the claimant's property over control of minerals and petroleum.
[351] Human rights considered due to the strong petitioning of two international NGOs along with two domestic NGOs, such as the South African NGO, Centre for Applied Legal Studies (CALS).

fundamental freedoms and beneficial measures like health, labour and environment regulations,[352] and 'state of necessity' measures that aim to prevent potential societal collapse.[353]

The RoL is an important mechanism in international law, [354] related to human rights and sustainability.[355] Protecting human rights could be an element of the substantive RoL,[356] and formal RoL theories describe relationships and interactions with human rights.[357] Effective protection of human rights entails transparency, impartial adjudication and issues of equality also arise. Formal equality can assist even solidarity rights like indigenous communities to obtain 'equality before the law' compared to other citizens.[358] The RoL is related to justice,[359] and human rights instruments outline that human rights should be protected by the RoL.[360] Furthermore, even without a strict RoL approach SDG 16 promotes human rights protection.[361]

Goal 16 could guide appropriate institutional design through indicating human rights, (such as the right to life protected under Article 6 ICCPR[362] and Article 3 UDHR),[363] should have 'efficient and transparent regulations', 'realistic government budgets', and 'more independent national human rights institutions around the world'.[364] Furthermore, Goal 16 promotes the DRoL and an IRoL, and elements like access to justice, inclusiveness, and equality. EU sources could give judicial protection to constitutional justice principles like protection of human rights, fundamental freedoms, and the

[352] Office of the High Commissioner for Human Rights (10-14 September 2003), op. cit., p 16; *Mexico v Metalclad* (2001) BCSC 664, Tysoe J, [99]; *Ethyl Corporation v Canada* (1998), op. cit.; *Metalclad v Mexico*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000; *Methanex v US*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005.

[353] One could be a financial crisis such as the Argentine economic crisis of late 2001 and early 2002 where other 40 different investors made challenges for high damages against measures aimed to stabilise the economy, see, Paolo Di Rosa, 'The Recent Wave of Arbitrations Against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues' (2004) 36 IALR 41; For cases see, *CMS v Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005, [320]-[321]; *LG&E v Argentina and others*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, [257]; *Enron v Argentina*, ICSID Case No. ARB/01/3, Award of 22 May 2007, [191]-[214]; *Sempra v Argentina*, ICSID Case No. ARB/02/16, Award of 28 September 2007, [325]-[397]. It should be noted that emergency State measures are treated as legitimate exceptions to human rights protections.

[354] Venice Commission (2011), op. cit.; Treaty on European Union (Consolidated Version), Preamble, arts 2, 21; *ELSI* (1989), op. cit., [124] [128]; *Asylum Case* (1950), op. cit., 284; Tom Bingham (2010), op. cit.; Brian Tamanaha (2004), op. cit.; Robert McCorquodale (2016), op. cit., 279-284.

[355] G.A. Res. 60/1, 134, U.N. Doc. A/RES/60/l (Oct. 24, 2005).

[356] Robert McCorquodale (2016), op. cit., 283, 292; Tom Bingham (2010), op. cit., ch 7.

[357] Simon Chesterman (2008), op. cit., 344, 359; James Crawford (2014), op. cit.

[358] James Crawford (2014), op. cit., 273.

[359] Robert McCorquodale (2016), op. cit., 282; Brian Tamanaha (2004), op. cit., 92.

[360] UDHR (1948), op. cit., preamble.

[361] 'Peace, Justice and Strong Institutions' (UN) <https://www.un.org/sustainabledevelopment/peace-justice/> accessed 10 November 2018. SDG 16 is about Peace, Justice and Strong Institutions.

[362] ICCPR (1966), op. cit. art 6.

[363] UDHR (1948), op. cit., art 3.

[364] 'Peace, Justice and Strong Institutions' (UN), op. cit.

RoL, which could limit private commercial law interests in ISDS from intra-EU IIAs (see Chapter 3.2.1).[365] The UN aims to settle disputes peacefully and 'in conformity with the principles of justice and international law', [366] and international courts outline justice should be upheld.[367] As ISDS claims increase, the greater IIL needs to promote justice and adopt beneficial societal functions.

The Maastricht Guidelines outlined that States commonly reduce their role and rely on financial markets and foreign investors to enhance human welfare,[368] but it is nevertheless the States' fault if they enter into IIAs that impedes their legal obligation to implement human rights like ESCR or environmental SDGs.[369] The UN urged States to identify a human rights and environmental approach to the application of IIL.[370] However, investors can have more power and wealth than most States,[371] and some domestic systems may be incapable of holding investors accountable for abuses. It seems too simplistic and impractical to lay blame or responsibility on States. This is further compounded from international law failing to adequately accommodate foreign investors and their MNCs into the international system resulting in a complicated relationship emerging between international human rights and foreign investors.

2.7 Corporate Social Responsibility and IIL

The human rights system relies on a relationship between the State and the individual. However, in ISDS investors are commonly MNCs and non-State actors, which heightens the complexities of challenging human rights violations in the IIL context. Corporations have corporate personality which transforms a business into a legal person meaning it has legal personality to exist separately and

[365] Opinion 1/17 of the Court (Full Court) (30 April 2019) (European Court of Justice), [161], [162]-[188], [245]; Christer Soderlund, 'Intra-EU BIT Investment Protection and the EC Treaty' (2007) 24 J INT'L ARB 455; Ernst-Ulrich Petersmann, 'Human Rights, International Economic Law and Constitutional Justice' (2008) 19 EUR. J. INT'L L. 769, 780; Ernst-Ulrich Petersmann (2009), op. cit., 518, 520; Treaty on European Union, esp art 6; EU Charter of Fundamental Rights; European Convention of Human Rights; Court of Justice of the European Union; European Economic Area; Treaty of the Functioning of the European Union.
[366] Charter of the United Nations, art 1(1).
[367] Chester Brown, *A Common Law of International Adjudication* (OUP 2007).
[368] Maastricht Guidelines (1997), op. cit., [2].
[369] ibid, [15j].
[370] United Nations Economic, Social and Cultural Council, 'Economic, Social and Cultural Rights: Human rights, trade and investment', Report of the High Commissioner for Human Rights, E/CN.4/Sub.2/2003/9 (2 July 2003) 3-4.
[371] Aidan Green, 'Are multinationals now more powerful than the nation state?' (Spectator, 18 September 2018) <https://www.spectator.com.au/2018/09/are-multinationals-now-more-powerful-than-the-nation-state/> accessed 21 February 2019; UNCTAD, 'Are Transnationals Bigger than Countries?', Press release TAD/INF/PR/47 (December 8, 2002) <http://www.unctad.org/remplates/Webflyer.asp?docID = 2426&intItemID = 2068&lang = I> 18 January 2016; Maastricht Guidelines (1997), op. cit., [2]; Zlata Rodionova, 'World's largest corporations make more money than most countries on Earth combined' (The Independent, 13 September 2016) <https://www.independent.co.uk/news/business/news/worlds-largest-corporations-more-money-countries-world-combined-apple-walmart-shell-global-justice-a7245991.html> accessed 21 February 2019.

independently from its owners.[372] This principle is identified in various domestic legal systems,[373] and encouraged investment to boost the economy. Creating a company would be more advantageous for investors, since if the company became insolvent, only the company would succumb to the ramifications. This principle can be problematic when investors for the purposes of FDI use subsidiaries to invest in other States that have an insufficient domestic legal system to adequately prosecute the subsidiary company for potential abuses.

Although the subsidiary company is part of the MNC, the corporate personality principle means that the subsidiary has legal personality separate from the MNC, which means the State where the subsidiary operates can only prosecute it for abuses. The ramifications are evident from the Bhopal gas explosion where the subsidiary acted negligently by not implementing basic health and safety standards because of cost cutting,[374] resulting in thousands of life's being lost.[375] The Indian legal system failed to adequately prosecute the subsidiary,[376] since it did not have the required capabilities to adjudicate MNC abuses.[377] Although corporate personality can be limited such as piercing the corporate veil when it is considered the management of the parent and subsidiary company are identical, it is hard to prove as indicated by the Bhopal gas explosion where the American parent company evaded prosecution in America with the assistance of the *forum non conveniens* principle.[378] IIAs allow investors to claim against the State for abuses in an international tribunal, but States cannot use the same forum to hold investors accountable for abuses.

There are international initiatives associated with Corporate Social Responsibility (CSR) that aim to prevent MNCs evading liability in certain domestic jurisdictions. Firstly, the Organisation for Economic Co-operation and Development (OECD) outlined that MNCs should contribute to social and economic

[372] Nigel Markwick and Chris Fill, 'Towards a framework for managing corporate identity' (1997) 31(5) EJM 396, 399, 400, 407; Stephen Kobrin, 'Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms and Human Rights' (2009) 19(3) BEQ 349, 352; Ataollah Rahmani, 'Allocation of tort liability between companies and directors: the missing link' (2016) 27(2) ICCLR 37, 46; *Barcelona Traction, Light and Power Company* (Judgement: Secondary Phase) [1970] ICJ Rep 3 [39]; *The Albazero* [1977] AC 774, 807 (Roskill LJ); *Reed v Nova Securities Ltd* [1985] 1 WLR 193, 201 (Lord Templmean); Kenneth Amaeshi, Onyeka Osuji and Paul Nnodim, 'Corporate Social Responsibility in Supply Chains of Global Brands: A Boundaryless Responsibility? Clarifications, Exceptions and Implications' (2008) 81 JBE 223, 226.

[373] See UK law, *Salomon v Salomon & Co Ltd* [1897] AC 22, 29–32 (Lord Halsbury LC), 51-54 (Lord Macnaghten).

[374] Paul Shrivastava, *Bhopal: Anatomy of a Crisis* (2nd edn, Paul Chapman Publishing 1992) 3; David Weir, *The Bhopal Syndrome: Pesticides, Environment and Health* (Earthscan Publication Limited 1986) 30-41.

[375] Suroopa Mukherjee, *Bhopal Gas Tragedy: The Worst Industrial Disaster in Human History* (Tulika Publishers 2002) 11; Paul Shrivastava (1992), op. cit., 2.

[376] Joe Jackson and Maeve McLoughlin, 'Bhopal disaster: still waiting for the clean up' (2008) 406 ENDS 32, 33, 35; Jayaprakash Sen, 'Can defects of natural justice be cured by appeal? Union Carbide v Union' (1993) 42(2) ICLQ 369; "India Scraps Bhopal Deal Gandhi Tried to Force on Gas Victims", The Times, London, 15 January. 1990.

[377] *Re Union Carbide Corporation Gas Plant Disaster at Bhopal*, 643 F Supp 842 (SDNY 1986) 849.

[378] Ibid.

progress when initiating FDI in other States.[379] Secondly, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (TDPMESP) designated procedures for conditions of training, employment, industrial relations, life, and work, to guard against increasingly powerful MNCs who could influence State economies and international economic relations from abusing labour standards and social policy issues.[380] Thirdly, the UN Global Compact incorporated ten principles associated with, the environment, labour, anti-corruption, and human rights, such as businesses should respect international human rights and not commit human rights violations.[381]

Fourthly, the UN Draft Norms recognised numerous international instruments that highlight international codes of conduct for corporations and fundamental human rights norms, and emphasised that MNCs should respect, promote, and protect human rights under both domestic and international law.[382] Lastly, the Guiding Principles hold that protecting human rights should be a State obligation under international law, respecting human rights should be an MNC responsibility, and the prerequisite of an effective remedy available for individuals who were victims of human rights abuses.[383] However, these are only soft law initiatives and cannot be considered legally binding mechanisms that hold MNCs accountable for their human rights and environmental abuses.

Like sustainability and human rights, the enforcement/compliance/monitoring/accountability mechanisms of CSR are questionable. Despite the OCED's attempt to make claims against MNCs who commit abuses more accessible through the creation of national contact points that aimed to be transparent, it lacks enforcement powers. Although MNCs under the TDOMESP are obliged to complete a survey to certify their compliance, it lacks legally binding capabilities. Despite the UN Global Compact's reference to the UDHR, the 'Communication on Progress' that acted as the reporting and self-evaluation mechanism failed to adopt acceptable monitoring and verification standards, which could ascertain whether members were implementing the Compact's principles.[384]

[379] The Organisation for Economic Co-operation and Development (OECD) Declaration and Decision on International Investment and Multinational Enterprises (1976) 15 ILM 967.
[380] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO, 279th Sess, November 17 2000, in 41 ILM 187 (2002), available at "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy" <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf> accessed 16 May 2016.
[381] United Nations Global Compact (31 January 1999).
[382] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN4/Sub2/2003/12/Rev2 (2003) [1].
[383] United Nations Guiding Principles on Business and Human Rights (2011).
[384] 'United Nations corporate partnerships: The role and functioning of the Global Compact', page iii-iv, <https://www.unjiu.org/en/reports-notes/archive/United%20Nations%20corporate%20partnerships%20-The%20role%20and%20functioning%20of%20the%20Global%20Compact.pdf> accessed 6 September 2016.

Furthermore, the UN Draft Norms were abandoned before they gained international recognition. One reason the UN Draft Norms were rejected relates to limits on State sovereignty linked to surrendering power to the UN.[385] There is currently another attempt to create a form of binding CSR,[386] but it would require State approval to succeed. The previous CSR initiatives failed to become hard law because States, who were pressured by MNCs, could not agree upon a mandatory mode of practise. Moreover, the Guiding Principles put the obligation to protect human rights on States through creating adequate domestic legislation although some States lack the resources to offer appropriate remedies. Thus, current international CSR is unsatisfactory in protecting human rights against non-State actors who invest in foreign States, as it fails to hold MNCs accountable for the international abuses they commit when operating in their global business capacity.[387]

A better balance between State and investor rights and responsibilities in IIAs could be achieved by infusing IIL with binding CSR obligations, which in turn could translate to better practices in ISDS. Some commentators favour a soft-hard law continuum that pinpoints accessible and transparent CSR principles (precision) to be taken into consideration when making and managing investments (obligation).[388] This could increase moral obligations/integrity that are expected to be integrated within IIL, IIA and eventually ISDS (delegation).[389] A multi-stakeholder approach of States, investors, and workers could further the hard-soft CSR law continuum.[390] These commentators argue promotion of the soft-hard law continuum will enhance sustainable development. Achieving sustainable investment could better balance investor rights with beneficial societal protections.

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[385] Harmen Van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 Chinese Journal of International Law 43, 45.

[386] The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG); see, 'Fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (October 2019) <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx> accessed 23 November 2019.

[387] Stephen Kobrin (2009) op. cit., 362; Michael Barnett, 'Stakeholder Influence Capacity and the Variability of Financial Returns to Corporate Social Responsibility' (2007) 32(3) AMR 794, 807; Chrispas Nyombi, Andreas Yiannaros & Rhidian Lewis, 'Corporate personality, human rights and multinational corporations' (2016) 27(7) ICCLR 234, 247, 248; Maria Gonzalez-Perez and Liam Leonard, *International business, sustainability and corporate social responsibility* (Emerald 2013) 153, 154; Markos Karavias, *Corporate Obligations under International Law* (OUP 2013) 83, 114, 115; Ciprian Radavoi and Yongmin Bian, 'Enhancing the accountability of transnational corporations: the case for "decoupling" environmental issues' (2014) 16(3) ELR 168, 173; Dima Jamali and Ramez Mirshak, 'Business-Conflict Linkages: Revisiting MNCs, CSR, and Conflict' (2010) 93 JBE 443, 445, 446.

[388] Rafael Peels, Anselm Schneider, Elizabeth Echeverria and Jonas Aissi, 'Corporate Social Responsibility (CSR) in International Trade and Investment Agreements: implications for states, businesses and workers' (Conference Paper, 2015) <https://www.global-labour-university.org/fileadmin/GLU_conference_2015/papers/Peels_et_al.pdf> accessed 3 August 2020.

[389] Although the authors argument of delegation is weakened in IIA as they do not give States the right to initiate ISDS, a State could nevertheless counter investors claims.

[390] The academics argued that this could be developed by the International Labour Organisation.

Sustainable investment could be limited by this apparent 'race to the bottom' when States relax domestic regulations such as environmental standards to encourage FDI.[391] The UNCTAD Action Menu,[392] could assist sustainable investment management in host States to prevent disputes.[393] The Action Menu is only soft law, but it attempts to bring home States into the equation to fill the policy gap left by CSR. Yet the absence of procedural or substantive rules requiring home States to enforce liability for breaches committed by their investors in host States is disappointing.[394] Enhancing CSR could respond to races to the bottom,[395] and including investor obligations/rules in IIAs on the basis of human rights should promote sustainability.[396] Most IIAs created in 2018 included sustainable development provisions, but CSR provisions were absent in most although appearing more compared to previous years.[397] Conversely, the application of IIL could develop a global administrative law feature to counteract the problems arising from MNCs entering the international system. The next section will assess the challenges and benefits of an investor-State international dispute resolution setting. This will focus on evaluating the relationship between international administrative law and international investor-State disputes and whether investors should make claims against States in international adjudication. The next section indicates why ISDS should be reformed rather than abolished.

2.8 Procedural Problems with Application of IIL: Arbitrariness, transparency, and equality

Globalisation has facilitated the systemisation of the international system and diminished the significance of State-centric markets. A paradigm of complex governing arrangements at domestic, regional, and international level has emerged, which includes the shifting of power away from the State to other private actors. Now, international and regional institutions have gained considerable and broad regulatory powers. This paradigm has influenced a new institutional configuration known as international administrative law,[398] which some commentators argue could be applicable to

[391] Investment Policy Framework for Sustainable Development (2015) (UNCTADDIAE/PCB/2015/5), National Investment Policy Guidelines, Guideline 2.4.17; Ahmad Ghouri (2018), op. cit., 209-210.
[392] The UNCTAD Global Action Menu for Investment Facilitation, UNCTAD/DIAE (September 2016).
[393] Ahmad Ghouri (2018), op. cit.
[394] ibid, 203.
[395] ibid, 210.
[396] Rhea Tamara Hoffman, 'The Multilateral Investment Court: A stumbling block for comprehensive and sustainable investment law reform' (2018) ESIL Annual Conference, Manchester 13-15 September 2018, ch 4.1.
[397] World Investment Report (2019), op. cit., 105; Amy Man, 'Old players, new rules: a critique of the China-Ethiopia and China-Tanzania bilateral investment treaties', in Clair Gammage and Tonia Novitz (eds), *Sustainable Trade, Investment, and Finance: Towards Responsibility And Coherent Regulatory Frameworks* (Edward Elgar 2019) 152, 169. Sustainable development and CSR provisions may be limited in application.
[398] Benedict Kingsbury, Nico Krisch, and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law & Contemporary Problems 15; Can also be called global administrative law.

investor-State disputes.[399] However, arguments favouring global administrative law contain different theoretical foundations. Van Harten and Loughlin, for example, favour investor-State disputes governance by international administrative law, and not international commercial arbitration, since it concerns the adjudicative review of executive governmental public State actions and not private commercial activities.[400] Controlling the exercise of public authority that can constrain sovereign acts of a State's legislature, judiciary, and administration is a process related to public law and disputes concern 'the state's relationships with individuals who are subject to the exercise of public authority by the state'.[401]

Montt sees IIL as a 'new form of global public law' that synthesizes constitutional and administrative law implications in limiting government actions of State power comparable to domestic constitutions for the benefit of foreign investors through investor protections.[402] IIAs through State consent allow investors 'direct effect' to ISDS which has 'supremacy' to conduct 'judicial review' of government actions.[403] ISDS could form part of constitutional jurisprudence, as the relationship between tribunals and States resembles distribution of power between the judicial and political branches of domestic government. ISDS tribunals are expected to create clear jurisprudence when interpreting and protecting investor protections.[404] Schill believes investor protections should have constitutional-like domestic public law standards that hold States to account.[405] Schill argues international public law could implement global governance beyond dispute settlement, impact domestic law and policy making better than any other international legal regime, and can limit fragmentation by discovering the cohesion prevailing between legal systems.[406]

Schill's comparisons of international and domestic systems with IIL failed to identify the specific legal systems and general principles that should assist ISDS and it only referred to western domestic systems when many other domestic systems exist.[407] Moreover, Schill's theoretical foundation rests on the domestic system assisting the international system of IIL.[408] However, an IRoL is proposed to

[399] Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17(1) European Journal of International Law 121; Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing 2009). 5; Stephan Schill, 'W(h)ither Fragmentation?' (2011), op. cit.; *International Thunderbird Gaming Corp v Mexico*, UNCITRAL, Separate Opinion by Thomas Wälde of 1 December 2005, [12]–[13].
[400] Gus Van Harten and Martin Loughlin (2006), op. cit., 146.
[401] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 120.
[402] Santiago Montt (2009), op. cit., 5, 12.
[403] ibid, 13-15.
[404] ibid, ch 4-6, 109.
[405] Stephan Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52 Va J Int'l L 57.
[406] Stephan Schill, 'W(h)ither Fragmentation?' (2011), op. cit., 902.
[407] Stephan Schill, 'Enhancing International Investment Law's Legitimacy' (2011) op. cit., 93.
[408] ibid, 97.

assist the DRoL.[409] Even accepting Schill's domestic foundations, it is surprising that Schill has not advocated for introducing an appellate mechanism that inspects these administrative judicial review decisions when most domestic systems have appellate review.

A system lacks credibility to effectively constitute international administrative law principles in reviewing government public actions if it entails non-transparent proceedings held in ad hoc tribunals with party appointed adjudicators who may lack legitimacy and have conflict of interests. These adjudicators can set standards that may ignore sustainable investment,[410] and issue awards that go against democratically legitimate government decisions even if those government actions protect human rights and environmental considerations,[411] adversely affecting third parties like public citizens. The arguments advanced by some of these scholars involve thinking about the system in a different way, but more concrete attention can also be paid to specific problems. In this thesis, I argue that more effective public governance can be achieved by replacing ad hoc arbitration with a multilateral investment court system that includes appellate review with adjudicators who have legitimacy and credibility to review State public actions. This proposal should aim to prevent arbitrariness and promote transparency and equality which all link to other RoL elements to increase the chances of the proposal being able to adequately reinforce the RoL.

There is a growing sense among States and scholars that ISDS is problematic. Venezuela,[412] Bolivia,[413] and Ecuador left ICSID,[414] although Ecuador have since returned.[415] Russia, Italy, and Australia

[409] James Crawford (2003), op. cit., 8.
[410] *Magyar Farming, v Hungary*, Award of the Tribunal of 13 November 2019, [235].
[411] Office of the High Commissioner for Human Rights (10-14 September 2003), op. cit., p 16; *Mexico v Metalclad* (2001), op. cit., Tysoe J, [99]; *Ethyl Corporation v Canada*, (1998), op. cit.; *Bilcon v Canada* (2019), op. cit.; *Bear Creek Mining v Peru* (2017), op. cit.
[412] Venezuela on 24 January 2012 informed the World Bank denunciation of the ICSID Convention, and officially withdrew on 25 July 2012 from ICSID, See, 'Venezuela Submits a Notice under Article 71 of the ICSID Convention' (ICSID News Release, 26 January 2012) <https://icsid.worldbank.org/en/Pages/News.aspx?CID=47> accessed 17 March 2018.
[413] Bolivia on 2nd of May 2007 informed the word bank denunciation of the ICSID Convention, and officially withdrew from the Convention on 3rd November 2007, see, 'Denunciation of ICSID Convention' (ICSID News Release, 16 May 2007) <https://icsid.worldbank.org/en/Pages/News.aspx?CID=103> accessed 17 March 2018.
[414] On 6 July 2009 Ecuador informed the World Bank denunciation of the ICSID Convention, and officially left ICSID on 7 January 2010, see, 'Denunciation of the ICSID Convention by Ecuador' (ICSID News Release, 9 July 2009) <https://icsid.worldbank.org/en/Pages/News.aspx?CID=87> accessed 17 March 2018.
[415] 'Ecuador Ratifies the ICSID Convention' (ICSID News Release, 4 August 2021) <https://icsid.worldbank.org/news-and-events/news-releases/ecuador-ratifies-icsid-convention> accessed 12 September 2021.

withdrew from the Energy Charter Treaty.[416] Many States have terminated IIAs/BITs,[417] as it shrinks government policy space with respect to adopting measures of public interest while attracting international litigation,[418] limits domestic sectoral reforms,[419] and litigation is extremely expensive.[420] The EU is demanding the termination of intra-EU BITs as it impedes EU Law (see Chapter 3.2.1),[421] and States are reforming IIAs to enhance State power within ISDS.[422] There was outrage that Philip Morris could challenge beneficial societal health measures,[423] the US limited investor protections after NAFTA turned against it,[424] and there is public pressure against IIL (see Chapter 4.2.5). IIAs may not favour States and ISDS can currently prevent States from creating an environment for sustainable investment. Reform may be required to prevent a legitimacy crisis and potential international turmoil.

[416] The withdrawal in 2009 may have been influenced after it lost an expensive finding on jurisdiction in the Yukos case, see, Irina Mironova, 'Russia and the Energy Charter Treaty' (International Energy Charter, 7 August 2014) <https://energycharter.org/what-we-do/knowledge-centre/occasional-papers/russia-and-the-energy-charter-treaty/> accessed 17 March 2018; Amelia Hadfield and Adnan Amkhan-Banyo, 'From Russia with Cold Feet: EU-Russia Energy Relations, and the Energy Charter Treaty' (2013) 1 International Journal of Energy Security and Environmental Research 1; Nathalie Bernasconi-Osterwalder, 'Energy Charter Treaty Reform: Why withdrawal is an option' (International Institute for Sustainable Development: Investment Treaty News, 24 June 2021) <https://www.iisd.org/itn/en/2021/06/24/energy-charter-treaty-reform-why-withdrawal-is-an-option/> accessed 5 March 2022; 'Australia cuts ties with Energy Charter Treaty' (Business & Human Rights Resource Centre, 8 November 2021) <https://www.business-humanrights.org/en/latest-news/australia-cuts-ties-with-energy-charter-treaty/> accessed 5 March 2022.

[417] 'International Investment Agreements Navigator' (UNCTAD Investment Policy Hub), op. cit., i.e., India have terminated 67 BITs, Indonesia 30 Ecuador 24, Poland 20, Romania 18, Bolivia 15, and South Africa terminated half of its ratified BITs.

[418] Mushtaq Ghumman, 'Most of BITs to be scrapped' (Bilaterals, 25 March 2021) <https://www.bilaterals.org/?most-of-bits-to-be-scrapped> accessed 20 May 2021. For example, Pakistan is trying to scrap most of its BITs due to limits on the States right to regulate.

[419] Sean Woolfrey, 'Another BIT Bites the Dust' (Tralac, 30 October 2013), <http://www.tralac.org/discussions/article/5342-another-bit-bites-the-dust.html> accessed 17 March 2018. For example, South Africa terminated BITs since investors challenged its domestic mining sector reforms.

[420] UNCTAD World Investment Report, Global Value Chains: Investment and Trade for Development (2013), p.108. For example, Ecuador denounced nine BITs in 2008, as foreign investors increasingly brought costly claims against it.

[421] *Slovakia v Achmea BV* (Case C-284/16), 6 March 2018.

[422] Model Text for the Indian Bilateral Investment Treaty 2016, arts 14(2)(ii), 15(2). This includes putting importance on judicial domestic decisions and available domestic remedies.

[423] Eric Crosbie, Patricia Sosa, and Stanton Glantz, 'Defending strong tobacco packaging and labelling regulations in Uruguay: transnational tobacco control network versus Philip Morris International' (2018) 27(2) tobacco control 185; Benjamin Hawkins and Chris Holden, 'A Corporate Veto on Health Policy? Global Constitutionalism and Investor-State Dispute Settlement' (2016) 41(5) Journal of Health Politics, Policy and Law 969; Andrew Mitchell and Sebastian Wurzberger, 'Boxed In? Australia's Plain Tobacco Packaging Initiative and International Investment Law' (2011) 27(4) International Arbitration 632.

[424] The scope indirect expropriation and the fair and equitable treatment standards were limited, see, Guillermo Aguilar Alvarez and William Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11' (2003) 28 YJIL 365; Kenneth Vandevelde, 'A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests', (2009) 1 YIILP 283.

States supporting an Investment Facilitation Agreement (IFA) this decade at the WTO,[425] argue WTO influence over interpreting and setting investment norms could improve transparency, accessibility, coherence and efficiency of and with IIL and better promote sustainable investment.[426] An IFA could include risk mitigation and dispute prevention, enhanced institutional governance, and agendas for investment cooperation. However, an IFA is not envisioned to contain dispute resolution and if it did problems would arise as only States can be parties to WTO disputes.[427] Although investors could lobby for member States to raise a WTO dispute, this technique could be analogous to historical methods of States protecting their national's property in foreign States, such as diplomatic protection and treaties of capitulation.[428]

This was problematic for the RoL elements of access to justice and enforcement before the courts since it placed excessive reliance on States to pursue claims in an effective and fair manner on behalf of its citizens. Moreover, these political measures were exploited through 'Gun boat diplomacy', which was the deployment of naval vessels within the territories of foreign States (like former colonies) by powerful States to enforce compliance.[429] This not only limited peaceful coexistence,[430] but further RoL issues like State sovereignty and substantive inequality since the international setting turned into

[425] About 100 States expressed support to an IFA, see, 'Investment facilitation talks advance, delve into implementation and technical assistance' (WTO, 17 June 2021) <https://www.wto.org/english/news_e/news21_e/infac_17jun21_e.htm> accessed 17 August 2021; '"Easter text" to facilitate negotiations for an investment facilitation agreement' (WTO, 23 April 2021) <https://www.wto.org/english/news_e/news21_e/infac_27apr21_e.htm> accessed 17 August 2021; 'Investment facilitation agreement negotiators set up roadmap towards Ministerial Conference' (WTO, 26 January 2021) <https://www.wto.org/english/news_e/news21_e/infac_29jan21_e.htm> accessed 17 August 2021.

[426] One IFA supporter is Brazil, see, Secretariat of Foreign Trade Ministry of Industry, Foreign Trade and Services Brazil, 'Brazil's Experience on Investment Facilitation' (WTO) <https://www.wto.org/english/tratop_e/invest_e/01_opening_remarks_arabe_neto_brazil.pdf> accessed 13 March 2018; The potential EU-Angola IFA could promote both sustainable development and investment, see, Miriam Garcia Ferrer and Alvaro Rangel-Hernandez, 'EU and Republic of Angola launch negotiations for a first-ever Sustainable Investment Facilitation Agreement' (EU Press release, 22 June 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3096> accessed 17 August 2021.

[427] Brazil Model Cooperation and Facilitation Investment Agreement 2015, arts 23-24. Articles outline possibility for State-State arbitration and that damages can only be determined if both parties agree.

[428] *Panevezys-Saldutiskis Railway Case (Estonia v Lithuania)* (1939] PCIJ Series A/B 76, ICGJ 328, [16]; Article 1 of the International Law Commission's (ILC's) Articles on Diplomatic Protection adopted by the ILC's at its 58th session, in Report of the International Law Commission, UN GAOR, 61st Sess, Supp No 10, UN Doc A/61/10 (2006), p 16; *Mavrommatis Palestine Concessions* (1924) PCIJ Ser A, No 2, p 12; Clyde Eagleton, *Responsibility of States in International Law* (NYUP 1928); Richard Lillich, *International Law of State Responsibility for Injuries to Aliens* (UPV 1983); Rudolf Dolzer, 'Mixed Claims Commissions' (1992) 3 EPIL 438.

[429] French intervention against Mexico in 1838 and 1861, an embargo of Venezuelan ports by several European nations between 1902 and 1903, Italian military action in Colombia in 1885, and US interference against Nicaragua, Dominican Republic and Haiti in the early 20th century, see, Chrispas Nyombi, 'Protection of foreign investment pre-1945 and the impact of subsequent reforms' (2015) 5 IBLJ 419; Donald Shea, *The Calvo Clause* (UMP 1955) 13.

[430] Charter of the United Nations, art 1.

a self-indulgent playground for the powerful to enforce their interests against weaker States and non-State actors through exercising their political, military, or economic superiority.

Some academics disillusioned with ISDS believe that ISDS is serving the neo-colonial interests of already powerful developed State economic interests over weaker developing State economies.[431] Arguably the rejection of the non-binding Calvo Doctrine [432] by developed States, and which developing States supported because it offered an alternative measure to govern international investments to reverse the effects of the colonial techniques, reinforces the neo-colonial strategic orientation of ISDS.[433]

Sergio Puig and Gregory Shaffer indicate how fairness, resource allocation efficiency, and peace can be encompassed by the broader principle of accountability under the DRoL to denounce ISDS failure to complement domestic courts, institutions, and policies.[434] Some academics that see ISDS as a form of international administrative law have questioned the legitimacy of ISDS.[435] They argue that the balancing act between an investor's commercial property interests capable of enhancing the economy and the State's sovereign right to regulate on behalf of its citizens currently takes place in a setting outside of the State's domestic institutions and, therefore, the RoL cannot be reinforced. [436] Consequently, there have been passionate calls for ISDS to be radically reconceived or terminated altogether, and for a return to domestic law and domestic courts.[437]

Muthucumaraswamy Sornarajah argues for the exhaustion of local remedies which requires investors to initiate all avenues in the domestic system before initiating ISDS, but admits investors would prefer international dispute settlement over domestic options. [438] This suggests some investors are

[431] Gus Van Harten (2007), op. cit., 17; Thomas Schultz and Cédric Dupon (2014), op. cit.; Sergio Puig (2014), op. cit, 395-396.
[432] The Calvo doctrine indicated that aliens who establish themselves in a State should have equal rights of protection as nationals and not an extended protection to counteract western initiatives, such as minimum standard of treatment.
[433] The Calvo doctrine was created with the support of Latin American States at the International Conference of American States 1889 and the USSR after the 1917 communist revolution. For further reading on Calvo Doctrine see, Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Hague: Kluwer Law International 2009)., 13-14; C Calvo, *Le droit international théorique et pratique* (5th edn, vol 6, 1896) 231; Chrispas Nyombi and Maxwell Obesi, 'The remnants of the Calvo doctrine' (2016) 27(2) IBLJ 48; Donald Shea (1955), op. cit., 75; Chrispas Nyombi (2015), op. cit.
[434] Sergio Puig and Gregory Shaffer (2018) op. cit.
[435] Gus Van Harten and Martin Loughlin (2006), op. cit., 150.
[436] Ibid; Gus Van Harten (2020), op. cit. The dispute would also commonly arise in the domestic setting, see, Sergio Puig (2014), op. cit., 389.
[437] 'Public Statement on the International Investment Regime – 31 August 2010' (OSGOODE, 31 August 2010) <https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> accessed 18 March 2018.
[438] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2nd edn, CUP 2004) 296; There is also the issue of time as the adjudicators in the *Urbaser v Argentina* tribunal said the 18-month period for domestic litigation before ISDS was inapplicable because a dispute could not be resolved in the Argentina

determined for ISDS which makes initial proceedings pointlessly time-consuming and costly.[439] Sornarajah's idea that judges are from an elite class that specialise in commercial law rather than public law would apply both in international and domestic setting.[440] Regardless of the dispute setting, RoL aspects like sustainable development within the States right to regulate need further attention against the investor's substantive property rights. Sornarajah argues domestic courts are part of the democratic system,[441] but adjudicators might not be independent or impartial when the dispute is between their State and a foreign investor especially in politically and nationalistic motivated judicial systems. Moreover, UNCITRAL Working Group III (WGIII) are proposing reforming adjudicator elections in a way that might enhance democratic values in nomination, selection, and appointment (see Chapter 5).[442] Similarly, Van Harten persuasively argues that some national courts are far more independent and fairer than ISDS[443] and these concerns are currently under discussion at WGIII (see Chapter 5).[444]

However, international dispute settlement mechanisms play an important role in upholding legal principles where domestic systems cannot. For example, some States may lack the resources in their legal system to adequately hold MNCs accountable for abuses in the absence of binding CSR, never mind the expertise capable of efficiently evaluating complex commercial and public issues inherent of IIL which even the best adjudicators struggle to deal with (see Section 2.7). Some States may lack an independent judiciary separate from the executive and legislature[445] that can protect against unfair political bias or provide wronged parties access to justice.[446] Van Harten recognises that 'national institutions are very weak in some countries', but argues this weak system would apply equally for all

courts within this period. This means they could not be access to justice or a way for the RoL elements of transparency, equality, or the prevention of arbitrariness to be checked within the time period, see, *Urbaser v Argentina* (2016), op. cit, [202].

[439] *Urbaser v Argentina* (2016), op. cit, [202].

[440] Muthucumaraswamy Sornarajah, 'An International Investment Court: panacea or purgatory?' (Colombia Centre for Sustainable Investment: Columbia FDI Perspectives, Perspectives on topical foreign direct investment issues No. 180 August 15, 2016) 2.

[441] ibid, 2.

[442] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Fortieth session, Vienna, Online, 8–12 February 2021, <http://undocs.org/en/A/CN.9/WG.III/WP.203> accessed 5 March 2021.

[443] Gus Van Harten (2020), op. cit., 10.

[444] Possible reform of investor-State dispute settlement (ISDS), Draft code of conduct, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Fortieth session, Vienna, Online, 8–12 February 2021, <http://undocs.org/en/A/CN.9/WG.III/WP.201> accessed 5 March 2021.

[445] Cristoph Schreuer, 'Do We Need Investment Arbitration?', in Jean Kalicki and Anna Joubin-Bred (eds.), *Reshaping the Investor-State Dispute Settlement System* (Brill 2015), 879, 883.

[446] Jan Paulsson, 'Enclaves of Justice', The Rule of Law Conference April 2007, University of Miami School of Law.

individuals whether rich or poor and foreign or domestic in that State.[447] However, the investor's home State might get involved especially if the investor has lots of resources which could raise international tensions and bring IIL back to 'gun boat diplomacy'.

Additionally, concerns about dispute settlement in the domestic context is not limited to least developed States or developing States. For example, Italy is struggling with such a backlog of litigation cases that access to justice cannot be adequately achieved and such delay adds to costs and uncertainty for both investor and State,[448] while Philip Morris tried to manipulate Australian domestic policy through its MNC in ISDS,[449] and other States in the WTO.[450] Some investors have more power and wealth than most States,[451] so they are capable of interfering with the domestic affairs of sovereign States.[452] Some States have weaker governance and higher levels of corruption, and are less likely to resist such interference. A domestic court operating in a State with a weaker DRoL is more likely to follow the wishes of its government as opposed to an international setting, which should be more disconnected from the investor and State. In such cases, the international setting can provide access to justice, parity of treatment, and de-politicise the situation.

Adjudicators may have conflict of interests when the dispute involves their State, which may compromise their impartiality and independence further limiting the RoL. This could limit peaceful coexistence between the investor's home and host State. Van Harten argued how, for an international system to adjudicate, there must be proof of domestic system failings.[453] However, the system would perpetuate inequalities if some States could avoid ISDS because their domestic system is deemed sufficient while others are deemed as inadequate. Furthermore, it is unclear how such a categorisation could be made, or by whom.

[447] Gus Van Harten (2020), op. cit., 9-10.
[448] In Italy, there is the problem of Italian Torpedoes where litigation is quickly made in Italy by one party knowing that the dispute would not be heard for years due to Italy's backlog of litigation to encourage the wronged party to come to a more unfavourable out of court settlement since the lis pendens rule prevents that wronged party from taking action anywhere else, see, 'Italian Supreme Court news: the rise of the Italian Torpedo' (Lexology, 19 July 2013) <https://www.lexology.com/library/detail.aspx?g=8c7b00c4-80dd-43e4-89f3-fdd453a19420> accessed 1 May 2021.
[449] *Philip Morris Asia Limited v Australia*, PCA Case No. 2012-12, Final Award Regarding Costs of 8 July 2017.
[450] *Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (2018) op. cit.
[451] Aidan Green (2018), op. cit.; Zlata Rodionova (2016), op. cit.
[452] MNCs can prevent host State from effectively adjudicating measures, such as taxes placed on MNCs, and environmental considerations that could adversely affect MNC profits, see, Steven Ratner, 'International Investment Law through the Lens of Global Justice' (2017) 20(4) Journal of International Economic Law 747, 750-751.
[453] Gus Van Harten (2020), op. cit., 10.

Investor-State dispute settlement should be under an international forum as opposed to domestic systems but not State-to-State dispute resolution forums. This does not mean ISDS is without its shortcomings, even though it has supporters.[454]

Some academics view current ISDS as positive, arguing that ISDS 'endorses democratic accountability and participation, reasonable State administration, and protecting rights and other justified interests'.[455] ISDS can be positive but as this chapter has argued throughout, ISDS should encourage sustainable investment, and respect State sovereignty especially measures that are legitimate public policy measures like human rights or environmental considerations. At the time of writing, ISDS is not predictable or certain and it cannot adequately reinforce the RoL at the international or domestic level such as preventing arbitrariness, promoting transparency and advancing equality, which means States reacting upon ISDS awards will also struggle to adequately reinforce the RoL at the domestic level.

2.9 Conclusion

This chapter sets out the theoretical foundational issues around the RoL with links to existing complexities in IIL and ISDS that will be investigated further in the following chapters. Significant emphasis was placed on the RoL considering both its formal and substantive elements and justifying it as an instrumental concept in both domestic and international law. The RoL elements of transparency, equality, and the prevention of arbitrariness have an interesting relationship in ISDS when taking into account the complexities in IIL and ISDS of sovereign States, and human rights and sustainability issues arising in the economic claims of non-State actors. Elements of the RoL are interlinked and symbiotic but can have a differing relationship and application in domestic and international systems.

A central claim of this thesis is that ISDS awards should reinforce an IRoL while respecting the DRoL. State Sovereignty is significant in IIL as IIL operates where non-State actors and other sovereign States conduct business. States and non-State actors operating in IIL can have different resources and obligations, therefore inequalities can prevail which could make the system lack credibility and fairness. But ISDS which includes sovereign States and non-States actors should equally respect human rights through promoting sustainable investment.

[454] Some individuals that could favour ISDS are Yves Fortier, Francisco Orrego Vicuña, Charles Brower, Marc Lalonde, Stephen Schwebel, and Gabrielle Kaufmann-Kohler, see, Gus Van Harten, *The Trouble with Foreign Investor Protection* (OUP 2020) 13; Charles Brower and Stephan Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chi J Int'l L 471; Lesley Dingle and Daniel Bates, 'A Conversation with Judge Stephen M Schwebel' (University of Cambridge Squire Law Library, 13 May 2009).
[455] Benedict Kingsbury and Stephan Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality', in Steven Schill*, International Investment Law and Comparative Public Law* (OUP 2010) 75.

Commentators writing from different theoretical backgrounds accept that IIL requires further development, but their views on what these developments should look like differ considerably. Some academics argue ISDS enforces the RoL when other systems fail to.[456] This thesis will take the view that ISDS has *potential* to enhance the RoL through the formal means of right to due process and enforcement before independent and impartial courts provided adjudicator amendments are made addressing their conduct and election.[457] The creation of a unified, multilateral and enforceable appellate review mechanism,[458] within a binding two-tier system, encompassing adjudicators capable of reinforcing the RoL, such as acquiring relevant qualifications to respect human rights and sustainability issues, could reinforce the DRoL and an IRoL in both formal and substantive means. ISDS should provide not only procedural justice, but also substantive justice. Responding to RoL issues like the prevention of arbitrariness, transparency, and equality outlined in this chapter could further sustainable investment and create a more just system of governance.

The argument for a multilateral appeal process within a two-tier system that includes adjudicators which are capable of reinforcing the RoL is the core claim of this thesis. The next chapter will help illustrate why such a mechanism is needed by highlighting the shortcomings and failings of the existing framework with a focus on DRoL and IRoL issues, assessing the existing ISDS regulations of BITs/IIAs, UNCITRAL and ICSID drawing insights from the issues raised in this chapter. The scope for appellate review under the ICSID Convention and the NYC will be investigated.

[456] Jan Paulsson (2007), op. cit.
[457] Possible reform of ISDS, Draft code of conduct (2021), op. cit.; Possible reform of ISDS, Selection and appointment of ISDS tribunal members (2021), op. cit.
[458] Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Fortieth session, Vienna, Online, 8–12 February 2021, <http://undocs.org/en/A/CN.9/WG.III/WP.202> accessed 19 February 2021; Possible reform of investor-State dispute settlement (ISDS) Multilateral instrument on ISDS reform, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-ninth session, New York, 30 March–3 April 2020, <https://undocs.org/en/A/CN.9/WG.III/WP.194> accessed 1 March 2021.

Chapter 3: Forms of Regulation on ISDS

3.1 Introduction

This chapter aims to apply analysis of the 'rule of law' (RoL) in Chapter 2 to the current modes of regulating investor-State dispute settlement (ISDS). Chapter 3 will analyse whether the existing system of investor-state arbitration complies with the RoL values that have been identified in Chapter 2. The previous chapter highlighted the importance of the formal and substantive RoL, and the domestic RoL (DRoL) and an international RoL (IRoL) to be considered in ISDS. In my view, although ISDS is problematic, it has potential to reinforce the RoL in international investment law (IIL) subject to some amendments that can enhance formal, procedural and substantive justice. A unified appellate review mechanism, preferably within a two-tier system containing adjudicators capable of reinforcing the RoL, could enhance justice. This chapter develops this argument by investigating the extent to which the current forms of regulations on ISDS reinforce the DRoL and an IRoL, in both formal and substantive respects. The RoL themes in Chapters 1 and 2 will reoccur in this discussion with reference to how current forms of regulations interact with them. The ability for ISDS to incorporate an appellate review mechanism to help ensure an IRoL and the DRoL within current forms of regulation will also be considered.

The first section of this chapter examines international investment agreements (IIAs) that provide the basis for ISDS, discussing the implications for the RoL element of equality in the international setting. This links into investor protections and the extent to which they reinforce the RoL in light of differences in the interpretation of these protections. The substantive investor protection discussion will be brief, given the more procedural reform focus of the thesis on appellate review with capable adjudicators. The second and third sections will examine the main types of agencies/institutions that govern ISDS; the United Nations Commission on International Trade Law (UNCITRAL) and the International Centre for Settlement of Investment Disputes (ICSID). The significance of UNCITRAL as a UN agency and of ICSID as a member of the World Bank will be explored with reference to their relationship to the DRoL and an IRoL. The ability of these systems to tacitly allow and facilitate appellate review will be scrutinised. Attention with be drawn to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) and the ICSID Convention. IIAs and their provisions can reinforce the formal and substantive elements of the DRoL and an IRoL, but they can act unequally and be applied inconsistently, and may not reinforce sustainable investment. UNCITRAL can reinforce the DRoL and an IRoL, but Article V NYC can only reinforce the DRoL. Article 54 ICSID reinforces both an IRoL and the DRoL, but Article 53 may prohibit appellate review so an *inter se* modification could be required. Analysing both ICSID and UNCITRAL procedures for review of arbitral awards in light of RoL values is

one contribution the thesis makes to the prior literature. The last section provides an overview of the selection and appointment of ISDS arbitrators and the rules on arbitrator appointments in existing ISDS, in light of the RoL values identified in Chapters 1 and 2. This is relevant because one of the main proposals of the thesis, which will be presented later in the thesis, is that RoL values will be strengthened if changes to the appointment and selection processes are made. In this regard, the thesis will highlight contemporary RoL concerns including 'double-hatting', inclusiveness, diversity, self-interest, the so-called 'ISDS industry', and issues of expertise.

3.2 International Investment Agreements (IIAs) and Investor Protections

3.2.1 IIAs

The most common form of IIA is a bilateral investment treaty (BIT) which is an agreement concluded between two sovereign States that permits an investor from one of the sovereign States to make a direct claim against the other through a procedural protection system of ISDS. BITs have grown rapidly since the first case was decided under it.[1] Ten times more BITs existed in 2014 than 1999.[2] On 13th March 2020, there were 2901 BITs with 2341 in force and 390 bilateral and multilateral treaties focused on topics such as trade which contain investment provisions with 319 in force.[3] One year later the number of BITs interestingly decreased to 2852 and 2298 in force,[4] possibly due to the problems and challenges currently facing ISDS. Only ten UN recognised States are yet to sign a BIT, and a further seven States are yet to ratify one.[5] Ireland is on that list, although this is explained by its decision to terminate BITs due to potential incompatibility with EU law (discussed below).[6] Brazil has signed many BITs, but only recently ratified two and neither contain ISDS.[7]

[1] *Asian Agriculture Products LTD (AAPL) v Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of 27 June 1990.
[2] UNCTAD, Recent Trends in IIAs and ISDS, International Investment Agreements (2015).
[3] 'International Investment Agreements Navigator' (UNCTAD Investment Policy Hub, 31 December 2020) <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy> accessed 13 March 2021.
[4] Ibid. Bilateral and multilateral treaties focused on topics such as trade, which contain investment provisions, have increased to 417 and 324 in force.
[5] Ibid. Those 10 States are Bhutan, Fiji, Ireland, Kiribati, Liechtenstein, Monaco, Palau, Samoa, Solomon Islands, and Tuvalu. Those 7 States are Bahamas, Maldives, Marshall Islands, Saint Kitts and Nevis, Sao Tome and Principle, South Sudan, and Vanuatu.
[6] 'Commission asks Member States to terminate their intra-EU bilateral investment treaties' (European Commission Press Release, 18 June 2015) <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5198> accessed 3 January 2020. 'EU Member States agree on a plurilateral treaty to terminate bilateral investment treaties' (European Commission Press Release, 24 October 2019) <https://ec.europa.eu/info/publications/191024-bilateral-investment-treaties_en> accessed 3 January 2020.
[7] Angola-Brazil BIT (Signed 1 April 2015, Entered into force 28 July 2017); Brazil-Mexico BIT (Signed 26 May 2015, Entered into force 7 October 2018).

For multilateral treaties containing investment provisions, there are only four States that have never signed or ratified one.[8] Except Monaco,[9] every UN State is party to an agreement either bilaterally or multilaterally that incorporates investment in some way. The significance of a multilateral investment treaty (MIT) compared to a BIT is that it encompasses a larger number of States to the same agreement. MITs in theory could have a higher possibility of enhancing the DRoL and an IRoL, decrease fragmentation and complexity, and enhance uniformity and consistency in IIL. However, this depends on the extent to which the MIT is unified. The MIT EU model of creating different dispute resolution bodies per agreement with States,[10] could cause fragmentation, complexity, and limit uniformity (see Chapter 4.4).[11] Furthermore, many MITs, include other substantive content such as international trade provisions, like the EU Model, United States-Mexico-Canada Agreement (USMCA),[12] and the Energy Charter.[13] These could be more analogous to free trade agreement (FTA) than MITs, but they can nonetheless be enforced through ISDS if the dispute concerns investment (see Chapter 4.3.1).[14] Furthermore, investment chapters in these agreements include substantive protections reflecting expressions of investor protections found in IIAs which protect an investor's investment and are argued against the State in ISDS.

IIAs and ISDS interact with the principle of State sovereignty. State sovereignty could be part of an IRoL as an international concept since it aims for the State to be protected from interference by actors domiciled outside the State's territory. Yet State sovereignty could also be part of the DRoL, since the State's right to regulate could be in the context of its domestic territory. IIAs could limit State sovereignty, since proceedings that are brought for the purpose of challenging State domestic actions through investor protections are held against the State outside of the State's jurisdiction. Although IIAs are created through the consent of sovereign States, the current government of a State may not have consented or would wish to pursue different policy objectives to an earlier regime.

[8] The 4 States are Andorra, North Korea, Monaco, and San Marino.
[9] Although Monaco is located in Europe, it is not a member of the EU and therefore EU investment related agreements with other States will not directly impact it.
[10] Comprehensive Economic and Trade Agreement Between Canada and the European Union, (CETA) (Signed on 30 October 2016, Provisionally Effective 21 September 2017), ch 8, s D; Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam (EU-Vietnam), Investment Protection Agreement (IPA) (published 24 September 2018) (Signed 30 June 2019), ch 3; European Union, 'Proposal for Investment Protection and Resolution of Investment Disputes, Transatlantic Trade and Investment Partnership' (EU published 12 November 2015) (TTIP Draft), ch 2, s 3. TTIP is not enforced and negotiations currently stalled.
[11] Jaemin Lee, 'Mending the Wound or Pulling It Apart? New Proposals for International Investment Courts and Fragmentation of International Investment Law' (2018) 39 Nw J Int'l L & Bus 1, 24-27.
[12] United States–Mexico–Canada Agreement (USMCA) (Signed 30 November 2018, Revised Version Signed 10 December 2019, Effective 1 July 2020), art 1.1.
[13] Energy Charter (1994) 2080 UNTS 100, art 29.
[14] Ibid, art 26; USMCA (2019), op. cit., ch 14.

Democracy at the domestic level could be impeded since the State's next government will inherit these internationally binding agreements made by previous governments which can restrict State conduct.[15] However, State sovereignty in ISDS could be administered in the domestic setting through the NYC Article V(2) (see Chapters 3.3.3-3.3.5). A way to explain this relationship between the DRoL and an IRoL could be to argue they are symbiotic, 'each acknowledging the existence and validity of the other'.[16] This could be why the elements making up the DRoL and an IRoL are similar. Moreover, ISDS could be a better option than resolution in domestic and State-State forums whilst accepting reform is necessary to achieve its potential (see Chapter 2.8).

Investor protections can reinforce equality, and especially *formal* equality, by preventing foreign investors from being discriminated against in host States compared to nationals. However, IIAs provide investors with rights rather than States. IIAs could perpetuate inequalities through ISDS,[17] even though equality is protected by numerous human right instruments,[18] and promoted by the sustainability development goals (SDGs).[19] IIAs significantly favour certain foreign investors over the host State and its relevant public and private actors.[20] Domestic citizens do not have access to ISDS to protect rights and neither may other foreign investors if their home State has not ratified an IIA with the host State. Van Harten argues investor protections promote global inequality in favour of a very small minority responsible for companies that emit high levels of greenhouse gas emissions,[21] and consequently argues for removing investor protections so that States can adequately address important public policy issues like climate change.[22] This inherent power asymmetry could also favour developed States compared to least developed countries/States (LDCs) based on the imbalances from their distribution of income which influences investment flows.

The global economy contains capital exporting States which hold resources to invest in other States, like developed States, and capital importing States which require those resources, like LDCs.[23]

[15] In democratic societies governments can change every few years.
[16] James Crawford, 'International Law and the Rule of Law' (2003) 24 ALR 3, 10.
[17] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013) 91.
[18] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (UDHR), art 10; International Covenant on Civil and Political Rights. Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICCPR), arts 3, 14(1), 14(3), 23(4), 25(b), 25(c), 26, 42(9), 53(1); International Covenant on Economic, Social and Cultural Rights (ICESCR), Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), arts 3, 7(a)(i), 7(c), 13(2)(c), 31(1).
[19] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development (SDGs 2015-2030), 21 October 2015, A/RES/70/1 (entered into force 1 January 2016), esp Goals 5, 10, 16.
[20] Gus Van Harten, *The Trouble with Foreign Investor Protection* (OUP 2020) 5, 10.
[21] ibid, 1-13.
[22] ibid, 133-145.
[23] UNCTAD, World Investment Report 2016 - Investor Nationality: Policy Challenges (2016), p36; 'GDP per capita, current prices' (International Monetary Fund)

Individuals from developed States have more chance of holding resources to invest in other States compared to individuals in LDCs. If investors are more likely to be from developed States compared to LDCs, there would be more chance of an investor claim supported by investor protection being made in ISDS against LDCs than developed States provided an enforceable IIA exists.[24] Strong investor protections can be designed to attract investment.[25] Developing States and LDCs may sign IIAs with richer States to 'gain a competitive advantage over other developing States or LDCs in the pursuit of capital'.[26] The urge for economic liberalisation from institutions such as the World Bank and International Monetary Fund, decline in foreign aid and credit flows, and increasing debt levels could have encouraged capital importing States to agree upon IIAs with capital exporting States.[27] Developing States and LDCs may have been unable to evade IIAs,[28] whether they wanted to sign one or not.[29]

Many IIAs are between either a developed or emerging State with a developing State or LDC.[30] Although an increasing number of IIAs between developing States exist,[31] there remains few between LDCs and most of these agreements are not enforceable.[32] Developed or emerging States could exercise their superior resources over LDCs to achieve favourable investor protection agreements, since it is more likely its citizens hold the financial resources to invest than citizens of LDCs.[33] However,

<https://www.imf.org/external/datamapper/NGDPDPC@WEO/ADVEC/OEMDC/LBY/WEOWORLD/EGY/PIQ/CMQ/CBQ/NAQ/CAQ/AS5/SSA/EDE> accessed 18 December 2018.

[24] UNCTAD, World Investment Report 2019 – Special Economic Zones (2019), p 103.

[25] Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Hague: Kluwer Law International 2009) 46-48, 57-58; Kenneth Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis Journal of International Law & Policy 157, 175–177, 179; Chrispas Nyombi and Tom Mortimer, 'Tackling the legitimacy crisis in international investment law through progressive treaty-making practices' (2017) 20(5) International Arbitration Law Review 162; UNCTAD, International Investment Rule-Making (2007) TD/B/COM.2/EM.21/2; Kate Miles (2013) op. cit., 89.

[26] Kate Miles (2013) op. cit., 90; See also, Andrew Newcombe and Lluís Paradell (2009) op. cit., 48-49; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP, 2007) 43; Zachery Elkins, Andrew Guzman, and Beth Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties 1960–2000' (2006) 60 International Organization 811.

[27] Gus Van Harten (2007) op. cit., 41-42; Andrew Newcombe and Lluís Paradell (2009) op. cit., 48-49; Kate Miles (2013) op. cit., 89-90.

[28] Gus Van Harten (2007) op. cit., 42-43; Chrispas Nyombi and Tom Mortimer (2017) op. cit.; Andrew Newcombe and Lluís Paradell (2009) op. cit.,48–9; Kenneth Vandevelde (2005) op. cit., 177–179.

[29] Andrew Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Virginia Journal of International Law 639, 642–3, 671–4, 688; Kate Miles (2013) op. cit., 90.

[30] 'International Investment Agreements Navigator' (UNCTAD 2020), op. cit.

[31] Kate Miles (2013) op. cit., 91; Andrew Newcombe and Lluís Paradell (2009) op. cit., 47–8, 58; Gus Van Harten (2007) op. cit., 40.

[32] 'International Investment Agreements Navigator' (UNCTAD 2020), op. cit. They have been 27 negotiated BITs, but only 7 have become enforceable.

[33] Andrew Newcombe and Lluís Paradell (2009) op. cit., 43; Gus Van Harten (2007) op. cit., 40-41; Kenneth Vandevelde (2005) op. cit., 177–179, 170-171; Kate Miles (2013) op. cit., 89; Chrispas Nyombi and Tom Mortimer (2017) op. cit.; Andrew Newcombe and Lluís Paradell (2009) op. cit., 46-48, 57-58; Kenneth Vandevelde (2005) op. cit., 175–177, 179; International Investment Rule-Making (2007), op. cit.; Kate Miles (2013) op. cit., 89.

substantive equality is ingrained within the substantive RoL,[34] and is a key aspect of international human rights protections,[35] and the SDGs.[36]

The theory that developed States have used their superior resources to influence other States is an axiom in the literature and history.[37] However, what is less clear is that emerging States, which may also be classified as developing States, such as China,[38] can act in similar ways as developed States in relation to (other) developing States and LDCs.[39] Investment flows are increasing from developing/emerging economies such as the BRICS,[40] to other States.[41] IIL can deepen inequalities within and between States. There is concern that States attracting investment have effectively competed to concede RoL principles like State sovereignty, equality, and judicial independence, for the benefit of a small class of foreign billionaires who now have an influence over those States through their agreement of IIAs to restrict public policy measures.[42]

A principle that could potentially limit inequality and bring about uniformity in IIAs is 'most favoured nation' (MFN). MFN does not set autonomous standards but instead the inclusion of MFN in a treaty helps ensure that the parties to that treaty serve each other at least as favourably as they would third parties. This has covered substantive and procedural protection.[43] However, just substantive protection is more likely as procedural protection has been questioned by tribunals and may depend

[34] European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, adopted at its 86th plenary session (Venice, March 2011), [41]; Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity' (2016) 65 ICLQ 277, 292; Tom Bingham, *The Rule of Law* (Penguin 2010) ch 5

[35] UDHR (1948), op. cit., art 10; ICCPR (1966), op. cit., arts 3, 14(1), 14(3), 23(4), 25(b), 25(c), 26, 42(9), 53(1); ICESCR (1966), op. cit., arts 3, 7(a)(i), 7(c), 13(2)(c), 31(1).

[36] SDGs (2015-2030), op. cit., esp Goals 5 and 10.

[37] For investment see Diplomatic Protection contained in Chapter 2.8.

[38] Bolivia-China BIT, (signed on 8 May 1992, entered into force 1 September 1996); Cameroon-China BIT, (signed on 10 September 1997, entered into force 24 July 2014); China-Peru BIT, (signed on 9 June 1994, entered into force 1 February 1995).

[39] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP, 2008) 21. They outlined that agreements between South-South States were very similar to those concluded by North-South States. Kate Miles (2013) op. cit., 91-92.

[40] Brazil, Russia, India, China, and South Africa. The OECD uses the acronym BRIICs to include Indonesia.

[41] UNCTAD, World Investment Report 2017 – Investment and the Digital Economy (2017) xi, 18, 19. The BRICS States represent 24% of the world's 500 largest companies and contributed $2.1 trillion outward investment in 2016; Peter Gammeltoft, 'Emerging multinationals: outward FDI from the BRICS countries' (2008) 4 International Journal of Technology and Globalisation (IJTG) 5, 16-17.

[42] Gus Van Harten (2020) op. cit., 8.

[43] *Maffezini v Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000, [54]; *Técnicas Medioambientales Tecmed, SA v Mexico*, Award of 29 May 2003, [69]; *Siemens v Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004, [120]-[121]; *Gas Natural SDG v Argentina*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions of Jurisdiction of 17 June 2005, [28]-[30], [49].

on the wording of the MFN clause, [44] although these tribunals have recognised the benefits of independence and impartiality that procedural protection can enforce.[45] Some tribunals that rejected procedural protection in MFN, like *Telenor*, indicated that accepting it would act contrary to the intentions of treaty making parties which are States not investors.[46] But as discussed above IIAs can be unequal so it might be the intention of only one State to the agreement, which can be shown in *Telenor* by the inconsistency of provisions in other negotiated IIAs between the disputing host State and the investor's home State.[47]

In practice, the MFN investor protection in IIAs allow investors to claim in ISDS protections equivalent to those set out in other IIAs negotiated by the State hosting their investment.[48] This is an advantage to investors giving them the ability to cherry pick more favourable protections from the various, other IIAs negotiated by the host State, rather than relying on the provisions of a sole IIA between their home State and the host State. The host State cannot use the MFN clause in its favour through claiming more limited investor protections since it is only operational for the benefit of investors. The MFN protection is in countless IIAs, therefore it could be considered a significant method of ensuring formal equality across IIL from the IIAs to the ISDS. [49] MFN could further non-discrimination under international human rights,[50] and the SDGs,[51] as investors receive equal treatment regardless of their nationality or any other differences. However, harmonisation may not work as cherry picking encourages many permutations creating a chaotic situation, [52] and encourages treaty shopping creating uncertainty.[53]

[44] *Maffezini v Spain* (2000), op. cit., [62]-[63], *Plama Consortium v Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, [219], [223], [227]; *Salini v Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 29 November 2004, [118]-[119]; *Telenor v Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006, [90]-[101], esp [92].
[45] *Gas Natural SDG v Argentina* (2005), op. cit., [29]; *Telenor v Hungary* (2006), op. cit., [95].
[46] *Telenor v Hungary* (2006), op. cit., [95].
[47] ibid, [96]-[97] [100].
[48] *EDF v Argentina*, ICSID Case No. ARB/03/23, Decision on Annulment of 5 January 2016, [237]-[238]; *Bayindir v Pakistan,* ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005 [230]-[231]; *MTD v Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004 [103]-[104]; This could possibly be restricted to 'like circumstances', see, *İçkale İnşaat Limited v Turkmenistan*, ICSID Case No. ARB/10/24, Award of 8 March 2016, [328]-[329] [332].
[49] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 207. Dolzer and Schreuer outlined that '[t]he traditional significance of the MFN rule in economic treaties has led to its inclusion in most investment treaties'.
[50] UDHR (1948), op. cit., arts 7, 23(2); ICCPR (1966), op. cit., arts 4(1), 20(2) 24(1), 26; ICESCR (1966), op. cit., arts 2(2), 10(3).
[51] SDGs (2015-2030), op. cit., esp goal 5.
[52] *Plama Consortium v Bulgaria* (2005), op. cit., [219].
[53] *Telenor v Hungary* (2006), op. cit., [93]-[94].

MFN could reduce the scope for certain developing and LDCs to limit the application and scope of investor protections in certain IIAs.[54] In the ISDS, MFN could replace the negotiated substance of a treaty rather than to add an element of cooperation normally seen in trade.[55] This literal application of MFN means it would be futile/pointless for States to agree upon limiting investor protections in their IIAs, but at the same time include an MFN protection in that agreement and have separate IIAs with other States that do not include such limitations on investor protections. This is because the MFN would allow investors to outmanoeuvre these limitations by cherry picking more favourable protections in other IIAs negotiated by the host State. More importantly, this raises doubts as to the legal knowledge in IIL of the negotiators representing some States, or whether the State realises the significance of an IIA provision in ISDS.[56] That State would face severe inequalities both in ISDS and when negotiating an IIA with a State which understands the significance of an IIA, and has negotiators holding the required legal expertise. Studies show the poorer the respondent State, the more chance an investor wins in ISDS.[57]

IIAs should encourage *sustainable* foreign investment, which could be an inclusive interrelationship between economic, social, environmental, and possibly cultural factors that considers elements such as the RoL, human rights, and environmental issues alongside traditional factors of maximising and encouraging capital (as discussed in Chapter 2.6). Some academics have asserted that 'the term 'sustainability' refers to the balancing point of competing interests, values, and concerns'.[58] This should flow to ISDS tribunals that apply IIAs but some have been inconsistent and reluctant to even

[54] Lauge Poulsen, 'The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis' (2010) 30 NJIL&B 101, 125; Morocco-Nigeria BIT, signed on 3 December 2016. The Morocco-Nigeria BIT contains provisions for transparency (art 10), the environment (art 13), labour and human rights protection (art 15), the right of States to regulate (art 23), and corporate social responsibility (art 24), but it also has an MFN provision (art 6).

[55] Rudolf Dolzer and Christoph Schreuer (2012) op. cit.,207; Esmé Shirlow and Kabir Duggal, 'Most Favoured Nation Treatment' (Jus Mundi, 23 November 2021) <https://jusmundi.com/en/document/wiki/en-most-favoured-nation-treatment> accessed 13 December 2021.

[56] Lauge Poulsen (2010) op. cit., 126-129.

[57] Beth Simmons, 'Bargaining over BITs, Arbitrating Awards The Regime for Protection and Promotion of International Investment' (2014) 60(1) World Politics 12, 35; Daniel Behn, Tarald Berge and Malcolm Langford, 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration' (2018) 38(3) JILB 333, 370.

[58] Ying-Jun Lin, 'Achieving sustainable development objectives in international investment law through the lens of treaty interpretation', in Clair Gammage and Tonia Novitz (eds), *Sustainable Trade, Investment, and Finance: Towards Responsibility And Coherent Regulatory Frameworks* (Edward Elgar 2019) 257.

hold that investments should contribute to enhancing the economic development of the host State,[59] even though the right to economic and social development could be a human right.[60]

China may recognise the need to shift towards concepts like sustainable development in IIL with sustainable development related text in the preamble of some of its more recent IIAs.[61] Developing and emerging economies could further introduce more concise socio-economic, environmental, and human rights provisions detailing that measures should be adopted in a sustainable and equitable manner, which could give all host States the flexibility to regulate in the domestic context for the wider public interest.[62] In respect of the China-Tanzania BIT, Amy Man praises China's decision as a capital exporting State to include provisions that allow Tanzania as the capital importing State 'to adapt measures to support national industries and thereby boost the economy', which can amount to 'furthering the targets outlined by the SDGs'.[63] Yet this praise is limited since China included an MFN clause in that agreement which could give additional entitlements to Chinese investors (as discussed above),[64] and which Man may under-estimate, when she concludes that 'As emerging players, both China and Tanzania still lack the legal expertise needed to navigate the complexities of IIL'.[65] Tanzania could lack experience and expertise but to describe China in this way is naive. As 'the second largest investing country in the world' China has gained experience and expertise from their countless foreign investment activities.[66]

Furthermore, it is concerning that a recent tribunal award under the ICSID Convention considered that the 'objective of BITs (including the Treaty) is to provide for specific guarantees in order to encourage

[59] This is part of the Salini Test derived in *Fedax NV v Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction of 11 July 1997, [43], and laid out in *Salini Costruttori S.p.A. and Italstrade SpA v Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 31 July 2001, and applied in *Patrick Mitchell v Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award of 1 November 2006, [33]. However, this part has been rejected in *LESI SpA and ASTALDI SpA v Algeria*, ICSID Case No. ARB/05/3, Award of 12 November 2008, *Saba Foakes v Turkey*, ICSID Case No. ARB/07/20, Award of 14 July 2010, [110], and, *Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction of 17 May 2007.

[60] *Bilcon of Delaware et al v Canada*, PCA Case No. 2009-04, Award on Damages of 10 January 2019. See also Chapter 2.6.4 above.

[61] China-Tanzania BIT (signed 24 March 2013, entered into force 17 April 2014)); China-Canada BIT (signed 9 September 2012, entered into force 1 October 2014); China-Uzbekistan BIT (signed 19 April 2011, entered into force 1 September 2011); Amy Man, 'Old players, new rules: a critique of the China-Ethiopia and China-Tanzania bilateral investment treaties', in Clair Gammage and Tonia Novitz (eds), *Sustainable Trade, Investment, and Finance: Towards Responsibility And Coherent Regulatory Frameworks* (Edward Elgar 2019) 153-171.

[62] Ibid.

[63] Amy Man in Gammage and Novitz (2019) op. cit., 164-165.

[64] China-Tanzania BIT (2013), op. cit., art 4.

[65] Amy Man in Gammage and Novitz (2019), 166-167.

[66] World Investment Report (2017), op. cit., xi, 18, 19.

the international flows of investment into particular States',[67] rather than promoting a more modern focus on sustainable investment. Although this observation may not substantially impact part of the award in this case, it nonetheless helped draw tribunal 'conclusions that the BIT and the EU Treaties do not have the same subject matter'.[68] My argument is that a sustainable development provision in IIAs could be effective in ISDS and would reinforce the DRoL and an IRoL if it is more precise, binding, and not limited by MFN. However, this would require arbitrators in ISDS tribunals to act in a different way such as seeing IIAs as a mechanism to promote sustainable investment rather than just encouraging investment in order to effectively interpret these provisions.

A State could eventually cancel its IIAs that have provisions which are highly favourable to investors, but this is often impractical as terminating IIAs is expensive.[69] Moreover, the 'sunset' period means IIAs can remain legal until 10-15 years after termination or expiry for investments that would apply under the IIA before its termination.[70] The EU in *Achmea,*[71] after previous attempts,[72] tried to cancel intra-EU BITs due to incompatibility with EU law,[73] possibly due to its recent FTAs that incorporate investment with a two-tier dispute settlement procedure (see Chapter 4.4).[74] However, ISDS tribunals resisted citing its limited application or sufficient preclusive effect [75] causing the EU to ask members

[67] *Magyar Farming, v Hungary*, ICSID Case No. ARB/17/27, Award of the Tribunal of 13 November 2019, [235].
[68] ibid, [228]-[238].
[69] Some States still take on this impracticality to gain some bargaining leverage, such as Bolivia, Ecuador, and Venezuela that left ICSID, and India, Indonesia, and South Africa, which terminated many BITs, see Chapter 2.8.
[70] This is known as the 'sunset' period.
[71] *Slovakia v Achmea BV* (Case C-284/16), 6 March 2018. The CJEU in *Achmea* also acted against Advocate-General Wathelet's wishes, see, Opinion of Advocate General Wathelet, 19 September 2017.
[72] The Achmea decision came after the European Commission's amicus curiae brief objecting to the tribunal's jurisdiction over the intra-EU dispute, was embarrassingly rejected in, *Blusun v Italy*, ICSID Case No. ARB/14/3, Final Award 27 December 2016, [206]-[309]. The EU commission had also asked the termination of intra-EU BITs, see, European Commission, Press release, Commission asks Member States to terminate their intra-EU bilateral investment treaties, Brussels, 18 June 2015.
[73] EU rules are supposedly supreme over other international or domestic rules where the EU has exclusive competence, (see, Case 6/64 *Costa v ENEL* (1964); Case 106/77 *Finanze v Simmenthal SpA* (1978); European Union, Treaty on the Functioning of the European Union, arts 19, 351), and the Court of Justice of the European Union (CJEU), can have jurisdiction on the implementation of treaties, (see, European Union, Treaty on the Functioning of the European Union, art 267(a)). International agreements negotiated by member States must not be incompatible with EU law, see, C-205/06 *Commission v Austria* (2009); C-249/06 *Commission v Sweden* (2009).
[74] CETA (2016), op. cit., ch 8, s D; EU-Vietnam IPA (2019), op. cit., ch 3; TTIP (2015 Draft), op. cit., ch 2, s 3.
[75] *CEF Energia BV v Italy*, SCC Case No. 158/2015, Award of 16 January 2019, [97]; *Masdar Solar & Wind Cooperatief v Spain*, ICSID Case No. ARB/14/1, Award of 16 May 2018, [683]; *Greentech Energy Systems, et al v Italy*, SCC Case No. V 2015/095, Final Award of 23 December 2018, [403]; *Foresight Luxembourg Solar, et al. V Spain*, SCC Case No. 2015/150, Final Award and Partial Dissenting Opinion of Arbitrator Raül Vinuesa of 14 November 2018, [221]; *Cube Infrastructure Fund v Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum of 19 February 2019, [157], *NextEra Energy v Spain*, CSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles of 12 March 2019, [353]; *Magyar Farming v Hungary* (2019) op. cit.

States to sign the Achmea Declaration which emphasised the binding nature of the *Achmea* award.[76] This was met with further resistance from ISDS tribunals,[77] most notably in *Magyar Farming v Hungary*,[78] which extensively questioned both the *Achmea* case and Achmea Declaration. The EU then turned to a plurilateral treaty to terminate intra-EU BITs.[79] Although the treaty has not entirely resolved regarding intra-EU IIAs,[80] as some State were reluctant to sign, most did and many intra-EU IIAs have been terminated.[81] These developments emphasise the difficulties that IIA and ISDS reform could entail.

Reform must be inclusive so all relevant actors can participate in reform discussion, which could be why the EU is pushing for a multilateral investment court at UNCITRAL Working Group III (WGIII) (discussed further in Chapter 5).[82] Inclusivity at UNCITRAL and ICSID will be a topic of discussion in Sections 3.3.1 and 3.4.1 in this chapter. The remaining part of this section will focus on the investor protections contained in IIAs and their interpretation by arbitrators in ISDS with reference to the RoL values identified in Chapters 1 and 2. This discussion links to the EU's agreements with Canada and Vietnam (which are being considered as models for reform at WGIII), and the draft multilateral agreement on investment (MAI), which included investor protections (see Chapters 4.2 and 4.4). The

[76] 'Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgement of the Court of Justice in Achmea and on Investment Protection in the European Union' (EU Press Release, 17 January 2019), paras [1]-[3], [8]-[9] <https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf> accessed 27 April 2020. The political declaration was signed by at least 20 member States urging termination of intra-EU BITs by November 2019, informing ISDS tribunals of Achmeas significance, and that the sunset clause will not apply.; World Investment Report (2019), op. cit., p 101.

[77] *United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v Estonia*, ICSID Case No. ARB/14/24, Award of 21 June 2019. Award on an intra-EU BIT even though both the Netherland (investors home State) and Estonia (respondent State) had signed Achmea Declaration.

[78] *Magyar Farming v Hungary* (2019) op. cit., [200]-[248]. One of the many points the tribunal made was that interpreting certain BITs was a function given to ICSID Article 41 by the contracting parties of ICSID not the EU.

[79] European Commission, 'EU Member States agree on a plurilateral treaty to terminate bilateral investment treaties', (European Commission Statement of 24 October 2019) <https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/191024-bilateral-investment-treaties_en.pdf> accessed 28 April 2020.

[80] *Blusun v Italy*, ICSID Case No. ARB/14/3, Decision on Annulment of 13 April 2020, [339ii]. Tribunal rejected annulment but did not mention the EU plurilateral treaty, and expressly avoided considering the significance of the Achmea Declaration or *Achmea* Case on ISDS proceedings between EU member States in the context of the Energy Charter.

[81] Johannes Tropper and August Reinisch, 'The 2020 Termination Agreement of intra-EU BITs and its effect on investment arbitration in the EU' (2022) 16 TAYIA 301; Opinion 1/17 of the Court (Full Court) (30 April 2019) (European Court of Justice), [161] [245]. It was concluded that the resolution of investment disputes between investors and states in CETA 'does not adversely affect the autonomy of the EU legal order'.

[82] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-seventh session, New York, 1–5 April 2019, <https://undocs.org/A/CN.9/WG.III/WP.159/Add.1> accessed 18 November 2020.

next section also links to the issue of inconsistent and incorrect ISDS awards raised at WGIII (see Chapter 5.2).

3.2.2 Investor Protections

Investor protections like legitimate expectations can promote consistent State action and measures in the domestic setting, but can be applied inconsistently in the international setting by ISDS tribunals which undermines predictability. Different awards on similar issues also raises issues of correctness. Investor protections could compliment the DRoL and an IRoL such as through formal elements of preventing arbitrariness, subjecting government to laws, and enforcement before the courts, and substantive elements of transparency, fairness, and human rights. However, their application may interfere with State sovereignty in the domestic setting like the States substantive right to regulate in the DRoL, which could give certain foreign investors favourable and unequal rights compared to domestic citizens and States. This difficult task of balancing investor and State rights is not helped due to the omission of principles of sustainable investment in the text of IIAs and consideration by ISDS tribunals.[83]

Some academics such as Christopher Greenwood, Mads Andenas, and Eirik Bjorge suggest that investor protections and IIAs should not be interpreted consistently and assert that party autonomy is more important to the extent that each treaty is an agreement in its own right between the parties, treating each IIA as a completely separate and distinct agreement away from other IIAs.[84] Investor protections can vary between IIAs as States can be party to many IIAs which may subject them to different protections.[85] This is reflective of the evolving international society and acceptance of diversity between States.[86] However, Rudolf Dolzer and Christoph Schreuer have questioned whether the intention of the parties to each BIT, which Greenwood and others may rely upon when they write 'specific will of the parties to each BIT', is always an appropriate method to base awards.[87] They argue that when an IIA includes 'the negotiated substantive matter and also the MFN rule; there is no justification for deriving the parties' intention from one of these two elements alone'.[88]

[83] Ying-Jun Lin in Gammage and Novitz(2019) op. cit., 257.
[84] Christopher Greenwood, 'Unity and Diversity in International Law', in Mads Andenas & Eirik Bjorge (eds), *A Farewell to Fragmentation* (CUP 2015) 53.
[85] From 1998 there has been a surge of model BITs from various States, and it is not uncommon for a State to change its model BIT, see 'International Investment Agreements Navigator' (UNCTAD 2020), op. cit.
[86] Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112(3) The American Society of International Law 410, 411-412.
[87] Rudolf Dolzer and Christoph Schreuer (2012) op. cit., 209.
[88] ibid, 209.

Furthermore, the consistent interpretation of IIA obligations and protections, notwithstanding the disparity in definitions under different languages, is key to upholding the DRoL and an IRoL. To adopt the approach by Greenwood and others could cause fragmentation, inconsistency, and pluralism in the interpretation and application of investor protections.[89] More importantly, this approach ignores the emerging norm procedure on IIAs in ISDS of convergence over fragmentation. Schill argues that while IIAs are bilateral they generally have detectible patterns and include the same or similarly worded investor protections within each agreement and therefore the interpretation of these protections should converge towards a multilateral process.[90] This could help determine the scope of specific applicable provisions within the growing number of IIAs, which could assist transforming IIL from 'specialized *knowledges*' [91] into a specialised system. This should increase the chances of consistency and predictability of interpretation in ISDS settings. Since consistency and predictability are related to both the DRoL and an IRoL, this thesis favours Schill's interpretation of how ISDS tribunals interpret IIAs and their investor protections, but tribunals should also consider the specific wording of the clause as a precaution against an IIA's object, context and purpose becoming lost in such convergence.

Convergence, as a form of treaty interpretation, could have the potential to modernise old IIAs to reflect current international societal values, like filling the gaps arising from textual ambiguities and changing political ideologies.[92] The object and purpose of an IIA might have shifted from encouraging investment to promoting sustainable investment. Convergence through the lens of principles like the RoL, and sustainable development could quash fears that convergence could limit the States right to regulate in favour of investor protections.[93] It could also increase the chance of correctness since important identifiable aspects related to sustainability and the RoL such as human rights and environmental considerations can get lost in the economic claims submitted by investors under IIAs (see Chapters 1.2 and 2.6). Other relevant identifiable laws and rights exist that should be considered

[89] Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) 18 Journal of World Investment & Trade 585, 587; *Compare Glamis Gold Ltd v United States*, UNCITRAL, Award of 14 May 2009, and, *Merrill & Ring Forestry LP v Canada*, ICSID Case No. UNCT/07/1, Award of 31 March 2010.
[90] Stephan Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) EJIL 875, 893. Also see, Zachary Douglas, *The International Law of Investment Claims* (CUP 2009).
[91] Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, International Law Commission, 13 Apr 2006, UN Doc A/CN.4/L.682, [8] 11.
[92] Ying-Jun Lin in Gammage and Novitz (2019) op. cit.
[93] Theodore Kill, 'Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations' (2008) 106(5) Michigan Law Review 853, 880.

alongside the investor rights contained in IIAs.[94] This section will now investigate investor protections commonly found in IIAs with extra attention on the principles of 'fair and equitable treatment' (FET) and 'legitimate expectations'.

It must be stressed that this investigation of investor protections will be brief as the purpose of the thesis is procedural reform rather than substantive reform, and there is other academic scholarship investigating investor protections. The focus of the thesis is not to address the full range of substantive investor treaty protections, but a procedural focus on a multilateral appellate review mechanism. This thesis will only scratch the surface of whether investor protections reinforce the RoL. There is a link with substantive standards, in that part of the thesis' procedural focus is to consider whether to change who hears investor-State disputes (eg by including criteria regarding knowledge of international public law issues within the criteria for appointment of adjudicators to a multilateral two-tier body) in the expectation that this could lead to a better acknowledgement of policy space issues. Similarly, the existence of a single appellate mechanism may improve the consistency and certainty of IIL and help prevent ISDS awards from being arbitrary.

However, there is a range of literature that already deals with substantive investor protections and the RoL.[95] This includes whether FET is consistent with RoL values and whether the international protection against indirect expropriation is broader than domestic protections of private property.[96] The question of whether substantive investment treaty protections themselves fully comply with or embody the DRoL and an IRoL is a separate debate, whereas the focus on the thesis is on the specific issue of whether an appellate mechanism can make ISDS more consistent with RoL values like the prevention of arbitrariness, transparency, and equality. This means the consideration of investor protections will be brief, whilst using a RoL analysis identified in Chapters 1 and 2 which has consistently been applied in my research. I will briefly show the elements of the RoL that can relate to the purpose and requirements of investor protections. Furthermore, I will show the inconsistent

[94] Vienna Convention on the Law of Treaties (VCLT), (signed on 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 31(3)(C). Other VCLT articles also show how IIAs are not the only source of law that should be under consideration such as in the context of treaties becoming invalid if they breach a *jus cogens* norm, see, arts 53, 64, 71.

[95] Kenneth Vandevelde, 'A Unified Theory of Fair and Equitable Treatment' (2010) 43 NYU Journal of International Law & Policy 43; Stephan Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in Stephan Schill (ed*), International Investment Law and Comparative Public Law* (Oxford University Press 2010); Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2014) ch 4, esp. 164; Vicki Been and Joel Beauvais, 'The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine' (2002) 78 NYU Law Review 30; Gregory Starner, 'Taking a Constitutional Look: NAFTA Chapter 11 as an Extension of Member States' Constitutional Protection of Property' (2002) 33 Law & Policy in International Business 405; Jarrod Hepburn, 'Remedying Misaligned Norms in International and Constitutional Law: Investment Treaties, Property Rights and Proportionality' (2020) 43 UNSW Law Journal 1167.

[96] Ibid.

application of investor protections (see also Chapter 1.2 which included inconsistent ISDS cases) which links to concerns raised at WGIII over the interpretation of IIAs by different ad hoc investor-State tribunals and unjustifiable diverging outcomes (see Chapter 5.2).

FET will showcase the problems of inconsistent and fragmented interpretations, and legitimate expectations will further showcase the problems of varying interpretations in the context of the complex competing interests of investors and States. The other investor protections analysed will provide further evidence of the different approaches used by tribunals to define them. The use of the word 'or' when I analyse these investor protections represents the inconsistency of these approaches which leads to inconsistent ISDS awards. It is outside the procedural scope of this thesis to analyse the correctness or incorrectness of each case referenced in analysing these investor protections. The ambition to make ISDS more consistent should not come at the detriment of correctness, but the scale of different requirements for similarly worded investor protections shows that there currently are limits to ISDS being consistent or correct. Procedural reform of appellate review and adjudicator selection and appointment could help address these substantive issues of correctness and consistency which are discussed further in Chapter 5.2.

FET appears in countless IIAs,[97] and its meaning and application has been interpreted by academics and arbitrators.[98] This interpretation causes uncertainty, but it may mean either that investors should have the same treatment as nationals of the host State or be granted the minimum international standard of treatment.[99] *Tecmed*[100] indicated FET covers good faith, basic expectations, consistency, no ambiguity, transparency, and compensation. This implies FET promotes formal RoL elements of non-arbitrariness,[101] and enforcement before the courts,[102] and substantive RoL elements of legal certainty,[103] and transparency.[104] Some subsequent decisions regard *Tecmed* as broad and consider that the tribunal 'exceed[ed] its powers' on the interpretation of the IIA.[105] While other cases have

[97] Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers 1995) 58; Roland Kläger, *Fair and Equitable Treatment' in International Investment Law* (CUP 2011) 9.
[98] OECD (2004), 'Fair and Equitable Treatment Standard in International Investment Law', OECD Working Papers on International Investment, 2004/03, OECD Publishing, 1.
[99] Stephen Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (2000) 70(1) British Yearbook of International Law 99, 162; *ADF Group Inc v United States of America*, ICSID Case No. ARB (AF)/00/1, Award of 9 January 2003, [110].
[100] *Tecmed v Mexico* (2003) op. cit., [154].
[101] Albert Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan 1885), pt II, 110-113; James Crawford, (2003), op. cit., 4, 10; Simon Chesterman, 'An International Rule of Law?' (2008) 56(2) AJCL 331, 342.
[102] Albert Dicey (1885) op. cit., Pt II, 115-120.
[103] European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, adopted at its 86th plenary session (Venice, March 2011), [41].
[104] Tom Bingham (2010) op. cit., ch 3; Venice Commission (2011) op. cit., [41].
[105] *MTD v Chile*, ICSID Case No. ARB/01/7, Decision on Annulment of 21 March 2007, [65]-[67].

included other requirements, such as reasonableness,[106] non-discrimination,[107] not improper and discreditable,[108] natural justice,[109] and referred to international and comparative standards.[110] These are further integral elements to the RoL relating to justice,[111] equality,[112] and fairness.[113]

FET can overlap with other investor protections like non-discrimination.[114] The tribunal in *Waste Management,*[115] combined these other requirements in its FET definition, expanding the definition set out in *Tecmed*.[116] Thus, FET can be interpreted very broadly and differently, which from the perspective of the DRoL and an IRoL, has a palpable impact on the effectiveness of the system to uphold values such as equality, justice, correctness, predictability, and preventing arbitrariness. Although FET covers various elements integral to the RoL, diverging interpretations of the FET standard erodes formal and substantive aspects of the DRoL and an IRoL like consistency, correctness, and preventing arbitrariness. The extent which FET can provide justice is questionable.[117]

'Legitimate expectations' is another investor protection which overlaps with FET that has extensive and fragmented requirements which different ad hoc investor-State tribunals struggle to consistently interpret (see Chapter 5.2 for discussion at WGIII).[118] It is based on the host State's legal framework and on any explicit or implicit undertaking and representation made by the host State. Legitimate expectations in ISDS has been interpreted to guard against the State interfering with the investor's permissible expectations formed from representations, commitments or specific conditions offered

[106] *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, [309].
[107] *The Loewen Group Inc and Raymond Loewen v United States of America*, ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003, [135].
[108] *Mondev International Limited v United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002, [127].
[109] *ADF v US* (2003), op. cit., [110].
[110] *SD Myers, Inc v Canada*, UNCITRAL, Partial Award of 13 November 2000, [263]-[264].
[111] Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004), 92; Tom Bingham (2010) op. cit., ch 9.
[112] Venice Commission (2011) op. cit., [41]; Albert Dicey (1885) op. cit., Pt II, 114-115; Simon Chesterman (2008) op. cit., 342; Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 EJIL 315, 316-317; Robert McCorquodale (2016) op. cit., 292; Tom Bingham (2010) op. cit., ch 5.
[113] Tom Bingham (2010) op. cit., ch 9.
[114] *Loewen v US* (2003), op. cit., [135]; Stephen Vasciannie (2000), op. cit., 162; *ADF v US* (2003), op. cit., [110].
[115] *Waste Management, Inc v Mexico* (Number 2), ICSID Case No. ARB(AF)/00/3, Final Award of 30 April 2004, [98].
[116] *MTD v Chile* (2007), op. cit., [66].
[117] For further reading see, Jonathan Bonnitcha (2014), op. cit., ch 4, esp 164. Bonnitcha argued the FET concept as a whole was problematic when it can be used to challenge lawful governmental policy changes made in good faith.
[118] *Tethyan Copper Company v Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability of 10 November 2017, [811].

by the State,[119] at the time of investment,[120] which the investor reasonably relied upon.[121] It could relate to formal RoL elements of non-retrospectivity of the laws depending on the circumstances,[122] and the prevention of arbitrariness.[123] Legitimate expectations could prevent States from 'arbitrarily changing the legal framework of the investment under which the investment had been made',[124] such as 'arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities'.[125]

Furthermore, it can be applied in situations of 'inconsistent State action',[126] which means the formal RoL aspect of predictability in laws[127] could be protected by legitimate expectation through ordering a predictable and 'stable legal and business environment'.[128] Moreover, legitimate expectations could protect fairness in the exercise of governmental power,[129] in terms of fair treatment towards investors.[130] Additionally, commentators have argued the substantive RoL element of 'transparency[131] is closely related to protection of the investor's legitimate expectations. Transparency means that the legal framework for the investor's operations is readily apparent and that any decision affecting the investor can be traced to that legal framework'.[132] This means investors should 'know beforehand any and all rules and regulations that will govern its investments',[133] are made aware of any

[119] *National Grid plc v Argentina*, UNCITRAL, Award of 3 November 2008, [173]; *Eureko BV v Poland*, UNCITRAL, Partial Award of 19 August 2005, [231]-[232].
[120] *Southern Pacific Properties (Middle East) Limited (SPP) v Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992, [82]; *LG&E, et al v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, [130]; *Frontier Petroleum v Czech Republic*, UNCITRAL, Final Award of 12 November 2010, [287] [468].
[121] *Tecmed v Mexico* (2003) op. cit., [154]; *Enron v Argentina*, ICSID Case No. ARB/01/3, Award of 22 May 2007; *Waste Management v Mexico* (2004) op. cit., [98].
[122] James Crawford, (2003), op. cit., 4, 10.
[123] Simon Chesterman (2008) op. cit., 342; Albert Dicey (1885) op. cit., Pt II, 110-113; James Crawford, (2003), op. cit., 4, 10.
[124] Rudolf Dolzer and Christoph Schreuer (2012) op. cit., 148; *PSEG v Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007, [240]; *CME v Czech Republic*, UNCITRAL, Partial Award of 13 September 2001, [611].
[125] *Tecmed v Mexico* (2003) op. cit., [154]; *Tethyan Copper Company v Pakistan* (2017), op. cit., [905] [1372].
[126] *PSEG v Turkey* (2007), op. cit., [240]; *MTD v Chile* (2004), op. cit.
[127] Lon Fuller, *The Morality of Law* (Yale University Press 1964) esp ch 2; Tom Bingham (2010) op. cit., ch 3; Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 EJIL 315. (2011) op. cit., 316-317; Robert McCorquodale (2016) op. cit., 282.
[128] *CMS v Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005, [274]-[276]; However, current laws may not act as promises for legitimate expectations, see, *Charanne and Construction Investments v Spain*, SCC Case No. V 062/2012, Award of 21 January 2016; *El Paso v Argentina*, ICSID Case No ARB/03/15, Award of 31 October 2011, and *Philip Morris v Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016.
[129] Tom Bingham (2010) op. cit., ch 9.
[130] *Eureko v Poland* (2005), op. cit., [231]-[232].
[131] Tom Bingham (2010) op. cit., ch 3; Venice Commission (2011) op. cit., [41].
[132] Rudolf Dolzer and Christoph Schreuer (2012) op. cit., 149.
[133] *Tecmed v Mexico* (2003) op. cit., [154].

misunderstandings or confusion during the investment,[134] and that the transparent information should not be ambiguous,[135] or inconsistent.[136] Some of these claims may relate to human rights.[137]

Although legitimate expectations reinforce the DRoL and an IRoL, it could prevent States regulating in the public interest,[138] like for sustainable development, environmental considerations, and human rights, which could compromise the DRoL. This is applicable to most investor protections like expropriation.[139] Many investor protections can indirectly interfere with State citizen's solidarity rights (see Chapter 2.6.4).[140] Adjudicators have a complex and difficult task of balancing investor and State RoL related claims,[141] which could enhance formal equality if the tribunal respects both parties' interests 'without seeking to give priority to either'.[142] This is problematic to achieve when international commercial adjudicators may favour investor considerations while public law adjudicators may favour State considerations (see Section 3.5.3).

When weighing legitimate expectations against other factors, some tribunals have taken into consideration: 'whether the measures adopted exceeded the normal regulatory powers of the State'; whether the measure was 'adopted outside the acceptable margin of change';[143] whether it was proportionate;[144] whether the State misused their regulatory power;[145] whether the action was reasonable in the circumstance;[146] and whether promises were made by the State to the investor'.[147]

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[134] *Metalclad Corporation v Mexico*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, [76].
[135] *Tecmed v Mexico* (2003) op. cit., [143] [167] [172].
[136] *MTD v Chile* (2004), op. cit., [163] [165]-[166].
[137] ICCPR (1966), op. cit., i.e art 15. Art 15 relates to non-retrospectivity; Legitimate expectations claims can link to non-discrimination. See, *Tethyan Copper Company v Pakistan* (2017), op. cit., [905] [1372]. The measure to deny the license was 'arbitrary, unreasonable and discriminatory.'
[138] *El Paso Energy v Argentina*, ICSID Case No. ARB/03/15, Award of 31 October 2011, [358] [604]; *AWG v Argentina*, UNCITRAL, Decision on Liability of 30 July 2010, [236].
[139] *Magyar Farming v Hungary* (2019) op. cit., [347].
[140] *Bilcon v Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability of 17 March 2015, [127], [531]-[533], [734] [738]; Declaration on the Rights of Indigenous People, GARes61/295 of 13 September 2007; Declaration on the Granting of Independence to Colonial Countries and Peoples, GARes1514(VX) of 14 December 1960; Rio Declaration on Environment and Development (1992) UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874.
[141] *Bilcon v Canada* (2015), op. cit., [531]-[533]; Saluka v Czech Republic (2006), op. cit., [306]; Rudolf Dolzer and Christoph Schreuer (2012) op. cit., 149; Investment Policy Framework for Sustainable Development (UNCTAD 2015) (UNCTADDIAE/PCB/2015/5), principles 4-5.
[142] *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum of 22 May 2012, [255].
[143] *El Paso v Argentina* (2011), op. cit., [402].
[144] *Blusun v Italy* (2016), op. cit., [372].
[145] *Vivendi v Argentina*, ICSID Case No. ARB/97/3, Award of 20 August 2007, [7.4.24].
[146] *El Paso v Argentina* (2011), op. cit., [166] [363] [371]-[375]. Reasonableness applies to both investor and State; Lemire v Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and liability of 14 January 2010, [154]-[159]; Reasonableness can also apply objectively, see *AWG v Argentina* (2010), op. cit., [228].
[147] *Total v Argentina*, ICSID Case No. ARB/04/01, Decision on Liability of 27 December 2010, [164]; *EDF v Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009.

These considerations could interact with the formal RoL elements of prevention of arbitrariness and government acting within the law which could link onto the more substantive element of fairly exercising their powers,[148] However, they are also fragmented and complex, and investor-State conflicts remain.[149] These investor-State conflicts and varying interpretations of legitimate expectations further emphasise the need for convergence of interpretation and implementation of investor protections, which could further the DRoL and an IRoL.

The inclusion of sustainability provisions in IIAs could assist in balancing competing interests,[150] like investor-State conflicts. Ying-Jun Lin has argued that 'sustainable objectives can be read into existing investment treaties through treaty interpretation, even where such treaties do not expressly contain clauses relating to sustainable development' in accordance with the Vienna Convention on the Law of Treaties (VCLT).[151] This proposal could avoid the restrictions of sustainable development needing to be expressly written in the IIA in a concise and enforceable manner, and the MFN concern outlined above would be ameliorated as all treaties would have these sustainable objectives. A way in analysing IIAs through the lens of sustainable development that Ying-Jun Lin outlines is the 'textual approach involving clarifying the object and purpose of IIAs'.[152] This approach would require ISDS tribunals to reorient the object and purpose of an IIA away from simply encouraging investment[153] towards a mechanism designed to promote sustainable investment. A settled core definition of 'sustainable investment' would need to be established and a methodology for arbitrators to adopt when interpreting existing IIAs to avoid uncertainties and inconsistencies in ISDS. I will now turn attention to the varying definitions and requirements given to other investor protections.

Other investor protections include 'full protection and security' (FPS) which has been claimed when the host State fails to initiate measures that prevent the physical,[154] or possibly intangible destruction or damage of an investor's investment,[155] through its control of laws,[156] or authorities.[157] It may not matter whether the State is lacking resources in situations where it is reasonable and expected for the

[148] Tom Bingham (2010) op. cit., ch 6.
[149] *Bilcon v Canada* (2019), op. cit., [400]; *Bilcon v Canada* (2015), op. cit., [734]-[738]; The respondent State had to pay $7 million to the investor because its environmental sustainability protections interfered with the investor's legitimate expectation.
[150] Ying-Jun Lin in Gammage and Novitz (2019) op. cit., 257, 265-266.
[151] ibid, 257.
[152] ibid, 265.
[153] *Magyar Farming v Hungary* (2019) op. cit., [235].
[154] *Saluka v Czech Republic* (2006), op. cit., [484].
[155] *Siemens v Argentina*, ICSID Case No. ARB/02/8, Award of 17 January 2007, [303].
[156] *Azurix Corporation v Argentina*, ICSID Case No. ARB/01/12, Award of 14 July 2006, [406]-[408].
[157] *Wena Hotels v Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, [84].

investor's FPS to be protected.[158] This investor protection is probably the closest to achieving the substantive RoL protection of human rights in terms of respect for property rights and guarantees.[159] As discussed earlier, this thesis favours a substantive RoL approach, but this protection can also be supported by scholars who only recognise the formal RoL. It could enforce 'the subjection of government to general laws, whatever their content',[160] although a richer RoL approach would be more dependent on their content, since by law under FPS the government is expected to initiate measures according to their resources capable of preventing damage on investors.

Expropriation arises when the State uses its international right to expropriate a foreign investor's property.[161] The expropriation is lawful if it satisfies the following conditions: it is an investment that has been expropriated for the public purpose, there was non-discrimination, due process, and the investor received prompt (without undue delay)[162] compensation[163] which was adequate (market value),[164] and effective (convertible currency)[165] for regulatory expropriation.[166] Expropriation occurs when the investment is nationalised or encounters interference. Thus, two types of expropriation exist. Direct expropriation is when an investor is entirely deprived of the investment in legal title.[167] Indirect expropriation occurs when an investor retains legal title, but is deprived (commonly substantially deprived) of the right, economic benefit, enjoyment, or ability to sufficiently use their

[158] *Ampal-American Israel Corporation and others v Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss of 21 February 2017, [283]-[291]; *Cengiz İnşaat Sanayi ve Ticaret A.S v Libya*, ICC Case No. 21537/ZF/AYZ, Award of 7 November 2018; For emphasise on State resources see, *Pantechniki S.A. Contractors & Engineers (Greece) v Albania*, CSID Case No. ARB/07/21, Award of 30 July 2009.
[159] Robert McCorquodale (2016) op. cit., 282; Tom Bingham (2010) op. cit., ch 7; Venice Commission (2011) op. cit., [41].
[160] James Crawford, (2003), op. cit., 4, 10-11; see also Simon Chesterman (2008) op. cit.; Jeremy Waldron (2011) op. cit.; Albert Dicey (1885) op. cit.
[161] Rudolf Dolzer and Christoph Schreuer (2012) op. cit., 98.
[162] *Bernardus Henricus Funnekotter and others v Zimbabwe*, ICSID Case No. ARB/05/6, Award of 22 April 2009, [144]. Compensation was not paid promptly.
[163] *Magyar Farming v Hungary* (2019) op. cit., [364]. Compensation required even if expropriation 'for a public purpose, non-discriminatory and compatible with due process of law.'
[164] *Metalclad v Mexico* (2000), op. cit., [114]-[122]; *Bernardus v Zimbabwe* (2009) op. cit., [130].
[165] Rudolf Dolzer and Christoph Schreuer (2012) op. cit., 99-100.
[166] *Magyar Farming v Hungary* (2019) op. cit., [365]. Exercise of police power does not give rise to expropriation.
[167] *Quiborax S.A. and Non Metallic Minerals S.A v Bolivia*, ICSID Case No. ARB/06/2, Award of 16 September 2015, [200]; *Magyar Farming v Hungary* (2019) op. cit.; *Burlington Resources Inc v Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability of 14 December 2012, [506]. Expropriation can occur when a measure causes permanently deprivation of an investor's investment separate from police powers; *Bernardus v Zimbabwe* (2009) op. cit.

investment. Conversely, the content of both types of expropriations can still be applied differently in ISDS,[168] and has been argued to be uncertain and imprecise.[169]

There has been debate on ISDS allowing a standard of protection which is greater than that found in domestic law.[170] This would create inequality by favouring rich investors over general citizens.[171] In application, indirect expropriation claims in ISDS could succeed from labour standards, human rights and environmental protections subsequently introduced by a host State government that could interfere with the original terms of an investor's investment. This links to the State being unable to implement beneficial societal measures for the benefit of its citizens, which means ISDS could undermine the RoL in its apparent reluctance to reinforce State sovereignty. However, expropriation can reinforce the formal RoL element enforcement before the courts and substantive RoL aspects of fairness and justice,[172] since the action of expropriation is legal provided appropriate compensation is accessible. It would be unfair and unjust for an investor's property to be taken away without access to any remedy like compensation. Expropriation might also enforce equality between investors,[173] as all investors operating within a State should receive similar treatment regardless of their level of relationship with the State government.

Another important investor protection is the principle of 'non-discrimination', which reinforces the substantive RoL element of protection of human rights. Non-discrimination is ingrained within international human rights treaties,[174] and promoted within the SDGs.[175] In ISDS non-discrimination is claimed when the investor cannot receive fair and unprejudiced treatment compared to others,[176]

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[168] See conflicting decisions of, *CME v Czech Republic*, UNCITRAL, Partial Award of 13 September 2001, [604]-[605], *Ronald Lauder v Czech Republic*, UNCITRAL, Final Award of 3 September 2001, [203]; *Metalclad v Mexico* (2000), op. cit., [102]-[107], *Goetz v Burundi*, ICSID Case No. ARB/95/3, Award of 10 February 1999, [124]; *Pope and Talbot Inc v Canada*, UNCITRAL, Interim Award of 26 June 2000, [102]; *Occidental Exploration and Production Company v Ecuador*, LCIA Case No. UN3467, Final Award of 1 July 2004, [89]. Recent academia suggests that it is more commonly substantial, see, Arnaud de Nanteuil, 'Expropriation' in Makane Moïse Mbengue and Stefanie Schacherer, *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer 2019) 132.

[169] Jarrod Hepburn (2020), op. cit., 1170.

[170] Ibid; Vicki Been and Joel Beauvais (2002), op. cit; Gregory Starner (2002), op. cit.

[171] Gus Van Harten (2007) op. cit., 5, 10.

[172] Albert Dicey (1885) op. cit., Pt II, 115-120; Venice Commission (2011) op. cit., [41]; Tom Bingham (2010) op. cit., ch 9.

[173] Venice Commission (2011) op. cit., [41]; Albert Dicey (1885) op. cit., Pt II, 114-115; Simon Chesterman (2008) op. cit., 342; Jeremy Waldron (2011) op. cit., 316-317; Robert McCorquodale (2016) op. cit., 292; Tom Bingham (2010) op. cit., ch 5.

[174] UDHR (1948), op. cit., arts 7, 23(2); ICCPR (1966), op. cit., arts 4(1), 20(2) 24(1), 26; ICESCR (1966), op. cit., arts 2(2), 10(3).

[175] SDGs (2015-2030), op. cit., esp goal 5.

[176] The others can refer to more than just the same sector, see, *Occidental Exploration v Ecuador* (2004), op. cit., [173]; However, tribunals have found it difficult to compare other sections of the economy to establish discrimination, see, *National Grid v Argentina* (2008), op. cit., [202].

due to a measure that resulted in intentional or non-intentional discriminatory treatment against the investor.[177] Non-discrimination can be linked to the formal RoL element of prevention of arbitrariness,[178] which ISDS tribunals have noted.[179] Moreover, non-discrimination is linked to nationality, and arguably 'most of the practise dealing with non-discrimination focuses on nationality'.[180] Therefore, non-discrimination can overlap with MFN and national treatment. National treatment is similar to the historic Calvo doctrine,[181] as it ensures investors are treated at least as favourably compared to nationals of the State hosting investment.[182] A case could be made when an investor is treated differently in a like circumstance,[183] or in a like situation,[184] or in a like case,[185] possibly without reasonable justification,[186] and violations against the investor may not require intention,[187] or be motivated by nationality.[188] These investor protections correlate to safeguarding the RoL element of formal equality both before the law and the courts.[189]

An 'umbrella clause' is in principle a 'catch-all' provision requiring the host State to observe its obligations and undertakings towards the foreign investor. Where the host State commits a contractual breach in connection with the IIA, this clause enables the investor to treat the contractual breach as coming under the 'umbrella' of the IIA. It could be treated as a treaty breach for the purpose of guaranteeing observance of the obligation.[190] However, like the above investor protections, its

[177] *Siemens v Argentina* (2007), op. cit., [321].
[178] Nigel Blackaby and Constantine Partaside QC with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration: Student Version* (6th edn, OUP 2015) [8.118]; United States-Ecuador BIT (signed 27 August 1993, entered into force 11 May 1997), art II(3)(b); Simon Chesterman (2008) op. cit., 342; Albert Dicey (1885) op. cit., Pt II, 110-113; James Crawford, (2003), op. cit., 4, 10.
[179] *Azurix v Argentina* (2006), op. cit., [393] [442(4)]; *Joseph Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision of Jurisdiction and Liability of 14 January 2010, [262].
[180] Rudolf Dolzer and Christoph Schreuer (2012) op. cit., 195.
[181] Carlos Calvo, First International Conference of American States 1889.
[182] *Corn Products International, Inc v Mexico*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility of 15 January 2008, [138]-[142]. Although the government measure was incorporated to respond to a crisis, it impacted foreign investors rather than domestic investors.
[183] *Marvin Roy Feldman Karpa v Mexico*, ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002, [171]. The tribunal held 'in like circumstance' meant the business, in this instance the export of cigarettes; *ADF v US* (2003), op. cit., [151]-[158]. Investor failed with claim of national treatment.
[184] *Occidental Exploration v Ecuador* (2004), op. cit., [173]. The tribunal held 'in like situation' was wider than the same business and even wider than the same sector.
[185] *Quiborax v Bolivia* (2015), op. cit., [247].
[186] *Bilcon v Canada* (2005), op. cit.; *Pope and Talbot Inc v Canada*, UNCITRAL, Awards on the Merits of Phase 2 of 10 April 2001.
[187] See the uncertainty in, *Siemens v Argentina* (2007), op. cit., [321], and, *Genin v Estonia*, ICSID Case No. ARB/99/2, Award of 25 June 2001, [369].
[188] *Marvin Roy Feldman Karpa v Mexico* (2002), op. cit., [183]-[184].
[189] Venice Commission (2011) op. cit., [41]; Albert Dicey (1885) op. cit., Pt II, 114-115; Simon Chesterman (2008) op. cit., 342; Jeremy Waldron (2011) op. cit., 316-317; Robert McCorquodale (2016) op. cit., 292; Tom Bingham (2010) op. cit., ch 5.
[190] *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Award of 12 October 2005, [85]; *Eureko v Poland* (2005), op. cit., [244]-[260].

application is legally uncertain. In *SGS v Pakistan,*[191] the tribunal held that an umbrella clause only protects a serious offence, whereas in *SGS v Philippines*[192] concerning the same company and clause, the tribunal held that the clause could be applied to any dispute. Furthermore, in *El Paso v Argentina*,[193] the tribunal held only a sovereign act could activate an umbrella clause while in *Siemens v Argentina*,[194] this approach was rejected by the tribunal and the same State was involved. Although this investor protection probably reinforces the RoL the least compared to the others, it could safeguard the formal RoL element supremacy of law, provided the umbrella clause is incorporated within the authority of the law, such as in an IIA.[195]

Most of these investor protections could reinforce the DRoL and an IRoL by protecting both the formal and substantive elements of RoL. This includes formal elements of preventing arbitrariness, government subjection to laws, and enforcement before the courts, and the substantive elements of transparency, fairness, and human rights. These investor protections can hold governments accountable in the domestic setting and ensure the substantive rights of investors contained in IIAs are protected. However, inconsistencies exist in the interpretation and application of these investor protections in ISDS, which limits the legitimacy of ISDS and its ability to reinforce the DRoL and an IRoL.

Adjudicators are faced with the challenging task of balancing investor and State interests to reinforce an IRoL and achieve justice across State boundaries while not undermining the DRoL of the States right to regulate within its territory. The outcome of inherent inconsistency is further compounded by the current complexities and fragmentation in IIL like different adjudicators, different IIAs, and different tribunals (as explained in Chapter 1). Increased convergence of investor protections through the application of sustainable development could assist tribunals in making consistent and correct awards when balancing complex investor-State interests. For this to occur in IIAs the sustainable development provision in IIAs would need to be binding, concise, and be frequent in each IIA and not limited by MFN protection. For this to occur in ISDS the tribunal would need to see the object and purpose of IIAs as a mechanism that promotes sustainable investment rather than one that just encourages investment. Although there has been criticism of whether ISDS adjudicators are capable of considering

[191] *SGS v Pakistan,* ICSID Case No. ARB/01/13, Decision on Jurisdiction of 6 August 2003, [166]-[172].
[192] *SGS v Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 January 2004, [119] [125] [128].
[193] *El Paso Energy v Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction of 27 April 2006, [70]-[77] (see also, *Pan America/BP v Argentina*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections of 27 July 2006, [101]-[103] [108]).
[194] *Siemens v Argentina* (2007), op. cit., [260].
[195] Albert Dicey (1885) op. cit., Pt II, 110-113; Simon Chesterman (2008) op. cit., 342.

legitimate public welfare objectives,[196] there is adjudicator reform being discussed at WGIII (See Chapter 5).

States are currently signing fewer BITs or terminating existing BITs,[197] or excluding ISDS from IIAs (see Chapter 2.8 and *Achmea* discussion in Section 3.2.1),[198] which brings into question the legitimacy and longevity of the current system and the need for reform.[199] Appellate review is a procedural proposal under consideration at WGIII in response to ISDS problems such as inadequate tribunal interpretation of IIAs (see Chapter 5),[200] and investment aspects are increasingly being created in FTAs that include appellate review (see Chapter 4.4),[201] which gives parties the option of either ICSID or UNCITRAL ISDS regulation.[202] Appellate review in some form could be offered through the ICSID Convention or the NYC which is used for recognition and enforcement of awards outside the scope of the ICSID Convention. They would need to be capable of facilitating appellate review awards if FTAs or an appellate review mechanism designates them as enforcement mechanisms. Thus, the remainder of this chapter will focus on UNCITRAL and the NYC and ICSID.

3.3 UNCITRAL and the New York Convention (NYC)

This section will evaluate UNCITRAL's ability to reinforce the DRoL and an IRoL through ISDS, and consider the extent to which UNCITRAL can safeguard these RoL values in the form of appellate review. In considering UNCITRAL's influence on the ISDS through a DRoL and an IRoL analysis, the first part of this section will consider UNCITRAL's inclusiveness, Working Groups, arbitration rules, and transparency rules. The thesis will then assess the extent to which UNCITRAL's dispute resolution provisions, relating to procedural and substantive powers, reinforce formal and substantive aspects of the DRoL and an IRoL. Moreover, that section will consider the extent to which these provisions

[196] Suzanne Spears, 'Making Way for the Public Interest in International Investment Agreements', in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011); Christian Tietje and Kevin Crow, 'The Reform of Investment Protection Rules in CETA, TTIP, and Other Recent EU-FTAs: Convincing?', in Stefan Griller, Walter Obwexer and Erich Vranes (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA* (OUP 2017); Thomas Kleinlein, 'Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law' (2011) 12(5) German Law Journal 1141.

[197] Lauge Poulsen and Emma Aisbett, 'When the claim hits: bilateral investment treaties and bounded rational learning' (2013) 65(2) World Politics 273, figure 1.

[198] Brazil-Ethiopia BIT (signed 11 April 2018); Brazil-Suriname BIT (signed 2 May 2018); Brazil-Chile FTA (signed 21 November 2018); Brazil-Guyana BIT (signed 13 December 2018).

[199] Cecilia Malmstrom, 'Proposing an Investment Court System' (European Commission, 16 September 2015) <https://ec.europa.eu/commission/2014–2019/malmstrom/blog/proposing-investment-court-system_en> accessed 25 May 2019.

[200] Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Fortieth session, Vienna, Online, 8–12 February 2021, <http://undocs.org/en/A/CN.9/WG.III/WP.202> accessed 19 February 2021.

[201] CETA (2016), op. cit., art 8.28; EU-Vietnam IPA (2019), op. cit., art 3.54.

[202] TTIP (2015 Draft), op. cit., ch 2, s 3, art 6(2). EU-Vietnam IPA (2019), op. cit., art 3.33(2); CETA (2016), op. cit., art 8.23(2).

have the capacity to tacitly allow, if not facilitate, appellate review. The same approach will be taken in respect of the NYC,[203] since it is used to recognise and enforce awards made under the UNCITRAL rules, which means attention will be drawn to the scope of Article V of the Convention. This section will use the EU model agreements of EU-Vietnam,[204] CETA,[205] and the stalled TTIP draft[206] to discover whether the NYC could recognise and enforce awards that have been awarded through an appellate review mechanism.

3.3.1 UNCITRAL as a UN Agency

3.3.1.1 Inclusiveness

UNCITRAL was created in 1966,[207] acting as a supplementary body assisting the UN General Assembly. Its purpose was to increase peaceful State participation and cooperation in international trade, especially for developing States, by enhancing their access to international trade and integration into the global economy.[208] UNCITRAL would limit domestic trade restrictions/barriers and prepare and harmonise model international trade rules/laws.[209] This reflects UNCITRALs current purpose.[210] UNCITRAL is the Commission tasked to 'further the progressive harmonisation and unification of the law of international trade'.[211] It initially consisted of 29 States from various continents,[212] but with the increase in UN member States UNCITRAL has become more inclusive with the Commission now containing 60 elected member States representing countries from[213] Western Europe and other States (14), Africa (14), Asia (14), Latin America and Caribbean (10), and Eastern Europe (8).[214] A responsibility of the Commission is to submit a report including recommendations to the General Assembly and the United Nations Conference on Trade and Development (UNCTAD).[215]

[203] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) (signed on 10th June 1958, entered into force on 7th June 1959) 330 UNTS 38.
[204] EU-Vietnam IPA (2019), op. cit.
[205] CETA (2016), op. cit.
[206] TTIP (2015 Draft), op. cit.
[207] The United Nations Commission on International Trade Law, Establishment of the United Nations Commission on International Trade Law (UNCITRAL), GA Res 2205(XXI) of 17 December 1966.
[208] Ibid, preamble.
[209] Ibid, preamble.
[210] 'About UNCITRAL' (UNCITRAL) <https://uncitral.un.org/en/about> accessed 30 September 2021.
[211] UNCITRAL (1966), op. cit., [8].
[212] ibid, [1]. 8 Western European and other States, 7 from African, 5 Asian, 5 Latin American, and 4 Eastern European
[213] Enlargement of the membership of the United Nations Commission on International Trade Law, Resolution adopted by the General Assembly, 57th session, GA RES 57/20 of 21 January 2003.
[214] United Nations Commission on International Trade, *The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law* (Vienna, United Nations 2007) 3.
[215] UNCITRAL (1966), op. cit., [10].

Similar to UNCITRAL, UNCTAD is connected to the UN seeking to affirm the inclusivity of all UN member States regardless of their level of development.[216] UNCTAD is a permanent intergovernmental body which promotes international trade between States to ensure integration of States at different levels of development so as to foster economic growth.[217] To achieve that purpose UNCTAD will formulate principles and policies in international trade and economic development that are capable of coming into effect,[218] cooperate and coordinate with and review other international trade law institutions within the UN,[219] and harmonize trade of governments and regions.[220] UNCTAD publishes up to date reports on world investment,[221] and 'measure progress by the SDGs, as set out in Agenda 2030'.[222] One of UNCTAD's recent developments was the 'global action menu'[223] which could strengthen the DRoL. It offered guidance on how States could improve their domestic investment policy management through creating a sustainable investment facilitation framework and climate (see Chapter 2.7). Even before the action menu, investment according to sustainable development principles has been a major priority for UNCTAD.[224] UNCTAD indicates that 'the rule of law needs to be respected' to promote sustainable development and has considered the case for an 'appeals facility' to 'undertake substantive review and correct the arbitral tribunals' first instance decisions' in the context of IIAs.[225] Consequently, UNCTAD seems to apply principles of inclusiveness, sustainable investment, equality, appellate review, and the RoL, which links to this thesis.

UNCITRAL conducts dispute resolution, transport, international contract practices, insolvency, international payments, electronic commerce, secured transactions, procurement, and sale of goods.[226] UNCITRAL can interact with governmental and non-governmental organisations and

[216] Establishment of the United Nations Conference on Trade and Development, GA/RES/1995(XIX), nineteenth session, 30 December 1964, [1].
[217] ibid, [3(a)].
[218] ibid, [3(b)]-[3(c)].
[219] ibid, [3(d)]-[3(e)].
[220] ibid, [3(f)].
[221] UNCTAD, World Investment Report 2015 – Reforming International Investment Governance (2015); World Investment Report (2016), op. cit.; World Investment Report (2017), op. cit.; UNCTAD, World Investment Report 2018 – Investment and New Industrial Policies (2018); World Investment Report (2019), op. cit.; UNCTAD, World Investment Report 2020 – International Production Beyond the Pandemic (2020); UNCTAD, World Investment Report 2021 – Investing in Sustainable Recovery Special Economic Zones (2021).
[222] 'About UNCTAD' (UNCTAD) <https://unctad.org/en/Pages/aboutus.aspx> accessed 17 March 2020.
[223] Global action menu for investment facilitation, Trade and Development Board, Sixty-third session Geneva, 5–9 December 2016; Ahmad Ghouri, 'What Next for International Investment Law and Policy?: A Review of the UNCTAD Global Action Menu for Investment Facilitation' (2018) 15(2) Manchester Journal of International Economic Law 190.
[224] Investment Policy Framework for Sustainable Development (UNCTAD 2015), op. cit.
[225] ibid, section 6.4, at 108 and 123; World Investment Report (2015), op. cit., table IV.3, 133-134, table IV.6, 147-149, 150-152.
[226] The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law (2007), op. cit., 1.

institutions to assist in furthering its work or objectives.[227] UNCITRAL could recognise and react to substantive disparities between State wealth, a feature of an IRoL, and also the SDGs,[228] through considering all States especially developing States and non-State actors when developing and harmonising disciplines on international trade.[229] All UN member States can be elected members of UNCITRAL, and if they are not currently members they are encouraged to attend UNCITRAL sessions held by the Commission and its subsidiary organs, such as the Working Groups.[230] A trust fund can be claimed by developing States to help them attend certain UNCITRAL sessions and to have the opportunity to inform and shape developments at the institution,[231] which could respect substantive equality and inclusivity. Additionally, non-State actors are also encouraged to attend; [232] non-governmental and governmental organisations are invited by the Commission, as are UN organs and specialised agencies that have a relationship with the UN.[233] There are suggestions for some informal UNCITRAL sessions to take place in different regions,[234] which would make it easier for States and other interested stakeholders to attend certain sessions. UNCITRAL has taken an inclusive approach to decision-making and policy formulation in IIL, which could assist the RoL such as respecting substantive equality.

UNCITRAL can push its initial boundaries of facilitating and harmonising trade and investment further, as it promotes the RoL and links to the UN SDGs.[235] The requirement to protect human rights and provide access to arbitration in tribunals at an IRoL could reinforce both substantive and procedural justice within the DRoL. UNCITRAL should be able to reinforce sustainable investment in IIL which will impact the DRoL. The DRoL and an IRoL are relevant to the SDGs, since Goal 16.3 outlines its aim as '[p]romot[ing] the rule of law at the national and international levels and ensure equal access to justice for all' which, it has been argued, covers 'the notion of formal equality under the law and substantive

[227] UNCITRAL (1966), op. cit., [11]-[12].
[228] SDGs (2015-2030), op. cit., i.e Goals 8(a), 17.5.
[229] UNCITRAL (1966), op. cit., [9]; Resolution adopted by the United Nations General Assembly, Report of the United Nations Commission on International Trade Law on the work of its forty-sixth session, 68th Plenary Meeting, 16 December 2013. (68/109), [7]-[10]; UNCITRAL Arbitration Rules (2013), 1; United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention), 69th Session, 7 November 2014 (69/496), (adapted 10th December 2014, enforceable 18th October 2017), 1.
[230] Report of the United Nations Commission on International Trade Law, 36th session, 57th plenary meeting, GA RES 36/32, 13 November 1981, [9].
[231] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019), Fifty-second session, 8–26 July 2019, United Nations Commission on International Trade Law, Fifty-second session, Vienna, 8–26 July 2019, [45], <http://undocs.org/en/A/CN.9/970> accessed 11 November 2020.
[232] ibid, [9].
[233] 'Methods of work' (UNCITRAL) <www.uncitral.org/uncitral/en/about/methods_faq.html+&cd=1&hl=en&ct=clnk&gl=uk> accessed 2 July 2019.
[234] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019), (July 2019) op. cit., [54].
[235] About UNCITRAL (UNCITRAL), op. cit.

equality'.[236] Inclusiveness is also part of Goal 16.7 which aims to '[e]nsure responsive, inclusive, participatory and representative decision-making at all levels'. Furthermore, UNCITRAL's focus on developing State participation in UNCITRAL sessions is another aim under Goal 16.8.[237] The UN is connected to many wider issues outside investment, considering contemporary societal and environmental aspects of which investment comes into conflict with but may fail to recognise as seen in Chapters 1 and 2. One of these UN wider issues that interact with investment is international human rights in IIAs such as non-discrimination[238] and equality,[239] and issues arising in ISDS such as indigenous rights[240] and group rights to natural resources.[241]

States and non-State actors can attend Working Group sessions,[242] which means it could operate in a way that reinforces the values of the DRoL and an IRoL. One of the Commission's main tasks is to inspect reports produced by the six Working Groups, which are designated as substantive working tasks.[243] The Secretariat of UNCITRAL acts as an administrator and does preparatory work for the Commission and its Working Groups. The task of the Working Group is to perform substantive preparatory work on topics within the Commission's programme of work and commonly meets two times a year in Vienna and New York.[244] Although Working Group I concerns enterprises that could become investors and Working Group II concerns an arbitration setting like ISDS with dispute reform, they are not the focal point of the thesis. WGIII is most relevant to the inquiry of this thesis as it offers a point of reflection for proposed responses to some of the challenges facing IIL and principally ISDS reform.

[236] Clair Gammage and Tonia Novitz (eds), *Sustainable Trade, Investment, and Finance: Towards Responsibility And Coherent Regulatory Frameworks* (Edward Elgar 2019) 8.
[237] SDGs (2015-2030), op. cit., Goal 16(8).
[238] UDHR (1948), op. cit., arts 7, 23(2); ICCPR (1966), op. cit., arts 4(1), 20(2) 24(1), 26; ICESCR (1966), op. cit., arts 2(2), 10(3).
[239] UDHR (1948), op. cit., art 10; ICCPR (1966), op. cit., arts 3, 14(1), 14(3), 23(4), 25(b), 25(c), 26, 42(9), 53(1); ICESCR (1966), op. cit., arts 3, 7(a)(i), 7(c), 13(2)(c), 31(1).
[240] Declaration on the Rights of Indigenous People (2007), op. cit.; *Bear Creek Mining Corporation v Peru*, ICSID Case No. ARB/14/21, Award of 30 November 2017, [226]-[228] [736]; *Álvarez y Marín Corporación S.A., Bartus van Noordenne, Cornelis Willem van Noordenne, Estudios Tributarios AP S.A. and Stichting Administratiekantoor Anbadi v Panama*, ICSID Case No. ARB/15/14, Final Award of 12 September 2018.
[241] *Urbaser v Argentina*, ICSID Case No. ARB/07/26, Award of 8 December 2016; *Aguas del Tunari, SA v Bolivia*, ICSID Case No. ARB/02/3, Petition by NGOs and people to participate as an intervening party or amici curiae of 29 August 2002, [1].
[242] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019), (July 2019) op. cit., [9].
[243] Official Records of the General Assembly, 33rd session, Supplement No 17 (A/13/77), [67].
[244] 'Working Documents' (UNCITRAL) < https://uncitral.un.org/en/gateway> accessed 17 March 2020.

WGIII has promoted an inclusive approach to its discussions, drawing insights from experts,[245] and States from different development levels including LDCs, [246] developing States, [247] emergent economies, [248] and developed States, [249] which have contributed to submissions. WGIII started investigating ISDS reform in 2017, and this thesis will analyse developments up until mid-2021 in Chapter 5 giving the thesis intriguing insights into contemporary ISDS debates and developments. UNCITRAL has already contributed to ISDS reform in enhancing transparency.

3.3.1.2 Transparency Rules

UNCITRAL does not create a permanent or designated seat to administer the dispute proceedings and most academic commentary focusing on UNCITRAL relates to topics of insolvency and arbitration between companies.[250] However, the Commission does have a significant role to play in ISDS and IIL, as UNCITRAL contextualises recognised and contemporary arbitration rules,[251] and is central to the UN for international trade law.[252] The 2010 UNCITRAL Arbitration Rules,[253] revised the 1976 Rules,[254] which share commonalities and differences, like the accessibility and inclusiveness of the arbitration process.[255] The 2013 UNCITRAL Arbitration Rules intervened in IIL specifically ISDS proceedings by creating reform in the area of transparency through the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, also known as the UNCITRAL Transparency Rules (UTR).[256] This is significant as transparency is a substantive element of the RoL.[257] The UTR are a set of procedural rules

[245] UN experts send a letter to the UNCITRAL Working Group III, 7 March 2019, OL ARM 1/2019.
[246] E.g. United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS)- Submissions from the Government of Guinea and of Mali, Thirty-eighth session Vienna, 14–18 October 2019.
[247] E.g. United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS)- Submission from the Government of Costa Rica, Thirty-eighth session Vienna, 14–18 October 2019.
[248] E.g. United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS)- Submissions from the Governments of Brazil and China, Thirty-eighth session Vienna, 14–18 October 20199.
[249] Possible reform of ISDS, Submission from the European Union and its Member States (April 2019), op. cit.
[250] This could be why some academics believe ICSID and the Permanent Court of Arbitration (PCA) are the main institutions that focus on ISDS, see, Nigel Blackaby and Constantine Partaside and Others (2015), op. cit., 54.
[251] Rudolf Dolzer and Christoph Schreuer (2012) op. cit., 243.
[252] The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law (2007), op. cit., 1.
[253] UNCITRAL Arbitration Rules as revised in 2010, Resolution adopted by the General Assembly on 6 December 2010, 57th plenary meeting, GA Res 65/4656, 6 December 2010.
[254] The United Nations Commission on International Trade Law, GA Res 31/98 of 15 December 1976.
[255] UNCITRAL Arbitration Rules (1976), art 1(1); UNCITRAL Arbitration Rules (2010), art 1(1); David Caron and Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (OUP 2013) 24-25.
[256] UNCITRAL Arbitration Rules (2013), UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration Official Records of the United Nations General Assembly, Official Records of the United Nations General Assembly, Report of the United Nations Commission on International Trade Law, 8-26 July 2013, 68th Session, Supplement No.17 (A/68/17), Ch III (entered into force 1 April 2014) (hereinafter UNCITRAL Arbitration Rules (2013) UTR).
[257] Tom Bingham (2010) op. cit., ch 3; Venice Commission (2011) op. cit., [41].

for making publicly available information on ISDS arising under IIAs. This includes publication of documents,[258] 3rd party submissions,[259] and public hearings.[260]

One purpose for creating the UTR was that the UN General Assembly explicitly outlined that ISDS needed to reflect the public interest in those disputes. Enhancing transparency could make it more accessible for the public to ensure recognition of the legitimate public interest in ISDS.[261] There is a public interest since ISDS awards can impact the citizens of States in terms of the States' regulatory space and public improvements. ISDS often relates to public mechanisms crucial to society, such as natural resources in forests, oil and gas, infrastructure in roads, power plants, and dams, and utilities in water, sanitation, and electricity.[262] State sovereignty can be limited as domestic legislation can be challenged, like norms regulating health, safety or environment protection, and governmental decisions to tackle an economic crisis.[263] The UN General Assembly argues that the UTR can 'significantly' increase a harmonised legal framework bringing fairness and efficiency in ISDS on top of expected improvements in transparency, accountability and governance.[264]

This would be consistent with SDG 16 which arguably recognises 'that without transparency and accountability, it is not possible to achieve justice through institutions'.[265] From another angle, without the substantive RoL (i.e transparency), parties can only have access to justice (formal RoL) and not achieve justice (substantive RoL).

[258] UNCITRAL Arbitration Rules (2013) UTR, op. cit., art 3.
[259] ibid, art 4-5.
[260] ibid, art 6.
[261] Resolution adopted by the United Nations General Assembly (2013), op. cit., 1; UNCITRAL Arbitration Rules (2013) 1; Mauritius Convention (2014), op. cit., 1.
[262] Oil, gas, mining, electrical power, and other energy have made up 41% of all ICSIDs cases, and made up 52% of cases in 2019, see, 'The ICSID Caseload- Statistics' (ICSID) (Issue 2020-1) <https://icsid.worldbank.org/en/Documents/resources/The%20ICSID%20Caseload%20Statistics%202020-1%20Edition-ENG.pdf> accessed 23 March 2020. *Chevron v Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II of 30 August 2018, pt VII, [7.44]; *Bear Creek v Peru* (2017), op. cit., [226]-[228] [736]; *Aguas v Bolivia* (2002), op. cit., [1]; *Urbaser v Argentina* (2016) op. cit; *Bilcon v Canada* (2019), op. cit., [400]; *Bilcon v Canada*, (2015), op. cit., [734]-[738].
[263] *Philip Morris Asia Limited v Australia*, PCA Case No. 2012-12, Final Award Regarding Costs of 8 July 2017; *Philip Morris Products SA and Abal Hermanos SA v Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016; *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005, and, *LG&E, et al v Argentina* (2006), op. cit.; *Bilcon v Canada* (2019), op. cit., [400]; *Bilcon v Canada* (2015), op. cit., [734]-[738]; P*erenco Ecuador Limited v Ecuador,* ICSID Case No. ARB/08/6, Award dated 27 September 2019, [1022] [1023(b)]; *Perenco Ecuador Limited v Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim of 11 August 2015.
[264] Resolution adopted by the United Nations General Assembly (2013) op. cit.
[265] Clair Gammage and Tonia Novitz (2019), op. cit., 8.

Although some academics believe: '*[a]ny* investment arbitration conducted under the UNCITRAL Arbitration Rules will include the application of the Transparency Rules',[266], in practice, this is not true. Although Article 1(4) UNCITRAL Arbitration Rules 2013 implies the UTR applies to ISDS established through IIAs,[267] Article 1(1) UTR indicates only investment treaties concluded on or after 1 April 2014 that incorporate and apply the UNCITRAL Arbitration Rules in ISDS can automatically have access to the UTR.[268] To have access for investment treaties created before that date there must be consent, either from the parties to the dispute,[269] or from the States, the respondent State and the claimant's home State.[270] Although party consent is discretionary, this was achieved in *Iberdrola v Bolivia*,[271] which is believed to be the first case to apply the UTR.[272] State consent could also be formed from a multilateral treaty that adheres to the UTR such as the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention).[273]

The Mauritius Convention is a State party treaty that consents to the UTR for IIAs created before 1st April 2014. The respondent State and the claimant's home State must be party to the Convention for it to apply,[274] unless the respondent State is party and the claimant consents to the Convention.[275] The Mauritius Convention applies the UTR to 'any investor-State arbitration',[276] whereas, the UTR itself allows the disputing parties to decide whether its rules apply outside the UNCITRAL Arbitration Rules.[277] However, with the UTR and Mauritius Convention being recent developments, their application is uncertain if the ISDS is under, for example, ICSID, which has different rules and procedures regarding transparency.[278] There are currently 23 state signatories to the Convention, including France, Germany, UK, and the US.[279] However, before 2020 only five States had ratified the Convention: Cameroon, Canada, Gambia, Mauritius, and Switzerland. Nevertheless, there are 5 BITs concluded between these States already in force, two BITs waiting to come into force, and three

[266] Hong-Lin Yu and Belen Olmos Giupponi, 'The Pandora's Box effects under the UNCITRAL Transparency Rules' (2016) 5 JBL 347, 348.
[267] UNCITRAL Arbitration Rules (2013), art 1(4).
[268] UNCITRAL Arbitration Rules (2013) UTR, op. cit., art 1(1).
[269] ibid, art 1(2)(a).
[270] ibid, art 1(2)(b).
[271] *Iberdrola SA and Iberdrola Energía SAU v Bolivia*, PCA Case No. 2015-05, Notice of Arbitration of 29 July 2014, [14.2]-[14.3].
[272] Matthew Westcott, 'The UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration' (2016) 82(3) Arbitration 302, 303.
[273] Mauritius Convention (2014), op. cit.
[274] ibid, art 2(1).
[275] ibid, art 2(2).
[276] ibid, art 2(1).
[277] UNCITRAL Arbitration Rules (2013) UTR, op. cit., art 1(9).
[278] *BSG Resources Ltd v Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No.2 on Transparency of 17 September 2015.
[279] Matthew Westcott (2016), op. cit., 305.

agreements containing investment provisions.[280] Between 2020-September 2021 four further States ratified the Convention.[281]

The Convention has limitations as it offers parties flexible, broad reservations capable of seriously undermining the Conventions main content in Article 2. These reservations, which can be made at any time,[282] include the ability to exclude the Conventions scope on certain investment treaties,[283] and that the UTR cannot be used in any other arbitration except that conducted according to the UNCITRAL Arbitration Rules.[284] These limitations can be overcome with party cooperation in ISDS. In *Doutremepuich v Mauritius*[285] the limitations were that the investors State (France) had not ratified the Mauritius Convention, and the France-Mauritius BIT was created many years before the UTR existed. Yet the parties agreed to use the UTR as the applicable rules for ISDS and even agreed a live-streaming 'that the hearing be video recorded and transmitted to the public via YouTube'.[286] UNCITRALs desire to encourage developing State and LDC participation with increased transparency and reliability will protect those most vulnerable from arbitrary use of power. UTR can assist implementing the substantive RoL in ISDS. Chapter 5 builds upon this analysis by investigating the current work of UNCITRAL in WGIII. The Mauritius Convention is mooted as a model for a multilateral instrument for ISDS such as appellate review.[287] But first can appellate review work under the UNCITRAL Rules and could it reinforce the formal and substantive RoL?

3.3.2 Appellate Review under the UNCITRAL Rules and facilitating Appellate Review Awards under UNCITRAL Rules

Articles 38 and 39 of UNCITRAL's 2013 Arbitration Rules, that incorporated the UTR in ISDS, could tacitly allow appellate review.[288] Entitled 'correction of the award', Article 38 could support the RoL

[280] 'International Investment Agreements Navigator' (UNCTAD 2020), op. cit.
[281] 'United Nations Convention on Transparency in Treaty-based Investor-State Arbitration' (United Nations Treaty Collection) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&clang=_en> accessed 3 October 2021. Australia, Benin, Bolivia, and Iraq.
[282] Mauritius Convention (2014), op. cit, art 4.
[283] ibid, art 3(1)(a).
[284] ibid, art 3(1)(b).
[285] *Christian Doutremepuich and Antoine Doutremepuich v Mauritius*, PCA Case No. 2018-37, Press Release of 7 June 2019, p2.
[286] ibid, p2.
[287] Possible reform of investor-State dispute settlement (ISDS), Multilateral instrument on ISDS reform, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-ninth session, New York, 30 March–3 April 2020, <https://undocs.org/en/A/CN.9/WG.III/WP.194> accessed 1 March 2021; UNCITRAL Working Group III, 'Multilateral instrument on ISDS reform - Webinar #2: UNCITRAL Secretariat & ISDS Academic Forum' (23 April 2020) < https://www.youtube.com/watch?v=h2AXze6XRs4> accessed 29 April 2020.
[288] UNCITRAL Arbitration Rules (2013), arts 38 and 39.

element of predictability.[289] This 'correction' is not a method for appellate review and does not cover procedural or substantive elements of a case. It applies only to administrative-related errors that have no bearing on the substantive findings of the tribunal dispute. The disputing parties under Article 39 could claim an 'additional award'. This is not appellate review, since it focuses on undecided matters rather than reviewing whether a decision was correct and just. Nonetheless it could uphold the formal RoL elements of due process[290] and substantive element of fair trial,[291] in the sense of all the case arguments being heard and adjudicated upon. These articles could protect formal and substantive elements of the RoL, but are unlikely to safeguard the RoL in the form of appellate review. If the UNCITRAL Rules themselves do not provide an option for appeal, could they at least enable an appeal in ISDS to be acceptable under the Rules?

Article 34(2) Arbitration Rules on UTR outlines that all awards 'shall be final and binding on the parties'.[292] Arguably, the word 'final' does not necessarily mean that UNCITRAL will not facilitate appellate review, since it could mean 'final' under the UNCITRAL Rules rather than 'final' after a first dispute settlement body. Article 1(1) outlines the need for disputes to be in accordance with the UNCITRAL Rules and 'subject to such modification as the parties may agree'.[293] It is possible that 'such modifications' could give the ability for parties to consent to appellate review, if such appeal proceedings are conducted in accordance with the UNCITRAL Rules. Moreover, the NYC is used by UNCITRAL to assist the 'final and binding'[294] nature of the awards through the recognition and enforcement of its awards. Although there was no mention of the NYCs importance to UNCITRAL in any of its arbitral rules, they are both under the UN, the NYC references UNCITRAL,[295] and UNCITRAL has publications on the NYC.[296]

3.3.3 NYC[297]

[289] Venice Commission (2011) op. cit., [41]; Jeremy Waldron (2011) op. cit., 316-317.
[290] James Crawford, (2003), op. cit.; Simon Chesterman (2008) op. cit.; Jeremy Waldron (2011) op. cit.; Albert Dicey (1885) op. cit., Pt II, 115-120; Robert McCorquodale (2016) op. cit., 292.
[291] Tom Bingham (2010) op. cit., ch9; Venice Commission (2011) op. cit., [41].
[292] UNCITRAL Arbitration Rules (2013), art 34(2).
[293] ibid, art 1(1).
[294] ibid, art 34(2).
[295] 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (UNCITRAL 2015), p 18, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf> accessed 13 January 2020.
[296] UNCITRAL, 'Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)', Forty-first session New York, 16 June-3 July 2008; UNCITRAL, 'Recommendation regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention"), Forty-first session New York, 16 June-3 July 2008; Working Group 2 has also published on the NYC.
[297] NYC (1958), op. cit.

On 1 January 2020, the NYC had 161 State parties, and as of October 2021 the NYC had 168 State parties expanding its global reach.[298] The purpose of the NYC is for domestic courts to recognise international arbitral awards as binding with the same importance as any directly enforceable decision made by domestic courts.[299] The strength of enforcing ISDS awards under the NYC has been praised in comparison to the difficulties of enforcement in other international systems although the NYC does have possibilities for recourse against awards.[300] The provisions that could be considered as potential appellate review styled mechanisms are found under Article V NYC, which sets out the grounds for refusing 'recognition and enforcement of the award'.[301] The refusal of the award is orchestrated by the 'authority where the recognition and enforcement is sought'.[302] Although the NYC is an international instrument dealing with cross border issues that include States and non-State actors meaning it should theoretically follow and contribute to an IRoL, Article V is set up for the function of the DRoL whose purpose could be to achieve justice within a States border. More importantly, Article V paves the way for the domestic court to reject an international award. This view is supported by commentators who advance the argument for the sovereign State to have more domestic control in IIL disputes and policies.[303]

Article V could support State sovereignty and the right for States to regulate for the purpose of issuing beneficial societal measures in this sense advancing the DRoL and constraining the effect of problematic awards, indirectly advancing a substantive IRoL. Also, appreciations of reasons for particular variations of the DRoL could be discovered in different States when their courts access Article V which could inform an IRoL. Diversities of cultures and backgrounds in different States could formulate alternative and wider RoL understanding than for example a western RoL interpretation. These different understandings could inform an IRoL making it more balanced, representative and inclusive. International law could be capable of being, in part, influenced and derived from domestic

[298] 7 States of Belize, Ethiopia, Malawi, Palau, Seychelles, Sierra Leone, and Tonga, joined since January 2020.
[299] NYC (1958), op. cit., arts I, II, III.
[300] Velimir Zivkovic, 'Pursuing and Reimagining the International Rule of Law Through International Investment Law' (2020) 12 Hague Journal of the Rule of Law 1, 9-12.
[301] Ibid, art V.
[302] ibid, art V.
[303] Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law (2018) 112(3) The American Society of International Law 361; Anthea Roberts (2018), op. cit.; Ahmad Ghouri (2018), op. cit.

law.[304] The DRoL and an IRoL could have the potential to work together 'each acknowledging the existence and validity of the other'.[305]

However, what might be less well founded is that the application of Article V could ultimately lead to the DRoL overruling and undermining an IRoL. Article V allows for an award made in the international setting that should cultivate an IRoL to be annulled by a court in the domestic setting that should cultivate the DRoL. Although considering different DRoL understandings may be advantageous for crafting fairer multilateral international instruments for States such as when constructing an appellate review mechanism (see Chapter 5), putting excessive weight for domestic systems to review ISDS awards may not be the way forward. This is peculiar because it has been suggested that 'the role of international law is to reinforce, and on occasions to institute, the rule of law internally'.[306] The international systems of the International Court of Justice (ICJ), European Court of Justice (ECJ), European Court of Human Rights (ECHR), and International Criminal Court (ICC) that should nourish an IRoL are all designed to assist domestic systems if they impede the RoL.

An investigation initiated within an IRoL could have a palpable impact on the scope of justice within the DRoL, by, for example, exposing potential corruption, problems in the time it takes to access justice, or unequal treatment before the law in domestic systems. When the domestic system interprets and recognises the award into its own system and reacts to it, it might do so within the context of the DRoL. This could be because although the DRoL and an IRoL could have similar fundamental values that flow across, they might serve different functional purposes. The function of Article V could recognise and support the differences between the DRoL and an IRoL in that they could serve different purposes so there could be differences in decision making at domestic and international levels. One of these different purposes could be that the DRoL might aim to achieve justice within a State's border, whereas, an IRoL might aim to achieve justice in a wider sphere that goes beyond State boundaries and could interact with a variety of both State and non-State actors taking into consideration a broad range of social, economic, political and cultural issues. Article V seems to outline this conflict between the DRoL and an IRoL by arguing what an international system may decide might not necessarily be adopted at the domestic level.

[304] Ernst-Ulrich Petersmann, 'International Rule of Law and Constitutional Justice in International Investment Law and Arbitration' (2009) 16(2) Indiana Journal of Global Legal Studies 513,515; Steven Neff, *Hugo Grotius on the Law of War and Peace: Student Edition* (CUP 2012); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005); HLA Hart, *The Concept of Law* (2nd edn, OUP 1994).
[305] James Crawford, (2003), op. cit., 10.
[306] ibid, 8.

In contrast, the *ELSI* Case declared that 'an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law'.[307] This interpretation would support the suggestion that 'the role of international law is to reinforce, and on occasions to institute, the rule of law internally',[308] rather than vice versa as suggested by Article V. An IRoL might be unable to reinforce the RoL internally in ISDS, if States are given an opportunity such as through Article V to avoid adopting awards made by the international system. Also, ISDS needs improvement for it to sufficiently reinforce an IRoL. Nonetheless, an advantage of Article V is that it seems to ensure that an international action should be within State consent. State consent could be an important part of customary international law.[309]

In this peculiar instance under Article V, inequality and anarchy may occur if the DRoL, which focuses on the interests within the State, is more persuasive than an IRoL, which should focus on the wider community of States and non-State actors. Thus, for the approach of Article V to potentially focus only on justice within State borders could seem rather archaic and outmoded, given the contemporary complexities associated with transnational actors operating through global value chains. This thesis supports the crucial element of State sovereignty, but at the same time calls for compliance, co-operation, and equality. It seems unlikely that this balance can be achieved under Article V.

3.3.4 Appellate Review under NYC

This section considers whether Article V could provide an appellate review mechanism, which would reinforce the formal and substantive RoL.[310] Article V(1)(a) is about the agreement to arbitrate before an international tribunal being invalid under either the seat or *lex arbitri* of the arbitration, or that the parties themselves were under some incapacity under the law applicable to them. If the agreement is invalid then the arbitration award will be invalid and the award cancelled. This is not appellate review as it does not investigate the award. It questions the basis of the contractual/treaty agreement to arbitrate before the dispute commences. This provision could to an extent uphold the formal RoL by avoiding arbitrariness and ensuring disputes are handled within the confines of the law. Article V(1)(b) concerns the party against whom the award is invoked not being given proper notice of the appointment of the arbitrator, or of the arbitration proceedings, or being otherwise unable to present their case. This provision could uphold the formal RoL since due process has always been a crucial

[307] *Elettronica Sicula SpA (ELSI) (United States v Italy)* ICJ Judgment of 20 July 1989, [124]; Sean Murphy, 'The ELSI Case: An Investment Dispute at the International Court of Justice' (1991) 16(2) Yale Journal of International Law 391.
[308] James Crawford, (2003), op. cit., 8.
[309] *France v Turkey* (the *SS Lotus* Case), 1927 PCIJ (ser A) No 10 (Sept 7), [44].
[310] NYC (1958), op. cit., art v.

element from early formal RoL discussions in Albert Dicey, [311] to present more substantive interpretations from Robert McCorquodale.[312] The inability of one party to present arguments may not only raises issues of procedural justice but also could limit equality since it could tilt the balance of the case in favour of the other party to obtain a favourable award.

Article V(1)(c) is used when the tribunal goes above and beyond its agreed powers. This provision could correlate to the formal RoL element that no one is above the law insofar as the tribunal had a law to act in a certain way, but used their power to act outside that law. Although only ultra vires can be cited as a ground for appeal, this could be the closest provision to appellate review compared to Art V(1)(a) and Art V(1)(b). It investigates how the decision was made and ensures that aspects of the decision found to have been made within the tribunal's power can still be recognised and enforced. Article V(1)(d) concerns the arbitration authority or procedure acting outside the agreement or in accordance with the seat of arbitration laws. This provision is a crossover between invalid agreement (Art V(1)(a)) and the arbitrator acting outside their authority (Art V(1)(c)).

Article V(1)(e) is about the award pending enforceability or set aside by the seat or *lex arbitri* of the arbitration. If the award is yet to become binding then it is yet to become law and the parties rights and obligations remain unfettered. The award being set aside by a State concerns the relationship between the DRoL and an IRoL with Article V going against common interpretations of how they coexist together since it allows the domestic setting (DRoL) the possibility to check whether the RoL is upheld internationally (IRoL) instead of vice versa. Article V(1) could uphold the formal RoL. Yet it is unlikely to reinforce the substantive RoL. An appellate review mechanism should be capable of reinforcing the substantive RoL such as legal certainty, correctness, transparency, fairness, and justice.

Article V(2) could be more limited in reinforcing different elements of the RoL since it focuses on State sovereignty. Article V(2)(a) concerns the situation where the dispute at hand was incapable of being arbitrated within the State where enforcement of the award was sought. This provision could prevent international tribunals from forcing the sovereign State to undermine State laws. Article V(2)(b) is about the award acting contrary to the State's public policy. This provision could prevent enforcing awards that act contrary to the RoL, sustainable investment, and the interests and values of the States citizens. This provision could be considered a mechanism for appellate review in some States as

[311] Albert Dicey (1885) op. cit., Pt II, 115-120.
[312] Robert McCorquodale (2016) op. cit., 292.

Christian Tams has suggested 'some courts have relied on Article V(2)(b) in order to perform a substantive review of awards'.[313]

Although these provisions could uphold certain elements of the RoL, they do not provide an option for appellate review as the factual arguments and legal reasoning of the tribunal award is commonly not being questioned directly. Additionally, even if they are being questioned, successfully arguing a provision just invalidates the award immediately rather than presenting alternate or new factual arguments and legal reasoning. This is peculiar as Article V places great importance on nourishing the DRoL within State borders. Yet the provisions for reviewing awards under Article V do not seem to reflect traditional domestic appeal contexts that would further the DRoL. Therefore, Article V offers a limited form of review and is not analogous to domestic understandings of appeal or the type of multilateral and unified appeal situated in the international setting proposed by this thesis. If the NYC is not in itself capable of tacitly allowing appellate review, the next question is could this system recognise and enforce awards made through an appellate review mechanism?

3.3.5 NYC facilitating appellate review awards

This section will use the EU model agreements (also discussed in Chapter 4.4) of EU-Vietnam,[314] CETA,[315] and the stalled TTIP draft,[316] which all incorporate a two-tier dispute resolution body, to evaluate whether the NYC can facilitate appellate review awards. Jansen Calamita thinks that if an appellate review mechanism is agreed in a treaty that adds to the existing ISDS structure, rather than overhauling it, then with respect to the application of the NYC on the resulting award it should qualify.[317] However, who is to decide if an appellate mechanism adds or overhauls the current system of ISDS and what procedures would they use in making their decision? It may be the domestic courts of States since that is where enforcement of an award is sought under the NYC. In contrast, even if the appellate review took place in a EU model structure[318] with a permanent body and judges that were only elected by the States and which is outside the traditional framework for ISDS, it could still be classed as an arbitral award under Article I(2) NYC. Article I(2) not only allows ad hoc arbitration but also 'permanent arbitral bodies to which the parties have submitted',[319] and a standing tribunal of State appointed judges has already been applied under the NYC in the Iran-US claims tribunal.

[313] Christian Tams, An Appealing Option? The Debate about an ICSID Appellate Structure (2006) Essays in Transnational Economic Law No. 57, 10
[314] EU-Vietnam IPA (2019), op. cit.
[315] CETA (2016), op. cit.
[316] TTIP (2015 Draft), op. cit.
[317] Jansen Calamita (2017) op. cit., 619.
[318] To clarify this EU model structure is directed towards EU-Vietnam, CETA, and the stalled TTIP draft.
[319] NYC (1958), op. cit., art I(2).

Although Calamita concedes that the EU model seen in CETA, EU-Vietnam, and TTIP departs from traditional international arbitration, he believes that, if there is an agreement between the parties for dispute settlement at a particular tribunal, enforcement of an award under that tribunal should be governed under the NYC.[320]

However, although the text for some of the EU instruments refers to the dispute settlement bodies as investment arbitration *tribunals*, there is also reference in the new generation agreements to an investment *court*.[321] The judicialization of the system as proposed under the EU model may depart too much from the traditional arbitration format of ISDS. This change might be considered by some domestic courts as too significant to fall within the scope and meaning of the NYC. Domestic courts may not regard the EU model as arbitration that falls within the NYC. In the EU case, on the other hand, the model attempts to undercut Article V with the inclusion of provisions which may act as waivers to the domestic courts right of rejecting recognition and enforcement.[322]

Although Calamita submits that 'CETA contains no such provision',[323] the text of CETA stipulates that 'a disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure as regards an award under this section'.[324] This wording is similar to the text used in the EU-Vietnam FTA,[325] and the draft text of TTIP.[326] Calamita deemed both 'to act as a 'waiver' of the grounds for review in Article V of the Convention'.[327] We can test Calamita's theory by applying this 'waiver' firstly to Article V(1) and then Article V(2). The wording of Article V(1) suggests that it can only be claimed by the party which the award goes against. This means if a waiver prevented that losing party from claiming Article V(1) nothing else could entail the application of V(1). Waivers under Article V(1) could cover the parties that could claim under it, while Article V(2) on the other hand is more complex. Article V(2) concerns the State court in which the enforcement is sought. Thus, the court could apply Article V(2) without the authority of the party that the award goes against. This theory is supported by the NYC guidance that 'the court may, on its own motion, refuse recognition and enforcement of an award'.[328]

[320] Jansen Calamita (2017) op. cit., 621
[321] Jaemin Lee (2018), op. cit., esp 4; Lisa Diependaele, Ferdi De Ville, and Sigrid Sterckx, 'Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System' (2019) 24(1) New Political Economy 37; TTIP (2015 Draft), op. cit., ch 2, s 3.
[322] EU-Vietnam IPA (2019), op. cit., arts 3.36(3)(b), 3.57(1)(b); TTIP (2015 Draft), op. cit., ch 2, s 3, art 30(1).
[323] Jansen Calamita (2017) op. cit., 622.
[324] CETA (2016), op. cit., art 8.28(9)(b)
[325] EU-Vietnam IPA (2019), op. cit., arts 3.36(3)(b), 3.57(1)(b).
[326] TTIP (2015 Draft), op. cit., ch 2, s 3, art 30(1).
[327] Jansen Calamita (2017) op. cit., 621-622, see footnote 144.
[328] 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2015), op. cit., p 1.

However, this is problematic in the EU model because if enforcement is sought in a State that is *not* party to the EU agreement then the court will not be prevented from applying Article V(2). For example, CETA is an agreement between the EU and Canada only, which means that other State courts will not be bound by its provisions. The general rule in contracts or treaties is that only parties can incur responsibilities and obligations to be bound to the terms.[329] The EU cannot bind States that are not party to an agreement. The EU agreements cannot have extra territorial effect on third countries that have not signed it. Although extra territorial effect can occur such as in the *Front Polisario* case involving the Western Sahara,[330] this decision has been criticised,[331] and arguably it is less likely if the territory is an internationally recognised sovereign State, [332] which has not consented in any capacity.[333] This means the EU model set up may not have completely binding awards as their treaties outline,[334] unless non-party States enforce and recognise EU model awards that are sought in their courts. Although it is unlikely an award would need to be sought away from the respondent's court in ISDS,[335] a way around this is a multilateral agreement involving as many States as possible.

However, as seen with the Mauritius Convention that promotes the UTR, although the Convention could resemble exemplar of a flexibility device, State ratifications to treaties are made very slowly. Furthermore, it is uncertain whether the EU model agreements should be allowed to waive the right to Article V in the first place, since although the UNCITRAL Rules allow waivers under Article 32,[336] the NYC has no such provision of waiving rights. Granting a waiver may be down to a State exercising its discretion to do so, which is likely to raise issues in terms of fairness and equality. It is likely that waivers for Article (V)(1) have more chance than Article (V)(2), since Article (V)(1) can only be claimed by the party that the award goes against and not a potential non-party State court where recognition

[329] In the UK this is the Doctrine of Privity, see, *Tweddle v Atkinson* (1861) 1 B&S 393; *Dunlop Tyre Co v Selfridge* [1915] AC 847; *Beswick v Beswick* [1968] AC 58.
[330] Case C-266/16, *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, [2018] EU:C:2018:118; Case C-104/16 P, *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro* (*Front Polisario*), [2016] ECLI:EU:C:2016:973; *Front Polisario* (judgment of 10 December 2015, case T-512/12).
[331] Eva Kassoti, 'Between Sollen and Sein: The CJEU's reliance on international law in the interpretation of economic agreements covering occupied territories' (2020) Leiden Journal of International Law 1, 18. Eva Kassoti, 'The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)' (2007) 2(1) European Papers 339.
[332] Montevideo Convention (1933) 165 LNTS 19.
[333] *Lotus* Case (1927), op. cit., [44].
[334] EU-Vietnam IPA (2019), op. cit., art 3.57(1)(a); TTIP (2015 Draft), op. cit., ch 2, s 3, art 30(1); CETA (2016), op. cit., arts 8.41(1), 29.10(1).
[335] However, it can happen when the respondent State refuses to pay and the investor seeks another State to seize extensively controlled commercial assets of the respondent State with the territory of that State, see, *Magyar Farming Company Ltd v Hungary*, Petition to US District Court for the District of Columbia to Confirm Arbitral Award of 4 March 2020.
[336] UNCITRAL Arbitration Rules (2013), art 32.

and enforcement is sought. But it is unlikely the discretion to waive will be applied among State courts consistently impacting the enforcement of awards.[337]

It is surprising that the EU has seemingly failed to recognise these problems in drafting investment procedures in its new generation FTAs as it has been suggested the effectiveness of the NYC is down to the domestic courts of States.[338] Arguably, the EU agreements do provide for the authority of domestic courts to apply in a similar fashion to Article V NYC. Article 3.42(3) EU-Vietnam provides that 'the Tribunal and the Appeal Tribunal shall be bound by the interpretation given to the domestic law by the courts or authorities which are competent to interpret the relevant domestic law'.[339] In CETA tribunals shall follow interpretation of domestic law made by domestic authority.[340] The EU agreements indicate any interpretation of domestic law made by tribunals are not binding on domestic authority.[341] I

The inclusion and consideration of domestic authority within the process of establishing an ISDS award in the EU model seems different from the NYC which puts emphasis on domestic authority after the international award when a party seeks that the recognition and enforcement of an award is refused under Article V. Considering domestic authority during the international award could reinforce both the DRoL and an IRoL. From this standpoint, depending on the level of scope the EU model gives domestic authority and domestic interpretation, it seems the EU model has the *potential* to have a greater possibility of achieving justice across borders for both States and non-State actors than Article V NYC which focuses on justice within State borders.

However, what limits the EU model's *potential* is its lack of inclusiveness. Each EU agreement only has one other party to it and they seem to protect only awards enforceable in the State courts of the parties and not awards issued in non-party States.[342] This means the EU model is restricted to achieving justice within the State borders that are party to the agreement. It lacks inclusiveness to achieve justice beyond State boundaries for both States and non-State actors. Any two-tier dispute resolution body in ISDS should at least consider the DRoL to limit domestic dissatisfaction or potential

[337] Jansen Calamita (2017) op. cit., 622-623. Refers to Berman's work, see, George Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards* (Springer 2017) 40-41.
[338] Jansen Calamita (2017) op. cit., 622.
[339] EU-Vietnam IPA (2019), op. cit., art 3.42(3).
[340] CETA (2016), op. cit., art 8.31(2).
[341] EU-Vietnam IPA (2019), op. cit., art 3.42(3); TTIP (2015 Draft), op. cit., ch 2, s 3, art 13(4).
[342] TTIP (2015 Draft), op. cit., ch 2, s 3, art 30(2); EU-Vietnam IPA (2019), op. cit., art 3.57(2).

resistance to international awards, and attract more than two parties to sufficiently further an IRoL and the DRoL.[343]

States are not acting illegally or wrongfully if they do not recognise or enforce awards, since this is permissible under the NYC. However, the problem lies in whether States use Article V reasonably, responsibly, truthfully and justifiably. The impact of the NYC on the RoL, as discussed above, is interesting, since it allows the domestic courts to have an opinion on an international award. It might be assumed that an IRoL will help to enrich the DRoL, but since State domestic courts have the final word on whether to apply an international award it seems the DRoL checks whether an IRoL is recognised in the international setting. This could be the reaction of dualist State systems that have to implement international standards in the domestic system before those international standards become applicable. Consequently, international standards might be interpreted slightly differently once implemented at the domestic level to accommodate justice within that States border. This could show that the DRoL and an IRoL are symbiotic, but operate in a different way. This means future conflict between the DRoL and an IRoL might be difficult to avoid, and this could be one of the purposes of Article V to showcase the acceptance of these conflicts.

The World Trade Organization (WTO)[344] (discussed in Chapters 2.5.2 and 4.3) also has tension between the DRoL and an IRoL. Some States opt for mutually agreed solution/pay compensation instead of adopting panel reports.[345] This shows States could react upon international tensions. Though they may try to resolve the tensions in a different way from the exact wishes of the international community but in a way that could still be capable of appeasing the international community and achieving justice within its border. However, this is a temporary fix which may only cover up RoL problems in the domestic system and these problems could reappear causing future tensions.[346] Domestic courts which refuse recognition and enforcement of awards under the NYC could consequently impact the international setting. For one, the international setting might have to react to avoid future conflict between the two systems. It might not be sustainable if international awards are repeatedly rejected in the domestic setting and could create legitimacy concerns. The WTO is arguably facing a legitimacy

[343] Many IIAs, such as BITs are between two States and the RoL problems arising out of these agreements are highlighted in Section 3.2, such as potential State sovereignty interferences in the domestic setting and equality deficiencies in the international setting. There is also conflict in how IIAs are interpreted.
[344] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization (1994) 1867 UNTS 154, 33 ILM 1144, signed on 15 April 1994 (entered into force 1 January 1995).
[345] *United States — Subsidies on Upland Cotton*, WT/DS267/46, Mutually acceptable solution on implementation notified on 16 October 2014. Brazil seemed more content for their farmers to be compensated rather than getting the US offensive trade measure removed.
[346] Mavluda Sattorova, 'Reassertion of Control and Contracting Parties' Domestic Law Responses to Investment Treaty Arbitration: Between Reform, Reticence and Resistance' in Andreas Kulick (eds), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016) 56-63.

crisis (see Chapter 4.3). One reaction could be for the international setting to accommodate domestic arguments for rejecting past awards when issuing future awards to limit the chances of those future awards being rejected.

However, another issue at hand could be that this thesis is focused on the English interpretation of the RoL, and in practice there will be many domestic systems to consider. What one domestic court may recognise and enforce, another domestic court may not. This potential cultural/legal relativism could lead to unpredictable results perhaps often based in national self-interest if one abstract DRoL cannot be used as a measure for domestic courts. In this way the NYC could confuse the balance between the DRoL and an IRoL, and the impact of international law contemplating differing domestic decisions on similar substances may cause fragmentation and complexity. Arguably, this means strict priority should be given to an IRoL in the sense that what happens in domestic law may not necessarily be accepted at the international level. The conclusion drawn from this analysis is that domestic jurisdictions are not a good site for appellate review of international awards. There needs to be an international forum. ICSID could have such forum.

3.4 ICSID

This section will evaluate ICSID's ability to reinforce the DRoL and an IRoL, and consider the extent to which ICSID can safeguard the DRoL and an IRoL in the form of appellate review. In considering ICSIDs influence on the ISDS through a DRoL and an IRoL analysis, the first part of this section will consider the World Bank of which ICSID is a part of and the system of ICSID itself. The discussion will draw attention to accessibility, inclusiveness, equality, arbitration rules, and Article 54 ICSID Convention. The thesis will then assess the extent to which ICSID's dispute resolution provisions, relating to procedural and substantive powers, reinforce formal and substantive aspects of the DRoL and an IRoL. This section will also consider whether they have the capacity to facilitate and tacitly allow appellate review. Focus will be drawn to Sections 5 and 6 of the ICSID Convention, since it includes interpretation, revision and annulment of the award, and the recognition and enforcement of the award. Of particular importance to this inquiry is the apparent prohibition of appellate review under Article 53. The effectiveness of *inter se* modifications on the ICSID Convention will be considered to evaluate ICSIDs ability to facilitate appellate review awards. This section will critically examine academic commentary regarding the common notion that Article 53 prevents ICSID tacitly allowing and facilitating appellate review.

3.4.1 ICSID[347] as part of the World Bank

ICSID is one of five institutions that make up the UN World Bank.[348] The original purpose of the World Bank was to reconstruct, develop, and transition member territories ravaged by war from wartime economies into peaceful economies, and to help less developed States develop.[349] This would be achieved by providing loans to promote investment, and to facilitate investment for useful and productive purposes such as enhancing living standards and labour conditions.[350] Currently, the goals of the World Bank are to end extreme poverty and promote shared prosperity.[351] Its goals are the same as the SDGs 1 and 10 which aim to end poverty and reduce inequalities among States. This suggests the World Bank gives special attention to middle-income and especially low-income States, which reflects its original purpose,[352] and is attentive to the disparities of wealth between States. This reinforces a substantive IRoL, and the SDGs which aim to develop LDCs.[353] As the SDGs and World Bank are under the UN it means ICSID should reinforce the SDGs in theory. But in practice a recent ICSID case described the object of IIAs as to encourage investment, rather than to promote sustainable investment or investment capable assisting the SDGs.[354]

Moreover, the World Bank Articles outline that it will have a cooperative relationship with international organisations that specialise in related fields.[355] This could show that it realises justice needs to be achieved beyond State borders in the international setting. However, the World Bank lacks equality, a crucial element of the RoL, since it is set up to favour the most powerful and wealthy States (see Chapter 2.5.3). The procedures of the World Bank to appoint the executive directors and allocate voting powers gives wealthy States the ability to control and decide. By comparison to the other World Bank institutions, ICSID is not controlled by the executive directors and does not have

[347] International Centre for Settlement of Investment Disputes (ICSID) (Signed on 18th March 1965, entry into force 14 October 1966) 575 UNTS 159.
[348] Article of Agreement, International Monetary Fund and International Bank for Reconstruction and Development, United Nations Monetary and Financial Conference, Bretton Woods, 1-22 July 1944. The other institutions are the International Bank for Reconstruction and Development; International Development Association; International Finance Corporation; Multilateral Investment Guarantee Agency.
[349] ibid, art I(i).
[350] ibid, art I.
[351] 'Who are we' (World Bank) <http://www.worldbank.org/en/who-we-are> accessed 30 April 2018; 'What we do' (World Bank) <http://www.worldbank.org/en/about/what-we-do> accessed 30 April 2018.
[352] International Monetary Fund and International Bank for Reconstruction and Development (1944), op. cit., art I(a).
[353] SDGs (2015-2030), op. cit., i.e Goal 8(a); Goal 17.5.
[354] *Magyar Farming v Hungary* (2019) op. cit., [235]. Some commentators have also proposed that the purpose of ICSID 'is to promote economic development through the creation of a favourable investment climate' rather than to promote principles of sustainability, see, Rudolf Dolzer and Christoph Schreuer (2012) op. cit., 238.
[355] International Monetary Fund and International Bank for Reconstruction and Development (1944), op. cit., art V, s 8.

unequal voting share powers,[356] although the executive directors did assist in drafting the Convention.[357]

ICSID offers rules for the resolution of ISDS providing a procedural and institutional framework for arbitration, conciliation, and fact-finding proceedings. As ICSID took over the role from the ICJ as the forum for ISDS,[358] ICSID became a popular and specialist institution in the field of ISDS since the mid-1990s.[359] The first ICSID case was not registered until six years after ICSID came into force in 1966,[360] yet during 2020 ICSID registered 58 claims.[361] From 2011-2020 it issued 225 Convention awards.[362] However, interestingly during 2018 ICSID registered a then record 56 cases, while in 2019 it dropped to 39, and then rose to a new record in 2020.[363] Of those 39 registered cases in 2019 the most frequent respondents were States at differing development levels,[364] which is interesting as developing States have historically been perceived to be the most likely respondents in ICSID claims.[365] As of 12 September 2021, ICSID has 156 contracting State parties. Arguably the biggest State absentees are from the BRICS nations.[366] Russia has only signed the Convention and Brazil, India, and South Africa are not even members, leaving China the only contracting State.

The jurisdiction of ICSID requires that the respondent State is party to the ICSID Convention and that the investor's home State is also a party under Article 25(1).[367] Article 25(1) further outlines that the parties must consent in writing, which means being a party to the Convention does not automatically enable access to ISDS before the authority of ICSID.[368] However, this is not commonly a problem, as IIAs are a method for the respondent State to consent (see Section 3.2.1). The investor will consent as a claimant when they pursue ISDS proceedings before ICSID under an IIA that their home State has ratified with the respondent State. With such insurance for jurisdiction and consent, ICSID will not

[356] 'Boards of Directors' (World Bank) <https://www.worldbank.org/en/about/leadership/directors> accessed 21 March 2020.
[357] ICSID Convention (1965), op. cit., Introduction. ICSID does maintain links with the World Bank, as for example, the World Bank president will be ex officio chairman of the administrative council, see, ICSID Convention (1965), op. cit., art 5.
[358] *ELSI* (1989), op. cit.; *Panevezys-Saldutiskis Railway (Estonia v Lithuanaia)* [1939] PCIJ Series A/B 76, ICGJ 328 (1939).
[359] Rudolf Dolzer and Christoph Schreuer (2012) op. cit., 239.
[360] 'The ICSID Caseload – Statistics' (ICSID) (Issue 2021-1) <https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf> accessed 2 October 2020.
[361] ibid.
[362] ibid.
[363] ibid.
[364] Ibid. Both Spain and Colombia were subject to three claims a-piece.
[365] Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 European Journal of International Law 387, 396.
[366] World Investment Report (2017), op. cit., 6, 18, 19.
[367] ICSID Convention (1965), op. cit., art 25(1).
[368] State Party consent is also backed up by ICSID's preamble, see, ICSID, preamble.

stand for non-cooperative parties. Proceedings will continue regardless of whether parties cooperate leading to binding awards.[369]

ICSID has four sets of arbitration rules starting with the original created in 1968,[370] followed by three amendments in 1984,[371] 2003,[372] and 2006.[373] The ICSID website outlines that the 2006 amendments were adopted after a public consultation,[374] and that States, business and civil society groups, and legal professionals were invited to be part of the consultation.[375] This suggests the consultation was open access. However, it was limited as the discussion amendment topics were conducted around the Secretariat's vision with questions proposed to the consultation on that basis.[376] It also seems there was no actual discussion between interested actors. Instead, written thoughts and questions on the ICSID secretariat's ideas would be sent to the Secretary-General through an email account managed by a consultant.[377] The process did not seem inclusive and lacked accessibility in the sense that interested actors sat secluded away from a constructive negotiating table. There is limited information regarding the participants who tried to voice their ideas and whether their ideas were considered. This draws into question the inclusiveness and transparency of the process, and compliance with the policy goals outlined in the SDGs.[378]

The recent rule amendment process of ICSID could give States the power to suggest reform topics as well as the public, and transparency seems to be one of the main topics.[379] This amendment process should be more inclusive and transparent than the last. The current consultative procedure stalled due to covid-19, but it did produce on 15 June 2021 its fifth working paper and first since February 2020.[380] However, it has not involved discussion of an appellate review mechanism.

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[369] ICSID (1965), op. cit., arts 38, 41, 45.
[370] ICSID Arbitration Rules (1968).
[371] ICSID Arbitration Rules (1984).
[372] ICSID Arbitration Rules (2003).
[373] ICSID Arbitration Rules (2006).
[374] 'ICSID Convention Arbitration Rules' (ICSID) <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention-Arbitration-Rules.aspx> accessed 2 April 2020.
[375] 'A Brief History of Amendment to the ICSID Rules and Regulations' (ICSID) <https://icsid.worldbank.org/en/amendments/Pages/Background%20Material/History-Amendment-ICSID-Rules.aspx> 2 April 2020.
[376] ICSID Secretariat, 'Suggested Changes to the ICSID Rules and Regulations' (Working Paper of the ICSID Secretariat, 12 May 2005), [1]; ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration' (ICSID Secretariat Discussion Paper, 22 October 2004).
[377] Suggested Changes to the ICSID Rules and Regulations(2005), op. cit., [8]. The email account provided was basic: 'icsidideas@worldbank.org'.
[378] SDGs (2015-2030), op. cit., esp Goals 16(6), 16(7).
[379] A Brief History of Amendment to the ICSID Rules and Regulations (ICSID), op. cit.
[380] 'ICSID Rules and Regulations Amendment- Working Papers' (ICSID) <https://icsid.worldbank.org/resources/rules-amendments> accessed 2 October 2021.

The changes that the ICSID secretariat proposed for the 2006 amendments concerned 'the preliminary procedures; publication of awards; access of third parties to the proceedings; and disclosure requirements of arbitrators'.[381] The Administrative Council had powers to adapt these changes,[382] since it acts as the governing body of ICSID,[383] and had already adopted changes that created the 1984 and 2003 amendments.[384] All ICSID State parties have one representative at the Administrative Council,[385] and changes must be accepted by a two-thirds majority,[386] which occurred when some of the proposed 2006 arbitration rules were adopted. Given the nature of the system, it seems reasonable that only States could vote but stakeholders like non-State actors should contribute like in proposing recommendations before voting, as a multi-stakeholder approach is important to upholding an IRoL.

One of the frequently used adopted 2006 provisions was Rule 41(5),[387] which introduced claims that are 'manifestly without legal merit' as a preliminary objection in the 2006 Amendment. This is different from instances where legal merit or jurisdiction is doubtful,[388] since these issues can still be dealt with if the first session decides a claim is not manifestly without legal merit.[389] Rule 41(5) could enhance the substantive RoL element of hearings without excessive cost or delay,[390] as it limits the time and cost of the tribunal proceedings if the claim is manifestly without legal merit. It could also enhance the legitimacy of ICSID by encouraging investors to use ICSID tribunals responsibly. Rule 6(2) was amended to expand the scope of arbitrator disclosures to include any circumstances likely to give rise to justifiable doubts as to the arbitrator's reliability for independent judgment. This could enhance the formal RoL element of independence and impartiality of the judiciary, in this case the arbitrator.[391] Hearings in independent and impartial courts are also international human rights,[392] which are substantive elements of the RoL.

[381] Suggested Changes to the ICSID Rules and Regulations (2005), op. cit., [6].
[382] ibid, [8].
[383] ICSID Convention (1965), op. cit., arts 6, 7. It adapts, approves, and determines the centres rules, regulations, conditions, and arrangements, like arbitration proceedings.
[384] Possible Improvements of the Framework for ICSID (2004), op. cit., [4]. The administrative council has also adopted the previous 1968 rules.
[385] ICSID Convention (1965), op. cit., art 4(1).
[386] ibid, art 6(1)(g).
[387] 'Decisions on Manifest Lack of Legal Merit' (ICSID) <https://icsid.worldbank.org/en/Pages/process/Decisions-on-Manifest-Lack-of-Legal-Merit.aspx> accessed 2 April 2020. As of 1 April 2020, 34 decisions on Rule 41(5) have already been made.
[388] ICSID Arbitration Rules (2006), art 41(1).
[389] Ibid, art 41(5).
[390] Tom Bingham (2010) op. cit., ch 8.
[391] James Crawford, (2003), op. cit.; Robert McCorquodale (2016) op. cit.; Tom Bingham (2010) op. cit.; Venice Commission (2011) op. cit., [41].
[392] UDHR (1948), op. cit., art 10; ICCPR (1966), op. cit., art 14.

The change to Rule 48(4) could enhance the substantive RoL element of transparency.[393] ICSID now guarantees publishing excerpts of the tribunals legal reasoning promptly even if parties refuse consent to publish the full award. This means the transparency given in the release of case information will be up to date, timely and contemporary. This is contrary to the past arbitration rules where the tribunal would wait '*several months*' for parties to receive consent,[394] before *maybe* publishing excerpts.[395] Moreover, Rule 48(4) could enhance the substantive RoL element of legal certainty.[396] Interested actors can inspect past cases to decide, for example, whether their case has any merit, especially as ICSID claims are increasing, although excerpts are unlikely to capture the whole picture of the dispute. Thus, the 2006 amendments include a mixture of formal and substantive RoL improvements especially transparency (like the 2013 UNCITRAL Rules), which could be used in ISDS under the ICSID Convention.

The strength of enforcing ISDS awards under the ICSID Convention has been praised in comparison to the difficulties of enforcement in other international systems.[397] Although ICSID has review functions which have been described by Zivkovic as being almost redundant,[398] there are instances where ISDS awards have been challenged.[399]

Article 54 ICSID Convention outlines that domestic courts will not be given an opportunity to inspect an award before recognising and enforcing it, since decisions should be treated as if they were a final domestic award in that State.[400] This means an iRoL could be taking priority over the DRoL. A tribunal award could be used to further the RoL in the domestic setting, since the international award might expect to be recognised and enforced in the domestic setting without inspection from domestic authority. Access to international arbitration tribunals at an IRoL could have a palpable impact on the scope of justice within the DRoL. It could have the potential to expose problems and encourage changes in the domestic system.

However, the enforceability of ICSID awards may not be as straightforward as Article 54 suggests. The tribunal in *United Utilities (Tallinn) BV v Estonia*,[401] determined it had jurisdiction in relation to an intra-EU BIT, but was cautious of the application of the *Achmea* decision and its own ISDS award on

[393] Tom Bingham (2010) op. cit.; Venice Commission (2011) op. cit., [41].
[394] Possible Improvements of the Framework for ICSID Arbitration (2004), op. cit., [12].
[395] ICSID Arbitration Rules (2003), art 48(4).
[396] Venice Commission (2011) op. cit., [41].
[397] Velimir Zivkovic (2020), op. cit., 9-12.
[398] Ibid, 9-12.
[399] 'The ICSID Caseload – Statistics' (ICSID) (Issue 2021-1) <https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf> accessed 20 April 2022. Annulment proceedings make up over ¼ of all ICSID proceedings.
[400] ICSID Convention (1965), op. cit., art 54.
[401] *Tallinn v Estonia* (2019), op. cit.

domestic law. The tribunal award suggested it could be up to the domestic court to decide what regional and international award to follow.[402] This implies domestic courts may not automatically follow ICSID awards. An explanation for this could be that the international system may have no one binding court, no one executive or legislature, no one separation or hierarchy of powers.[403] This may not necessarily be a problem with the DRoL reviewing international awards through the lens of a State's domestic legal procedure (State sovereignty in the domestic context) as in Article V NYC. But two awards made outside the domestic system that should be following an IRoL which could have frictions when both applied in the domestic system.[404]

Article 54, indicating domestic courts must enforce and cannot review ISDS awards, could limit the RoL in IIL by taking away the potential safeguard of domestic courts ensuring the RoL is applied in ISDS. Appreciations of reasons for particular variations of the DRoL could inform an IRoL since international law could be capable of being, in part, influenced and derived from domestic law. This could be supported by the DRoL and an IRoL possibly being symbiotic, 'each acknowledging the existence and validity of the other'.[405] Some commentators have suggested that as the current international setting of ISDS fails to complement or advance the DRoL, that increased deference to domestic policy-making,[406] or domestic courts,[407] is necessary.

However, if tribunals in ISDS were to follow an IRoL then Article 54 is suitable to the current understanding of the relationship between the DRoL and an IRoL. It has been argued that 'the role of international law is to reinforce, and on occasions to institute, the rule of law internally'.[408] The application to IIL means that the role of ISDS could be to reinforce, and on occasion to institute, the rule of law within domestic courts.[409] More broadly this can also impact domestic government by checking on failures of DRoL, such as arbitrariness and discrimination. However, for this to occur ISDS awards should reinforce an IRoL. It is not clear whether ISDS tribunals are furthering an IRoL, since as discussed in this thesis there are several issues that act contrary to the RoL like inconsistency, unfairness, and reluctance to hear human rights and sustainable development considerations.

[402] ibid, [541].
[403] Robert McCorquodale (2016) op. cit., 289.
[404] *Magyar Farming v Hungary* (2019) op. cit., [225]-[238], held EU law and intra-EU BITs did not have conflicting subject matter under Article 30 VCLT.
[405] James Crawford, (2003), op. cit., 10.
[406] Ahmad Ghouri (2018), op. cit., 193, 203, 211, 213.
[407] Sergio Puig and Gregory Shaffer (2018) op. cit.; Anthea Roberts (2018), op. cit., 417-418.
[408] James Crawford, (2003), op. cit., 8.
[409] Stephan Schill, (2011) op. cit.; Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' (2014) 25(4) EJIL 1147.

Although I concede much work is required to reach the stage of ISDS reinforcing the RoL in the domestic setting, an appellate review mechanism preferably within a two-tier system containing adjudicators capable of reinforcing the RoL could be a step forward. It could improve consistency, judicial predictability, fairness, justice, and sustainable investment, and increase the chances that the 'right' decisions are being made, which could lend greater legitimacy to the ISDS system. The need for an appellate review mechanism could be further exemplified by the fact ISDS is governed by international legal regimes and, therefore, should follow and uphold an IRoL. Thus, could appellate review work under ICSID and could it reinforce the formal and substantive RoL?

3.4.2 Appellate review under ICSID

Although Calamita believes 'the ICSID Convention establishes a closed system with respect to the review of arbitral awards rendered under it',[410] Tams argues 'ICSID awards *can* be reviewed'.[411] The provisions that have the most potential to be considered mechanisms for appellate review are under Chapter IV, Sections 4, 5 and 6 of the ICSID Convention.[412] This thesis will assess the extent these provisions provide an appellate review mechanism and whether they reinforce the formal and substantive RoL.

Section 4, Article 49(2) relates to the tribunal considering a question that was not part of the award, or rectifying any clerical, arithmetical or similar error in the award.[413] While responses to the question and rectifying errors will become part of the award, it is unlikely to constitute a mechanism for appellate review. It responds to a mistake made by the tribunal when not considering a question rather than re-evaluating their answers to a question. Moreover, it seems the errors relate only to administrative errors that have no bearing on the substantive legal aspects of the award. This provision could support the formal RoL element of due process as the parties' questions will be heard and considered by the tribunal,[414] and rectifying errors improves the substantive element of legal certainty for the awards decision contents.[415]

Section 5, Article 50 concerns the interpretation of the award.[416] The reviewer may investigate the award to form a deeper understanding of its content but may not decide whether the award was correct, so appellate review is not available. This provision could support the substantive RoL element

[410] Jansen Calamita (2017) op. cit., 609.
[411] Christian Tams (2006) op. cit., 6.
[412] ICSID Convention (1965) op. cit., s 4-6.
[413] ibid, art 49(2).
[414] Simon Chesterman (2008) op. cit.; Albert Dicey (1885) op. cit.; James Crawford, (2003), op. cit.
[415] Venice Commission (2011) op. cit., [41].
[416] ICSID Convention (1965) op. cit., art 50

of legal certainty,[417] since parties can request clarification of the award contents and how it is to be applied in practice. The interpretation of the award can also create legal certainty for actors potentially looking to pursue ISDS as to where their dispute stands compared to previous awards.

Article 51 is concerned with revision of the award.[418] It can only be claimed if there is discovery of a fact not known to the tribunal that will decisively affect the award. The legal decision in the first award is not being reviewed, but its content is considered alongside the discovery of a fact. The tribunal under Article 51(4) can stay enforcement of the first award pending its decision. This suggests the award or outcome could be changed by the discovery of this new fact. But as the first award contents are not being reviewed, it may not be considered appellate review. Article 51 could support the substantive RoL in enhancing both parties accessibility to the law which can assist them presenting their case before a tribunal creating a fairer trial and enhancing the possibility of justice.[419] These ICSID Articles can reinforce a mixture of both the formal and substantive RoL, but may not act as an appellate review mechanism.

Article 52 could be a 'provision [that] can be characterised as a form of systemic review of awards'.[420] Article 52(a) is about the tribunal not being properly constituted. This could safeguard the democratic process for enacting law, the legality[421] and the legal order and stability,[422] formal elements of the RoL. Article 52(b) concerns the tribunal manifestly exceeding its powers. This prevents tribunals from not using their powers fairly or in good faith for their purpose by acting outside powers specifically given to them resulting in unreasonableness.[423] In its formal application this could be the prevention of arbitrariness,[424] no man is above the law whatever their position,[425] and 'the independence of the judiciary which must be established by law'.[426] Article 52(c) is about corruption in the tribunal. This could support a fair trial, in particular access to justice,[427] before independent and impartial courts,[428]

[417] Venice Commission (2011) op. cit., [41].
[418] ICSID Convention (1965) op. cit., art 51.
[419] Tom Bingham (2010) op. cit., ch 3, ch 7; Venice Commission (2011) op. cit., [41].
[420] Christian Tams (2006) op. cit., 6; ICSID Convention (1965) op, cit., art 52.
[421] Venice Commission (2011) op. cit., [41].
[422] Robert McCorquodale (2016) op. cit.
[423] Tom Bingham (2010) op. cit.
[424] James Crawford, (2003), op. cit.; Simon Chesterman (2008) op. cit.; Jeremy Waldron (2011) op. cit.; Albert Dicey (1885) op. cit.
[425] Lon Fuller (1964), op. cit.
[426] James Crawford, (2003), op. cit., 4, 10.
[427] Venice Commission (2011) op. cit., [41]; Tom Bingham (2010) op. cit.
[428] James Crawford, (2003), op. cit.; Robert McCorquodale (2016) op. cit.; Jeremy Waldron (2011) op. cit.

which are more formal elements of the RoL,[429] but can also be protected by substantive human rights.[430]

Article 52(d) concerns a serious departure from a fundamental rule or procedure. This could protect the formal RoL element of due process in particular equity before the law as all disputing parties should equally expect to have the same fundamental rules and procedures between each other and other disputing parties.[431] Article 52(e) is about the tribunal issuing an award without any reasons. In the formal RoL application this could safeguard the prohibition of arbitrariness.[432] In the substantive RoL application this also could protect the promotion of transparency. But the tribunal would need to communicate non-arbitrary reasons for there to be effective transparency.[433] Article 52 may only reinforce the formal RoL, with the possible exception of transparency. An appellate review mechanism should protect more substantive RoL aspects such as legal certainty, judicial predictability, fairness, and justice. Although Article 52 can impact the substantive award, it may not contain the substantive content to be considered an appropriate mechanism to conduct appellate review.

The purpose of Article 52 is to allow either party to seek annulment of the award. Annulment only cancels the award. The panel in the first ICSID annulment proceedings in *Klöckner v Cameroon*,[434] said Article 52 'is in no sense an appeal against arbitral awards',[435] as when inspecting Article 52(b) the question is not whether the award was correct but whether there was a manifest exercise of power.[436] Tams emphasised that the first annulment proceedings did actually perform a substantive review of awards and although later proceedings became more restrictive, 'the scope of Article 52 remains controversial and that "annulment jurisprudence" is still far from settled'.[437] Similarly, other scholars argued that Article 52's provisions 'were interpreted quite broadly, resulting in *de facto* appeals on points of law and fact', but have since 'taken a narrower approach' meaning annulment of awards have 'become rarer'.[438] Annulment of awards have not 'become rarer' as there have been 15 annulling awards from 2000-2020 compared to four in the 20th century. Yet tribunals have 'taken a narrower

[429] James Crawford, (2003), op. cit.; Robert McCorquodale (2016) op. cit.; Jeremy Waldron (2011) op. cit.
[430] UDHR (1948), op. cit., art 10; ICCPR (1966), op. cit., art 14.
[431] Simon Chesterman (2008) op. cit.; Albert Dicey (1885) op. cit.
[432] Albert Dicey (1885) op. cit.; James Crawford, (2003), op. cit.; Simon Chesterman (2008) op. cit.
[433] Venice Commission (2011) op. cit., [41]; Tom Bingham (2010) op. cit., ch 4; 'Peace, Justice and Strong Institutions' (UN) <https://www.un.org/sustainabledevelopment/peace-justice/> accessed 10 November 2018.
[434] *Klöckner Industrie-Anlagen GmbH and others v Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Ad hoc Committee Decision on Annulment of 3 May 1985, p 89, [Introductory Note].
[435] ibid, p 93, [3].
[436] ibid, p 109, [56].
[437] Christian Tams (2006) op. cit., 7-8.
[438] Nigel Blackaby and Constantine Partaside and Others (2015), op. cit., 649-650.

approach' with the success rate including discontinued proceedings at 66.6% before 21st century compared to 13.2% between 2000-2020.[439]

Tams argued Article 52 should be 'only concerned with the procedural propriety of an award rather with its correctness as a matter of substance',[440] and Calamita indicated that the 'Article 52 annulment procedure is deemed to be exclusive',[441] which suggests the provisions should have no scope for appellate review. This is supported in *AES v Hungary*,[442] which argued that 'annulment is an exhaustive, exceptional, and narrow circumscribed remedy and not an appeal'. Articles 52(a) and 52(b) could be classed more as 'procedural propriety' than the other provisions of Article 52. That said the ad hoc annulment committee in *Patrick Mitchell v Congo*,[443] held that the tribunal in their substantive opinion had wrongfully established a protected investment within the meaning of the ICSID Convention and concluded that this was a 'manifest excess of powers' under 52(b), and failure to state reasons under 52(e). Moreover, where the tribunal may have made a mistake of law which favours one of the parties due to corruption, the serious departure from a fundamental rule could mean legal authority is omitted, and this could impact the correctness of a decision. This could result in an award being made without reasons which would require the annulment committee to investigate the actual substance of the award. This means there should be some scope for appellate review, albeit on very limited grounds. Furthermore, Article 52(6) could further the argument that 'ICSID awards *can* be reviewed',[444] since an annulled award will go to a new tribunal, meaning the annulment is not the end result.[445] However, it is uncertain whether starting again in another tribunal can be classed as common understanding constituting *appellate* review,[446] and Article 53 could further limit the scope of appellate review.

Section 6, Article 53(1) states: '[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention'.[447] This provision is the main reason commentators believe that ICSID is a 'self-contained system' not intended to be considered 'a substantive appellate procedure' and that Article 52 'should be exclusive' or 'deemed

[439] The ICSID Caseload – Statistics (2021), op. cit.
[440] Christian Tams (2006) op. cit., 7.
[441] Jansen Calamita (2017) op. cit., 604.
[442] *AES Summit Generation Limited and AES-Tisza Erömü Kft v Hungary*, ICSID Case No. ARB/07/22, Decision of the ad hoc Committee on the Application for Annulment of 29 July 2012, [17].
[443] Patrick Mitchell v Congo (2006), op. cit., [67].
[444] Christian Tams (2006) op. cit., 6.
[445] ICSID Convention (1965), op. cit., art 52(6).
[446] Appellate review procedures do not normally start again in another tribunal unless it is a criminal or employment proceeding.
[447] ICSID Convention (1965) op, cit., art 53.

to be exclusive' or 'an exceptional remedy' that is 'to be narrowly construed'.[448] Although commentators refer to the drafters' intentions to not include appeals,[449] I argue that the wording of Article 53 does not entirely disregard the possibility for appellate review. The words 'any appeal' might be intended to be strict in that appeal is prohibited regardless of any situation, development, or authority in the domestic and international setting. Calamita, Tams, and Schreuer are some of the many commentators that strongly believe appellate review is prevented in ICSID under Article 53 without amendment to the Convention.[450] It may be that for ICSID to effectively allow appellate review would require some express written statements of clarification and assurances in its arbitration rules.

Speaking hypothetically, although ICSID prides itself on the finality of its awards, an appeal review mechanism tacitly allowed within ICSID should not undermine the ICSID system unless many first-tier awards are challenged and successfully appealed. There could be need for an appellate review mechanism in ICSID now as it seems States are becoming more dissatisfied with ICSID awards. During 1991-2000, 10% of ICSID proceedings concerned annulment, while in 2001-2010 it rose to 21.3%, yet during 2011-2020 it rose further to 28.1%.[451] Although annulment proceedings cannot occur until after an award is made, which would in part explain increases in annulment proceedings over time, it does not explain when compared to all ICSID proceedings why the percentage is going up given annulment proceedings have become much narrower and are therefore harder to establish.[452] Registered ICSID cases generally rise each year[453] so the increasing percentage of annulment proceedings is an interesting development in the system. It could be unsustainable to separate substantive and procedural grounds when reviewing awards.[454] Thus, the next question is can ICSID facilitate awards made by an appellate review mechanism.

3.4.3 ICSID's capability of facilitating appellate review awards

If Article 53 does not allow appeals within ICSID, ICSID State parties could agree upon an ICSID appellate review mechanism in writing. But any modifications to the Convention will require the consent of all State parties under Article 66. The ICSID Secretariat has admitted unanimous State

[448] Christian Tams (2006) op. cit., 7; Jansen Calamita (2017) op. cit., 604; Christoph Schreuer, Loretta Malintoppi, August Reinisch, and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009), 1102, [18].
[449] Christoph Schreuer, Loretta Malintoppi, and Others (2009), op. cit., 1102 [18]; Christian Tams (2006) op. cit., 7.
[450] Jansen Calamita (2017) op. cit.; Christian Tams (2006) op. cit.
[451] The ICSID Caseload – Statistics (2021), op. cit.
[452] Christian Tams (2006) op. cit., 7-8; Nigel Blackaby and Constantine Partaside and Others (2015), op. cit., 649-650.
[453] The ICSID Caseload – Statistics (2021), op. cit.
[454] Noemi Gal-Or, 'The Concept of Appeal in International Dispute Settlement' (2008) 19(1) The European Journal of International Law 43, 48.

ratification 'would at best be a very long process',[455] and at the time of writing this seems unlikely.[456] Tams argues consent for modifications in the additional facility could be more realistic since it requires a majority in the ICSID Administrative Council.[457] However, ICSID and its additional facility could operate differently. There may be intention for only a one tier model in the additional facility,[458] and its awards are subject to domestic review under the NYC.[459]

Another possibility is an *inter se* modification of ICSID in which State parties to a dispute[460] or a group of States,[461] could agree upon appellate review of ICSID awards. This would take the form of a small multilateral agreement to avoid the consent of all States,[462] or the consent of two-thirds of the administrative council members.[463] For these proposals to be effective under the ICSID arbitration rules they would need to consider Article 53 ICSID Convention, which may prohibit appeals, while maintaining the ability to be considered ICSID awards to uphold enforcement and recognition under Article 54. If Article 53 really presents no opportunity to appeal whatsoever then modification of this provision will be required within the *inter se* modification.[464]

There is presently academic conflict regarding the scope of Article 53 and the potential for its modification. Schreuer asserts that 'Art 53 is not open to modification by the parties',[465] whereas, Tams argues that '[l]egally speaking, nothing could prevent States and/or investors from so doing'.[466] My view is that Article 41 VCLT could allow modification of Article 54 through *inter se* modification, since it offers the potential for 'agreements to modify multilateral treaties between certain of the parties only'.[467] Article 41(1) outlines that it does not require a certain number of parties (States) as it is possible if just two States would like to modify a multilateral treaty (ICSID) between themselves

[455] Possible Improvements of the Framework for ICSID Arbitration (2004), op. cit., [3].
[456] Jansen Calamita (2017) op. cit., 605; Christian Tams (2006) op. cit., 11.
[457] Christian Tams (2006) op. cit., 12; ICSID Convention (1965), op. cit. art 6(3).
[458] ICSID Convention (1965), op. cit., additional facility, art 52(4).
[459] ibid, art 25(1).
[460] Christian Tams (2006) op. cit., 12.
[461] Jansen Calamita (2017) op. cit., 605.
[462] ICSID Convention (1965), op. cit., art 66.
[463] ibid, art, 6(1)(g).
[464] ICSID Secretary-General in 2004 proposed an appellate review mechanism as a possible inter se modification, see, ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration' Discussion Paper (22 October 2004) Annex 'Possible Features of an ICSID Appeals Facility', [7] 20-23; Jansen Calamita (2017) op. cit., 606.
[465] Christoph Schreuer, Loretta Malintoppi, and Others (2009), op. cit., 1103, [19].
[466] Christian Tams (2006) op. cit., 12.
[467] Vienna Convention on the Law of Treaties (VCLT), (signed on 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 41.

only. Moreover, it seems that only either one of Article 41(1)(a) or Article 41(1)(b) needs to be satisfied.[468]

Article 41(1)(a) VCLT allows treaty modification if 'the possibility of such a modification is provided for by the treaty'. The ICSID Convention has a whole Chapter dedicated to amendments under Chapter IX so it is unlikely that modifications are prohibited by the treaty. Chapter IX could be used as a justification to amend Article 53 under Article 41(1)(a). However, Calamita strongly believes that the strict wording of Article 53 means it is a 'clear prohibition' to modify the inclusion of appellate review, [469] although the Convention frequently seems to allow modifications for many other provisions.[470] Calamita accepts that the wording of some of the provisions serves as a 'clear grant for party modification', while depicting Article 53 as 'an express prohibition on what States may never do under the Convention'.[471] Calamita's concerns seem to relate to the wording of each provision rather than the flexibility of the Convention to allow modifications as a whole.

Although the Convention does not expressly give rights to appeal, Chapter IX does not expressly say this Convention will never allow any modification to Article 53 or any modification that limits Article 53. To the contrary Article 53 outlines 'except those provided for in this Convention'. This suggests modifications to the Convention can limit the application of 'shall not be subject to any appeal or to any other remedy', provided appellate review is contained and administered within the Convention. Article 52 could be amended for appellate review to include provisions that can reinforce the substantive RoL. Amending Article 53 to allow appeal and Article 52 to include substantive review mechanisms is being considered at WGIII (as will be discussed further in Chapter 5 of this thesis).[472]

All the conditions in part 41(1)(b) VCLT should be satisfied to allow modification.[473] If the modification is only between parties to a dispute or a group of States it should not 'affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations' under Article 41(1)(b)(i). However, as discussed above (Section 3.3.5), the EU model may have the potential to affect other parties. Although the EU intends to have ICSID awards if the parties choose that arbitration rule,[474] Calamita considers the EU model disrespects the ICSID Convention and departs too much from

[468] Jansen Calamita (2017) op. cit., 607.
[469] ibid, 608.
[470] ICSID Convention (1965), op. cit., arts 25(2)(b), 25(3), 25(4), 29(2)(a), 30, 31, 33, 35, 37(2), 38, 39, 40, 56(1), 42(1), 42(3), 43, 44, 46, 47, 60(2), 63.
[471] Jansen Calamita (2017) op. cit., 608.
[472] Possible reform of investor-State dispute settlement (ISDS), Appellate mechanism and enforcement issues (February 2021), op. cit., [48]-[52].
[473] International Law Commission, Draft Articles on the Law of Treaties with Commentaries, 1966 Yearbook of International Law Commission, vol II, 235.
[474] EU-Vietnam IPA (2019), op. cit., 31(8); CETA (2016), op. cit., 8.41(6); TTIP (2015 Draft), op. cit., ch 2, s 3, 30(6).

customary Convention rules.[475] What will matter in practice is whether States decide that EU awards that have reference to ICSID can be classified as ICSID awards.[476] Article 41(1)(b)(ii) indicates that such modification does not interfere with the treaty's object and purpose. Calamita believes appellate review would interfere with the object and purpose of the Convention which he thinks is to prohibit domestic court interference, unlike the NYC.[477]

However, if appellate review was conducted exclusively within an international setting acquiring enforcement mechanisms through State consent, such as in the realm of the ICSID Convention, it should not succumb to domestic interference. An *inter se* modification for appellate review awards to be facilitated under the ICSID Convention might not undermine the ICSID Convention since a final award would still be produced under the ICISID Convention away from domestic courts. Domestic influence should only arise when the international award is interpreted, recognised, and reacted upon within the domestic system and possibly contrasted against other international awards if tensions arise. The significance of an inter modification will depend on the number of States party to the agreement. The more State parties, the more chance an ISDS appellate review award could achieve justice across borders for both States and non-State actors (Section 3.3.5).

There is a danger that appellate review would increase the time and cost of dispute proceedings. Smaller parties might be at a disadvantage in a two-tier model since a government could drain away the claimant's litigation war-chest until it is compelled to give up.[478] However, an investor could also easily drain away a State's litigation war chest since investors can have more power and wealth than most States.[479] Thus, assistance should be given to more vulnerable parties. UNCITRAL and ICSID acknowledge disparities in wealth between States and look to protect and adhere to the needs of vulnerable States. The WTO offers support and provides financial aid from its members' contribution

[475] Jansen Calamita (2017) op. cit., 615-617.
[476] Although State discretion is not ideal, there will be times where the domestic system will have to deal with tensions between different international systems, see, *Tallinn v Estonia* (2019), op. cit., [541].
[477] ibid, 610-612.
[478] *International Thunderbird Gaming Corp v Mexico*, UNCITRAL, Separate Opinion by Thomas Wälde of 1 December 2005, [12]–[13]; Wälde, TDM 2/2005, 71 (74), Referenced in Christian Tams (2006) op. cit., 15.
[479] Aidan Green, 'Are multinationals now more powerful than the nation state?' (Spectator, 18 September 2018) <https://www.spectator.com.au/2018/09/are-multinationals-now-more-powerful-than-the-nation-state/> accessed 21 February 2019; Zlata Rodionova, 'World's largest corporations make more money than most countries on Earth combined' (The Independent, 13 September 2016); 'The ten largest ones, such as Exxon, Shell, and Wal-Mart, have collective revenue exceeding the combined revenue of 180 states', see Global Justice Now, 'Ending Corporate Impunity: The Struggle to Bring about a Binding UN Treaty on Transnational Corporations and Human Rights', Raw data on 2017 revenues of governments and corporations (2018).

in the WTO advisory centre (see Chapter 2.5.2).[480] An advisory centre in IIL could assist States in investment disputes and investment treaty making.[481]

Tom Bingham argues dispute resolution not being 'both restrictive and [incurring] excessive cost or delay' is an element of the RoL.[482] Parties already struggle with cost and time in ISDS which could impact their ability to seek justice,[483] and extra proceedings could deepen these problems. ISDS proceedings could take an average of 4 years with around $1 million in court fees and around $6 million in party costs for investors and $4.6 million for States.[484] An appellate review mechanism could potentially undermine the RoL instead of the proposed purpose of furthering it, but this can be avoided if the procedure is not overburdened, time-consuming, and costly. Under Article 17(5) DSU the WTO appellate body should reach a conclusion to the dispute after only 60 days from a party's decision to appeal, although in practice it can take much longer. Colin Brown argues although most WTO cases are subject to appeal, appeal may not occur as regularly in an investment court, since there is less in-house counsel for investment litigation.[485]

He concedes that many appeals would occur in investment court in the early years of its operation but case load will gradually decrease as case law and precedents establish and appeal would only be granted in warranted cases.[486] Moreover, appellate review could be a better option for saving time and cost and furthering the DRoL and an IRoL than what is offered in the circular proceedings of Article 52(6) ICSID which restarts proceedings after an award had been given but was annulled. Commentators have argued an extra set of bright minds evaluating a case can only further limit the chance of error and this is necessary since an adverse finding/award for an investor would deter other investors from making claims.[487] This thesis agrees and furthers the argument by declaring it is not just investors that are impacted by adverse findings, adverse State findings would deter other States'

[480] See Advisory Centre for WTO Law. Also, the WTO works alongside the UN through a joint institution, the International Trade Centre, which offers additional support to businesses (many of whom are based in developing/emerging economies).
[481] This would come under the WTO or create own centre in IIL through a multilateral instrument, see, Colin Brown, 'A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches' (2017) 32 ICSID Review 673, 689-690.
[482] Tom Bingham (2010) op. cit., ch 8.
[483] *Silverton Finance Service Inc v Dominican Republic*, UNCITRAL, Final Award of 15 March 2017, [47[, [67]. The cost of dual language proved too much for the investor and had to pull out which meant they could not look for justice [47]. Investor was further punished by having to pay the respondents arbitration costs [67].
[484] Matthew Hodgson and Alastair Campbell, 'Investment Treaty Arbitration: cost, duration and size of claims all show steady increase' (Allen & Overy, 14 December 2017) <https://www.allenovery.com/en-gb/global/news-and-insights/publications/investment-treaty-arbitration-cost-duration-and-size-of-claims-all-show-steady-increase> accessed 22 May 2020. Different studies have different statistics.
[485] Colin Brown (2017), op. cit., 684.
[486] ibid, 684.
[487] V.V Veeder 'The Necessary Safeguards of an Appellate System' [2005] TDM 6, 6. Referenced in Christian Tams (2006) op. cit., 28.

right to regulate. WGIII discussed in Chapter 5 could provide interesting insights into how an appellate mechanism responds to consistency, wealth disparities and costs and time. The adjudicators in ISDS are also relevant to this discussion.

3.5 ISDS Adjudicators

This section will firstly evaluate the RoL concerns when selecting and appointing adjudicators in ISDS.[488] My argument is that concerns over the independence and impartiality of adjudicators are aligned to the prevention of arbitrariness, transparency, and equality, and I will demonstrate the importance of reinforcing RoL concerns in both the selection and appointment of adjudicators. This section will discuss current issues regarding the selection and appointment of adjudicators in ISDS, with reference to ICSID, UNCITRAL, and the IBA Guidelines. I then go on to highlight contemporary concerns in the selection and appointment of adjudicators in ISDS, including 'double-hatting', inclusiveness, diversity, self-interest, the so-called 'ISDS industry', and issues of expertise. Lastly, this section will consider questions regarding the selection and appointment of adjudicators in an appellate review mechanism.

3.5.1: RoL concerns in the selection and appointment adjudicators

Impartiality and independence are commonly recognised as elements of the RoL.[489] However, there are concerns that these elements are not fully respected in the selection and appointment of adjudicators in ISDS arbitral settings.[490] These issues relate to conflict of interests that might arise when adjudicators in ISDS are 'double hatting'; a term which refers to the multiple roles an individual might take as arbitrator, counsel, and expert in different cases, sometimes simultaneously.[491] Further issues relating to adjudicators concern inclusiveness and diversity, self-dealings and self-interest, as well as experience and expertise.[492] This raises questions as to whether ISDS can promote the RoL which requires access to justice.

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[488] Adjudicators in ISDS commonly sit as arbitrators in arbitration proceedings, see UNCITRAL arbitration rules (2010), and ICSID arbitration rules (2006), and the IBA Guidelines on Conflicts of Interest in International Arbitration, Adopted by resolution of the IBA Council on Thursday 23 October 2014.

[489] Venice Commission (2011), op. cit., [41]; Simon Chesterman (2008), op. cit., 344; James Crawford (2003), op. cit., 4, 10; Jeremy Waldron (2011), op. cit., 316-317; Robert McCorquodale (2016), op. cit., 282; Velimir Zivkovic (2020) op. cit., 5; Tom Bingham (2010), op. cit., ch 9; Joseph Raz, 'The Rule of Law and its Virtue', in Raz*, The Authority of Law: Essays on Law and Morality* (OUP, 1979), ch 11.

[490] Sergio Puig (2014), op. cit; Malcolm Langford, Daniel Behn, and Runar Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 Journal of International Economic Law 301; Phillipe Sands, 'Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel', in Arthur Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (New York: Brill, 2012); Muthucumaraswamy Sornarajah, 'An International Investment Court: panacea or purgatory?' (Colombia Centre for Sustainable Investment: Columbia FDI Perspectives, Perspectives on topical foreign direct investment issues No. 180 August 15, 2016); Gus Van Harten (OUP 2020), op. cit.

[491] Ibid.

[492] Ibid.

The ability of ISDS to reinforce RoL elements such as preventing arbitrariness, implementing transparency, and promoting equality can be closely aligned with independence and impartiality of dispute settlement. In order to prevent arbitrariness, adjudicators must exercise their powers fairly, in good faith, according to the purpose for which those powers were given, and without exceeding the boundaries of such powers or using them unreasonably.[493] Transparency, which is closely related to the prevention of arbitrariness, refers to the exchange of documents and public access to information.[494] This can be used to further access to justice and due process,[495] and help build strong institutions that protect rights and principles and achieve justice.[496] There is demand for both equality before the law and equality in the application of the law.[497] Adjudicators not acting reasonably or fairly, not fully or accurately disclosing relevant information, or not treating individuals or content (like identifiable laws or facts in the dispute proceedings) equally will restrict the ability of ISDS to provide an environment for independent and impartial proceedings.

ISDS concerns relating to such matters as diversity of arbitrators, transparency in selection and appointment of arbitrators, costs of ISDS procedures (such as arbitration fees), and conflict of interests can be attributed to the 'closed nature of the community and its ability to engage in self-dealing'.[498] Measures which foster impartial and independent adjudication like limiting arbitrators 'double hatting' and capacity for conflict of interest will help achieve appropriate access to justice and due process to parties seeking a fair hearing.[499] Qualifications and procedures in the selection and appointment of adjudicators that can reinforce the prevention of arbitrariness, enhance transparency, and promote equality can assist ISDS to be considered more impartial and independent.

3.5.2: ICSID, UNICITRAL, and IBA

This section will explore the selection and appointment procedures that exist in ISDS institutions and highlight the corresponding RoL concerns that arise in the context of these settings. The update of

[493] Tom Bingham (2010), op. cit., 66-67, 294, ch 6.
[494] Joseph Raz, in Raz (1979), op. cit., ch 11; Lon Fuller (1964), op. cit., esp ch 2; Jeremy Waldron (2011), op. cit., 316-317; Tom Bingham (2010), op. cit., 66-67, 294, ch 3.
[495] UN SDGs (2015-2030), op. cit., Goal 16.
[496] 'Peace, Justice and Strong Institutions' (UN), op. cit; Rafael Peels, Anselm Schneider, Elizabeth Echeverria and Jonas Aissi, 'Corporate Social Responsibility (CSR) in International Trade and Investment Agreements: implications for states, businesses and workers' (Conference Paper, 2015) <https://www.global-labour-university.org/fileadmin/GLU_conference_2015/papers/Peels_et_al.pdf> accessed 3 August 2020; Clair Gammage and Tonia Novitz (2019), op. cit., 8.
[497] Simon Chesterman (2008), op. cit., 336; Friedrich Hayek, *The Political Ideal of the Rule of Law* (National Bank of Egypt 1955) 34; Joseph Raz, in Raz (1979), op. cit., ch 11; Robert McCorquodale (2016), op. cit., 292; Tom Bingham (2010), op. cit., ch 4-5; Albert Dicey (1885), op. cit., Pt II, 120; Velimir Zivkovic (2020) op. cit., 5-6
[498] Malcolm Langford, Daniel Behn, and Runar Lie (2017), op. cit., 305.
[499] Tom Bingham (2010), op. cit., 66-67, 294, ch 9; James Crawford (2003), op. cit., 4, 10; Venice Commission (2011), op. cit., [41]; Lon Fuller (1964), op. cit., esp ch 2; Jeremy Waldron (2011), op. cit., 316-317; Velimir Zivkovic (2020) op. cit., 5-6; Robert McCorquodale (2016), op. cit., 292.

ICSID arbitration rules in 2022 lies outside the scope of this thesis, for which the original cut-off date for research was February 2021, so for consistency's sake the appropriate reference point remains the 2006 arbitration rules and the ICSID Convention. The ICSID rules provide that ICSID State parties can select up to 4 arbitrators to be on the ICSID panel.[500] These individuals shall meet certain qualifications such as having 'high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment'.[501] However, most individuals appointed on the ICSID panel are never assigned as arbitrator in ICSID proceedings.[502] Furthermore, the disputing parties can agree to select other individuals not on the ICSID panel in ICSID proceedings,[503] but they shall possess the same qualifications as those on the ICSID panel.[504] The majority of adjudicators in ICSID cannot have the same nationality of either party unless the parties agree,[505] which could assist impartiality and independence.

Arbitrator panel members can be disqualified if they 'manifestly lack' the required qualifications of the ICSID panel.[506] However, it is noticeable that the ICSID panel qualifications (listed above) focus on economic criteria like commerce, industry or finance, even though ISDS claims commonly involve social and cultural aspects suited for more public international law expertise.[507] Conflict of interests which can impact independence or the availability of the arbitrator to deliver a verdict in a reasonably timely manner is not expressed within the ICSID qualifications.[508] UNCITRAL arbitration rules allows arbitrators to be challenged if there are 'justifiable doubts' as to the arbitrator's impartiality or independence.[509] However, challenges under UNCTRAL are more limited as the UNICTRAL rules do not mention experience or expertise or conflict of interests, and UNCITRAL also does not have a panel of adjudicators like ICSID. In ICSID, individuals can sit simultaneously in an ICSID case and in annulment proceedings, even though in annulment proceedings it is the chairman of ICSID's administrative counsel that selects the arbitrators.[510] Furthermore, from the start of ICSID to 2014, there have only

[500] ICSID Convention (1965), op. cit., art 13.
[501] ibid, art 14.
[502] Sergio Puig (2014), op. cit., 416.
[503] In annulment proceedings the chairman of the Administrative Council will select adjudicators that were not on the tribunal that rendered the original award, see ICSID Convention (1965), op. cit., art 52(3).
[504] ICSID Convention (1965), op. cit., art 41.
[505] ibid, art 39; Rule 1 of the ICSID Arbitration Rules (2006) excludes disputing parting selecting an arbitrator that represents their nationality if there are less than 3 arbitrators. Rule 3 indicates the disputing parties select their own arbitrator and agree upon the president of the tribunal or the chairman of the Administrative Council will if no agreement.
[506] ICSID Convention (1965), op. cit., art 57. Rule 9 of the ICSID Arbitration Rules (2006) indicates the other arbitrators on the panel will decide whether to disqualify the arbitrator in question and if the other arbitrators cannot decide the chairman of the Administrative Council will.
[507] ICSID Convention (1965), op. cit., art 13.
[508] Ibid.
[509] UNCITRAL Arbitration Rules (2013), art 12.
[510] Sergio Puig (2014), op. cit., 400; ICSID Convention (1965), op. cit., art 52(3).

been three successful arbitrator disqualification proceedings, although some do resign when challenged or during disqualification proceedings.[511]

Moreover, although the IBA Guidelines do recognise the importance of the ethical conduct of arbitrators,[512] these ethical standards are not legally binding and are written from an international commercial arbitration aspect. Arbitrators cannot be sanctioned for failure to comply, and they do not expressly prohibit double hatting.[513] Similarly to UNCITRAL and ICSID, the IBA Guidelines endorse independence and impartiality as they recommend arbitrators do not take appointments if there are 'justifiable doubts' as to whether they are independent and impartial. The IBA Guidelines indicate adjudicators should surrender appointments before or during the term if they are influenced by factors outside the merits of the case presented by the disputing parties. It seems double hatting could give rise to an appearance of conflict of interest which could compromise independence and impartiality. However, the IBA Guidelines are reliant on self-regulation and self-policing.[514] Other arbitration rules like the Stockholm Chamber of Commerce and International Chamber of Commerce also seem to avoid expressly prohibiting double hatting.[515]

3.5.3: Concerns in the selection and appointment of adjudicators: double-hatting, inclusiveness, diversity, self-interests, ISDS industry, and expertise.

An example of double hatting is when Mr Gaillard was the claimant appointed arbitrator and the claimant appointment counsel in two cases simultaneously involving similar legal issues.[516] The respondent challenged the arbitrator and the Hague Court pressed him to drop one role and he subsequently dropped the counsel role.[517] However, Mr Gaillard chose to stay as arbitrator in the case in which the challenge had been made with the risk that a grudge could be held against the respondent that raised the challenge. While there was no evidence of actual bias, which could compromise independence and impartiality, such a choice raises questions of legitimacy and impartiality, which could have an effect on RoL concerns such as transparency and arbitrariness.[518] There is a danger that,

[511] Sergio Puig (2014), op. cit., 405-406.
[512] IBA Guidelines on Conflicts of Interest in International Arbitration, Adopted by resolution of the IBA Council on Thursday 23 October 2014.
[513] Malcolm Langford, Daniel Behn, and Runar Lie (2017) op. cit., 324.
[514] ibid, 324.
[515] ibid, 324.
[516] *Telekom Malaysia Berhad v Ghana*, PCA Case No. 2003-03, UNCITRAL, Settled; *Consortium R.F.C.C. v Morocco*, ICSID Case No. ARB/00/6, Decision on Annulment of 18 January 2006.
[517] *Ghana v Telekom Malaysia Berhad*, Hague District Court, Challenge No. 13/2004, Petition No. HA/RK 2004.667, 18 October 2004; Challenge 17/2004, Petition No. HA/RK/2004/778, 5 November 2004.
[518] Malcolm Langford, Daniel Behn, and Runar Lie (2017), op. cit., 324.

even if individuals have no intention to benefit themselves when acting as arbitrator and counsel simultaneously, they may be unwittingly influenced subconsciously.[519]

The top six most frequent individuals that took up the position of arbitrator in ISDS procedures up until 2017 did not double hat and stayed as arbitrator in all ISDS proceedings in which they participated in.[520] However, double hatting is common for some of the most notable ISDS adjudicators.[521] Some have stopped double hatting, but only because they have taken up roles in different systems or have reached retirement age.[522] This *quid pro quo* system, can result in counsel selecting an arbitrator who, the next time around when the arbitrator is counsel selects the previous counsel as arbitrator.[523] However, this will not advance the RoL.[524] It can produce arbitrary outcomes for the benefit of self-interest. Some argue limiting double hatting is not possible as the class of ISDS professionals is small, and it would not be economical for an individual to give up their counsel position when there is no guarantee they would be selected as arbitrator.[525] However, the problem may be a lack of inclusiveness for individuals to enter ISDS as counsel or arbitrators, rather than a lack of talent available. This raises issues as to the equality of the system.

There could be a lack of inclusivity resulting in a lack of diversity between adjudicators in selection and appointment due to preferential attachment between a number of connected individuals that have formed social clusters creating a situation where elite likeminded individuals dominate ISDS proceedings.[526] This observation has been made by Sergio Puig who conducted empirical research on the social structure of ISDS in ICSID between 1932-2014. There are some limitations to the arguments of Puig as the data was only from investor-State arbitrations in ICSID within this time period.[527] Furthermore, the data only considered the position of arbitrators in ISDS proceedings and not legal counsel or tribunal secretaries which are involved in arbitrator appointments, expert witnesses who can advise the adjudicators on certain issues, or the different roles of arbitrator as the presiding arbitrator is most responsible for case management and can have the most influence in the final decision as they are usually not appointed solely by one party.[528] However, Puig's research

[519] Phillipe Sands in Rovine (2012), op. cit., 31-32; Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 22(4) Arbitration International 495.
[520] Malcolm Langford, Daniel Behn, and Runar Lie (2017), op. cit., 320.
[521] ibid, 325, 328.
[522] ibid, 326.
[523] Thomas Buergenthal (2006), op. cit.
[524] ibid
[525] Luke Eric Peterson, 'Arbitrator Decries "Revolving Door" Roles of Lawyers in Investment Treaty Arbitration', Investment Arbitration Reporter (25 February 2010).
[526] Sergio Puig (2014), op. cit.
[527] ibid, 390-391.
[528] Malcolm Langford, Daniel Behn, and Runar Lie (2017), op. cit., 303-304.

nonetheless raised further justifiable concerns that relate to ISDS concerns that were discussed in UNCITRAL WGIII in respect to adjudicators (see Chapter 5). Puig's study also demonstrated how important the role of networks can be in securing appointment,[529] which can lead to certain individuals obtaining high influence and power within the system.[530]

Puig revealed that the 25 most central ICSID adjudicators have close interconnections with each other and rarely have connections to individuals outside this core group which limits inclusiveness.[531] The more arbitrations in which an individual is involved, the more connections they make, so the more central they become.[532] This increases their reputation and can enhance the chance of further appointments as arbitrator and to influence IIL to a greater extent.[533] Certain ISDS arbitrators obtaining such influence can increase consistency of ISDS awards as likeminded individuals would be making awards, but allowing a limited number of arbitrators to dominate the system is disproportionate and arbitrators can peruse double hatting which can promote their influence further and cause conflicts of interest.[534] This in turn raises questions over their impartiality and independence.[535]

ISDS also raises questions about diversity of the stakeholders in the system. This is because 10% of the total adjudicators that have been in ICSID proceedings make up half of all ICSID proceedings from its creation to 2014.[536] While 87 nationalities were represented, 7 nationalities of western developed States represented half of the arbitrator appointments.[537] Although a woman had the experience of being an arbitrator in the most ICSID proceedings, men had 93% of arbitrator appointments.[538] In all ISDS cases up until 2017, the top 25 arbitrators account for 4% of all investment arbitrators (629 in total), but constituted just over a third of all arbitral appointments (991 of 2676).[539] In general, out of all ISDS cases, male individuals from developed States or with an academic background in the Global North predominated in ISDS positions of arbitrator, counsel, and expert witness, with the exception of tribunal secretaries the distribution of which is more evenly balanced.[540]

[529] ibid, 309.
[530] ibid, 328
[531] Sergio Puig (2014), op. cit., 411.
[532] ibid, 422-423.
[533] ibid, 422-423.
[534] ibid; Phillipe Sands in Rovine (2012), op. cit., 28–49; Phillipe Sands, 'Developments in Geopolitics – The End(s) of Judicialization?' 2015 ESIL Conference Closing Speech, 12 September 2015.
[535] Ibid.
[536] Sergio Puig (2014), op. cit., 403.
[537] ibid, 405. These were New Zealand, Australia, Canada, Switzerland, France, the UK, and the US).
[538] ibid, 404-405.
[539] Malcolm Langford, Daniel Behn, and Runar Lie (2017), op. cit., 310.
[540] ibid, 314-319.

If only a certain core group of arbitrations are predominantly hearing cases, there may be consistency and this could be furthered if adjudicators are influencing each other.[541] However, such consistency may act unequally on the disputing parties as there has been a perception that arbitrators favour investors and investments and also favour developed States over non-developed States.[542] This links to allegations of for-profit arbitration where it is claimed that arbitrators drag cases out to receive sustained income and favour broad interpretation of investor protections which thereby encourage more ISDS cases and improve arbitrators' future employment prospects.[543]

Adjudicators, experts, lawyers, academics, law firms, think tanks, and other relevant actors acquiring a vested interest in ISDS flourishing have been labelled part of the 'ISDS industry',[544] or 'transnational capitalist class' (TCC).[545] These individuals can enhance for profit arbitration by holding multiple roles and attracting claims by encouraging investment friendly treaty interpretations, which favour a small class of private wealthy investors over public citizens.[546] Gus Van Harten highlights the internal contradictions of the ISDS industry which is comprised of individuals who have a vested financial interest in the continuation of ISDS: they write academic pieces against ISDS reform while praising current ISDS practices including cases where they have acted as arbitrators, and support wide investor protections which tribunals cite.[547] Similarly, James Gathii raises concerns about the practices of these individuals, and other elite individuals which also benefit from ISDS flourishing who reside in arbitration-friendly jurisdictions and hold both State positions and interests in MNCs.[548]

Of the top six most frequent individuals that took up the position of arbitrator, some acted predominantly as president arbitrator while others acted predominantly as wing arbitrator only or were frequently appointed by one type of litigant, either the respondent (State) or the claimant (investor).[549] Wing arbitrators are appointed by one disputing party as opposed to the president arbitrator who is appointed upon the agreement of the parties and is most responsible for case management.[550] There are other individuals outside this top six also predominantly appointed as wing arbitrator by one type of litigant.[551] These wing arbitrators could highlight strongly sided views to

[541] Sergio Puig (2014) op. cit., 400.
[542] Muthucumaraswamy Sornarajah (2016), op. cit; Malcolm Langford, Daniel Behn, and Runar Lie (2017), op. cit., 305.
[543] Gus Van Harten (2020) op. cit., 11-13.
[544] ibid, 11-13, 133-136, 140-142.
[545] James Gathii (2021), op. cit. 8-15.
[546] Gus Van Harten (2020), op. cit., 11-13.
[547] ibid, 140-142.
[548] James Gathii (2021), op. cit., 8-15.
[549] Malcolm Langford, Daniel Behn, and Runar Lie (2017), op. cit., 310.
[550] Ibid, 303-304; Sergio Puig (2014), op. cit., 397-398.
[551] Malcolm Langford, Daniel Behn, and Runar Lie (2017), op. cit., 310; Sergio Puig (2014), op. cit., 403, 418.

attract future appointments,[552] Adjudicator influence could rise due to their consistency on certain beliefs which favour the respondent or claimant, but such beliefs may be controversial due to their determination to seek to the needs and priorities of either the State or investor for future employment.[553] Consistent controversial beliefs due to a focus on securing future employment in ISDS is unlikely to lead to correct awards or to reinforce an IRoL. Another issue related to the correctness of awards is that human rights are fenced out of IIL and instead focus on investors rather than parties impacted by investment.[554] This concern related to the prevention of arbitrariness links to the qualifications of adjudicators.

Although the shift from contract-based ICSID arbitrations to investment treaty-based ICSID arbitrations in *AAPL v Sri Lanka*[555] suggested that ISDS had gained a significant public international law dimension, many ISDS adjudicators only possess private commercial law expertise.[556] ICSID partners with international commercial arbitration centres and there is an overlap of adjudicators and counsel in both commercial arbitration and investor-State arbitration.[557] It is thus unsurprising that adjudicators in ISDS procedures commonly have commercial backgrounds as opposed to experience in public international law.[558] This raises the question as to whether commercial arbitration paradigms of confidentiality between private parties and private party autonomy are suitable for investor-State disputes.

International commercial law adjudicators can form different perspectives on procedural and substantive issues like the function of disputes, the role of law, sources of law, the State, and the investor, compared to public international law adjudicators.[559] The ability to balance business objectives against societal concerns consistent with the RoL in the ISDS setting could be limited where the adjudicators' focus is commercial. Depending on their background, adjudicators could be conservative in favouring the protection of property rights, or they could be progressive in giving

[552] Sergio Puig (2014), op. cit., 400. The president arbitrator is commonly not solely appointed by one party so they would be less likely to make strongly sided views, see, Malcolm Langford, Daniel Behn, and Runar Lie (2017), op. cit., 304, and, Sergio Puig (2014), op. cit., 418.
[553] ibid, 422-423.
[554] James Thuo Gathii (2021) op cit., 23.
[555] *Asian Agricultural Products Ltd v Sri Lanka* (1990), op. cit., [38].
[556] Stephan Schill (2011) op, cit., 883, 889; Andrew Lang, 'World Trade Law After Neoliberalism' (2014) 23 Social and Legal Studies 408.
[557] Sergio Puig (2014), op. cit., 402.
[558] ibid, 402.
[559] Stephan Schill (2011), op. cit., 888; Bernardo Cremades and David Cairns, 'Contract and Treaty Claims and Choices of Forum in Foreign Investment Disputes', in Norbert Horn (ed), *Arbitrating Foreign Investment Disputes* (KLI 2004); Andrew Lang (2014) op. cit.

greater weight to other societal values such as protection of the environment.[560] More arbitrators seem to have commercial expertise and are therefore more likely to accept the priorities of investors than the governments of the State respondents. Adjudicators in ISDS could develop multiple competencies with experience, but until then, and with their professional background potentially influencing decision-making, inconsistent or incorrect awards could be issued. This is further compounded by the bilateral nature of IIL and ISDS being held in ad hoc tribunals where there are concerns of impartiality and independence in selecting and appointing adjudicators.

The concerns identified above relate to a failure to address arbitrariness, transparency, and equality in the selection and appointment of adjudicators in ISDS. For example, without greater transparency in the appointment process, concerns about expertise, representation, self-interests, and double hatting cannot be identified or addressed. This would impact the equality of the system and its ability to prevent arbitrariness since if the same individuals with the same expertise are dominating ISDS then its prospects of achieving an IRoL for the benefit of all States and actors would be limited. The ability of ISDS to achieve fair outcomes would be compromised as different views may not receive an equal hearing.

3.5.4: Selection and Appointment in an International Appellate Body

To reinforce and strengthen the RoL in ISDS, the issues and concerns outlined in the preceding section would need to be addressed in an appellate review mechanism. Noemi Gal-Or argued justice and especially fairness should be central to an appellate mechanism operating in the international system,[561] regarding selection and appointment of adjudicators as one of the main ways to achieve those objectives.[562] The authority of any appeal process and its promise of finality depends on the integrity of the entire system which must be impartial in its institutional design to produce the most effective judicial outcomes.[563] This means the system must have standards applying to its adjudicators, such as bars to double hatting where conflicts of interest arise.[564] Gal-Or argued inspiration could be taken from the WTO AB which adopted a full-time position model coupled with a requirement for competence, and for candidates to have skills beyond the club of international trade lawyers and practitioners (see Chapter 4.3).[565] Full-time adjudicators would depart from party autonomy and be

[560] Michael Waibely and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' (January 2017), p8, <http://www.yanhuiwu.com/documents/arbitrator.pdf> accessed 20 August 2022.
[561] Noemi Gal-Or (2008), op. cit., 60.
[562] Ibid, 60, 62-63.
[563] Ibid, 62-63.
[564] Ibid, 62-63.
[565] Ibid, 63.

more suited for a multilateral permanent body involving appellate review.[566] Furthermore, an appellate system must have transparency and broad access to justice to reinforce fairness and justice,[567] but such an approach may require the creation of a multilateral instrument (see Chapter 5.4-5.5).[568] This means adjudicators in an appellate review mechanism should be prohibited from double hatting so there could be a requirement that no other advisory work or work as counsel can be performed by any individual while they are appointed as an arbitrator. The adjudicators should have skills beyond international commercial law such as in international public law and be competent to hear submission by third parties concerning social, cultural, and economic issues, for example in relation to sustainable development.[569] Adjudicators should be full-time so they could have payment of a salary to deter them from taking on other work. Adjudicators should represent diversity to better reflect an IRoL and to achieve justice beyond State borders so selection and appointment procedures should consider aspects like geographic regions and genders. A standing body of adjudicators can enhance the consistency and thereby the reputation of an appellate review system.

The appellate mechanism should be designed in a way that minimises the cost and resource implications of appellate review, as it is widely recognised that high costs and time delays can obstruct access to justice.[570] In ISDS, disputing parties may already struggle with the high costs associated with arbitration and the lengthy nature of proceedings.[571] However, permanent adjudicators could eliminate the costs and time associated when the disputing parties select and appoint ad hoc adjudicators through party autonomy and the availability of permanent adjudicators can reduce disqualification claims which would further reduce cost and time.[572] Transparency and disclosure in the selection and appointment of full-time adjudicators can expose the likelihood of those arbitrators achieving justice and fairness in forming potential conflict of interests, having the expertise to consider all the issues, and representing diversity responds to concerns of the prevention of arbitrariness and equality. Although an appellate body may seem to add to the potential length of proceedings and thus exacerbate issues of cost and time, such a body, provided the methods to selection and appointment of adjudicators are in accordance with the prevention of arbitrariness, transparency, and equality,

[566] Colin Brown (2017) op cit., 683.
[567] Noemi Gal-Or (2008), op. cit., 62.
[568] Nicolás Perrone, 'Making Local Communities Visible: A Way to Prevent the Potentially Tragic Consequence of Foreign Investment' in A. Santos, C. Thomas & D. Trubek, *World Trade and Investment Law Reimagined* (Cambridge University Press, 2019) 179.
[569] ICESCR (1966), op. cit; SDGs (2015-2030), op. cit.
[570] Tom Bingham (2010) op. cit., ch 8.
[571] *Silverton Finance Service Inc v Dominican Republic*, (2017), op. cit., [47[, [67]; Matthew Hodgson and Alastair Campbell (2017), op. cit.
[572] Colin Brown (2017) op cit., 683.

could eventually make ISDS more consistent and help clarify IIL.[573] This would decrease the need for parties to go to ISDS to resolve disputes,[574] and appellate review is a better option than the current circular proceedings of Article 52(6) ICSID (see Section 3.4). Further discussion on adjudicators in appellate review and/or a multilateral two tier system will occur in Chapter 4.3 on the WTO AB, Chapter 4.4 on the two-tier systems of CETA and EU-Vietnam, and Chapter 5 on WGIII discussion for creating multilateral appellate review with capable adjudicators.

3.6 Conclusion

This chapter has assessed the forms of regulating ISDS through a rule of law analysis presented in Chapter 2. The arguments from this chapter are that IIAs can act unequally between States and investors and between certain investors protected by IIAs and general citizens and other investors not protected by IIAs (formal inequality) and States of differing development levels (substantive inequality). MFN can help reinforce equality but only between foreign investors. Investor protections can reinforce formal and substantive elements of the DRoL and an IRoL, but their application is limited as they can be applied inconsistently and impact the States substantive right to regulate. Convergence of IIAs and investor protections through the lens of sustainable investment could limit these problems. It could improve consistency and find a correct balance between State and investor interests.

UNCITRAL provides an inclusive environment that can encourage participation and initiate wider community interest like sustainable development and transparency. UNCITRAL does not currently offer appellate review but could facilitate this with modifications in future. Article V NYC supports the DRoL but it may not be a suitable forum to review international awards since it is focused on achieving justice within State borders rather than across borders. Although many domestic systems have appellate review mechanisms that protect the DRoL, Article V cannot be considered an appellate review mechanism as it only reinforces the formal RoL. The NYC could facilitate appellate review awards, but its effectiveness will depend on the number of disputing parties and States agreeing to waive Article V equally to prevent inconsistency and to uphold the legitimacy of appellate review.

ICSID should also promote sustainable investment and like UNCITRAL has improved transparency in its arbitration rules. Article 54 ICSID supports an IRoL as it achieves justice across State borders, but it may fail to recognise that the DRoL may have to interpret different international awards from different systems which cause tensions. Chapter IV of ICSID cannot be considered an appellate review mechanism as its provisions do not reinforce the substantive roL so cannot adequately reinforce the

[573] ibid, 684.
[574] ibid, 684.

DRoL and an IRoL. Article 53 may reject appeal within the ICSID system, and the scope for overcoming this barrier has been discussed above.

This chapter has shown that the current system contains limited regulations on who can sit as adjudicators that is relevant to the RoL such as the arbitrators' obligation of independence and impartiality. There are further limits to how independent and impartial the adjudicators can be when the system cannot adequately prevent arbitrariness, encourage transparency, or promote equality. This is because the same adjudicators operating in private networks dominate ISDS proceedings which limits inclusiveness and diversity. The adjudicators commonly come from a commercial law background which restricts their ability to consider all relevant law. Adjudicators can double hat and wing adjudicators can commonly be appointed only or predominantly by one type of litigant. This raises questions about the decision-making of adjudicators and reinforces concerns that the RoL may be undermined in ISDS. The creation of an international appellate body could overcome some of these challenges if it is designed in a way that explicitly addresses RoL concerns.

The remaining parts of this thesis will examine the proposals for multilateral and unified appellate review mechanisms with capable adjudicators, with a focus on the RoL dimensions of these proposals. It will question whether, and to what extent, such proposed reforms might further the DRoL and an IRoL and their formal and substantive elements. The next chapter will evaluate multilateral instruments and appellate review mechanisms in international economic law to gain insights in how ISDS could be reformed. This includes the multilateral agreement on investment (MAI), the WTO and its appellate body, and the EU agreements.

Chapter 4: Multilateral Instruments and Appellate Review Mechanisms

4.1 Introduction

This chapter shall apply analysis of the 'rule of law' (RoL) outlined in Chapter 2 to multilateral instruments and appellate review mechanisms. Chapter 3 investigated the extent to which the current forms of regulations on investor-State dispute settlement (ISDS) can reinforce or threaten the domestic RoL (DRoL) and an international RoL (IRoL), as understood in both formal and substantive terms. This chapter will build upon Chapter 3 by exploring whether multilateral instruments and appellate review mechanisms can enhance the DRoL and an IRoL in ISDS. This chapter will firstly (in section 4.2) present the Multilateral Agreement on Investment (MAI), a proposal that was initially celebrated for its attempt to make investment law operate according to norms adopted multilaterally, but was subsequently abandoned. The thesis will investigate why this proposal failed and then explore what lessons can be learned for future proposals to reform ISDS.

The next section (4.3) will present an analysis of the World Trade Organisation (WTO) and its appellate body (AB), as it provides an example of a unified multilateral arbitration system in international economic law (IEL). Of importance to this discussion is the current crisis facing the future of the AB, and the creation of the multi-party interim appeal arbitration arrangement (MPIA) as a response to that foregoing issue. Section 4.4 will then move the discussion to the EU trade agreements that contain investment aspects and appellate review mechanisms, such as the Comprehensive Economic and Trade Agreement (CETA), and EU-Vietnam, and a 'mega regional' agreement, the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), to which Canada and Vietnam are parties. This chapter will focus on the importance of inclusive and transparent negotiations (MAI), an operational AB (WTO), and provisions governing a two-tier system (trade agreement), which can reinforce the RoL.

4.2 Previous Proposal: Multilateral Agreement on Investment

This section details the story of the MAI. It is structured chronologically but takes account of the order in which developments became transparent to interested actors and not necessarily when they started. This order can further showcase the problems of the MAI such as its struggle to reinforce the DRoL and an IRoL, and better depict the tensions between interested actors. This section will set the scene for the initiative taken by the Organisation for Economic Co-operation and Development (OECD), which promoted the MAI, before investigating the MAI's intended purpose, and how the OECD was placed institutionally to engage in this mission. The next step will be to analyse the provisions of the MAI that were envisaged during these negotiations, including the dispute settlement section, and to assess the fall out of the MAI's exposed negotiations. This section will reflect on the

MAI's failings and the lessons that could be learned for future proposals and developments that could better further the DRoL and an IRoL.

4.2.1 The OECD: Its origins and institutional mission

The OECD is an intergovernmental economic organisation originally created to facilitate the Marshall Plan that brought American aid to the shattered western European economies struck down by WW2.[1] Once the Marshall Plan ended, the OECD's significance was limited by the rise of NATO and the Mutual Security Agency which took over the blended economic aid and military assistance aspects of the organisation. In 1961, the OECD was reformed to focus on wider economic issues, like foreign direct investment (FDI), that went beyond the Euro-centric focus of the Marshall Plan. Nevertheless, its founding members after reforming were mostly developed States including 18 European States along with Canada and the US. One of the first actions of the newly reformed OECD was to consider the 'Abs-Shawcross' draft Convention.[2] The purpose of the 'Abs-Shawcross' draft Convention was to contribute to the continued increase of international private capital through fundamental principles of international law regarding the treatment of the property, rights, and interests of aliens.[3] It was believed that a multilateral Convention could eradicate the uncertainties arising from fragmented bilateral agreements, by initiating mutual State conduct that assures nationals of participating States, measures of security and protection of their property, rights, and interests, to encourage the flow of foreign investments.[4] These fundamental principles within the multilateral Convention seemed to be supported by developed States but were not necessarily favoured by others.[5]

The 'Abs-Shawcross' draft Convention[6] influenced the OECD to create its own Draft Convention on the Protection of Foreign Property in 1962 (hereinafter 'OECD 1962 draft').[7] The OECD 1962 draft further attempted to crystallise the formulation of fair and equitable treatment (FET) (discussed in Chapter 3.2.2) outlined in the 'Abs-Shawcross' draft Convention into customary international law.[8] However,

[1] Back then the OECD was called the Organisation for European Economic Co-operation (OEEC). The Marshall Plan also brought aid to Greece and Turkey. 'Organisation for European Economic Co-operation'. <https://www.oecd.org/general/organisationforeuropeaneconomicco-operation.htm> accessed 23 July 2020.
[2] Draft International Convention on Investments Abroad (the Abs-Shawcross Convention) (1960) 9 J PUB L 116.
[3] The Proposed Convention to Protect Private Foreign Investment--Introduction (1960) 9 J Pub L 115, 119.
[4] Ibid.
[5] Ibid.
[6] Other OECD initiatives that might have influenced the MAI were, OECD Code of Liberalisation of Current Invisible Operations; OECD Code of Liberalisation of Capital Movements; OECD Code of Liberalisation of Capital Movements.
[7] OECD Draft Convention on the Protection of Foreign Property (1962) 2 ILM 241.
[8] Theodore Kill, 'Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations' (2008) 106(5) MLR 853, 874-879.

the OECD did not adopt this draft. Less developed southern European Member States resisted,[9] since they may have been cautious of FET,[10] as preceding agreements involving developing States did not reference FET.[11] After some negotiated US amendments to the draft which showed US acceptance that government contracts/treaties with private parties are binding and part of international law,[12] the OECD Council adopted by resolution the revised Convention on the Protection of Foreign Property.[13] This became a model for bilateral investment treaties (BITs) and a basis for ensuring the observance of the principles of international law, including investor protections.[14]

While the amendments crystallised the notion of ISDS detailed in the 'Abs-Shawcross' draft Convention,[15] it received little acceptance in developing States. Some thought this exposed a need for a wider application of these principles in agreements, which could occur at the OECD.[16] The OECD through its Committee on International Investment and Multilateral Enterprise had already led negotiations on the National Treatment Instrument four years earlier.[17] This would have obliged OECD members to grant national treatment to investors of other OECD States, but it failed to gain momentum. This instrument was considered too limited as the international system required something wider and more modern than just national treatment provisions.[18]

4.2.2 Purpose and Intention of MAI

When policy-makers and academics again engaged in the debate about multilateralization of BITs[19] over 1,000 BITs had been concluded.[20] On May 1995 there was consensus within the OECD for

[9] Peter Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now' (2000) 34 Int'l L 1033, 1036.
[10] Theodore Kill (2008) op. cit., 874-879.
[11] Havana Charter, the League of Nations Covenant, and the Bogota Declaration, see, Havana Charter for an International Trade Organization (1948), in U.N. Conference on Trade & Employment, Final Act and Related Documents 8-9, U.N. Doc. E/Conf. 2/78, U.N. Sales No. 1948.I1.D.4 (1948); Organization of American States, Economic Agreement of Bogota, (1948) L. Treaty Ser. No. 25, OAS Doc. No. OEA/Ser.A/4 (SEPF). Theodore Kill (2008) op. cit., 874-879., 878-879.
[12] G.W. Haight, 'International Organizations O. E. C. D. Resolution on the Protection of Foreign Property' (1968) 2(2) The International Lawyer 326, 326-328.
[13] OECD Draft Convention on the Protection of Foreign Property (1967) 7 ILM 117
[14] Peter Muchlinski (2000) op. cit., 1036.
[15] Abs-Shawcross Convention (1960) op. cit., art VII; OECD Draft (1967) op. cit., art 7.
[16] G.W. Haight, (1968) op. cit., 329.
[17] Also, around this time the World Bank, which has ICSID as one of its institutions, drafted a set of guidelines called the World Bank Guidelines on Foreign Investment.
[18] Edward Graham, *Fighting the Wrong Enemy: Antiglobal Activists and Multinational Enterprises* (Institute for International Economics, 2000) 20-22.
[19] Support for the multilateralization of IIL has continued today. Stephan Schill is a supporter of multilateralization of IIL, see, Stephan Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) EJIL 875.
[20] 'BITs & TIPs' (Investment Policy Hub) <https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search> accessed 13 October 2021.

negotiating an MAI which should 'develop a strong, comprehensive framework for international investment that will strengthen the multilateral system'.[21] The MAI was envisaged to be legally binding between State parties,[22] 'provid[ing] high standards for the liberalisation of investment regimes and investment protection, with effective dispute settlement',[23] acting as a 'top down' agreement.[24] Scholars anticipated the MAI to be extremely important,[25] and 'become the benchmark for future international investment agreements' (IIAs).[26] The MAI was envisioned as a 'free standing' treaty.[27] This implies the OECD recognised that its members could not move towards the multilateralization of IIL without the agreement of non-OECD States. The MAI was conceived to reduce the increasing fragmentation and complexity in IIL, which results, in part, from the focus on individual rules on investor and State conduct, which is endemic to bilateralism.[28] Yet, negotiating within the OECD, implies that OECD member States may not find common ground with non-OECD States. Academics believed developing States would gain from MAI membership as it increases investor certainty enabling long-term foreign investment that supports sustainable development as opposed to reciprocity towards market access which undermines the principle of non-discrimination.[29] Discrimination undermines both formal and substantive versions of the DRoL and an IRoL. William Witherell,[30] the OECD Director for Financial, Fiscal and Enterprise Affairs at the time, like the European Commission,[31] and other academics,[32] argued that the 'proposed agreement seeks to level the playing field'.[33] Witherell's 'level playing field' idea could relate to the theory of the MAI supposedly attracting all States so every investor would be treated identically in all States.

[21] 'OECD Begins Negotiations on a Multilateral Agreement on Investment' (OECD Press Release, Paris, 27th September 1995) <https://www.oecd.org/investment/internationalinvestmentagreements/43389907.pdf> accessed 3 June 2020. It was envisioned that negotiations would be completed on May 1997, and five Working Groups were established composed of independent government experts tasked with developing the MAI.
[22] William Witherell, 'The OECD Multilateral Agreement on Investment' (OECD), p 1. <https://unctad.org/en/docs/iteiitv4n2a2_en.pdf> accessed 4 June 2020.
[23] 'OECD Begins Negotiations on a Multilateral Agreement on Investment' (OECD) op. cit.
[24] Edward Graham (2000) op. cit., 54.
[25] William Witherell (OECD) op. cit., p 1.
[26] E.V.K. FitzGerald, R. Cubero-Brealey and A. Lehmann, 'The Development Implications of the Multilateral Agreement on Investment' (Department for International Development, 21 March, 1998) p 4 <https://search.oecd.org/investment/investment-policy/1922690.pdf> accessed 2 September 2020.
[27] The MAI would not be linked/supported by another structure and non-OECD members could accede to it.
[28] William Witherell (OECD) op. cit., p 5.
[29] E.V.K. FitzGerald and others (1998) op. cit., p 4; William Witherell (OECD) op. cit., p 5.
[30] At the time of the MIA negotiations he was the director for financial, fiscal, enterprise affairs of the OECD.
[31] Communication from the Commission, A Level Playing Field for Direct Investment World-Wide, COM/95/42FINAL (Brussels, 1st March 1995).
[32] Michael Daly, 'Investment Incentives and the Multilateral Agreement on Investment' (1998) 32(2) Journal of World Trade 5, 5; E.V.K. FitzGerald and others (1998) op. cit., p 5.
[33] William Witherell (OECD) op. cit., p 1.

There was an assumption that a unified and multilateral system would reduce gaps in inequalities and provide a fairer system reinforcing the RoL, and have the financial benefits of enhanced investment.[34] Although formal equality and fairness could be supported in such a system, the substantive equality and fairness of the system may not be judged until its provisions and the way they impact on the diverse parties to the instrument can be considered. Unequal bargaining positions and power asymmetries between States can exist in the negotiations and application of international organisations and IIAs like BITs (see Chapters 2.5 and 3.2.1-3.2.2). The dominant membership of the OECD, namely capital exporting States, could explain why the MAI failed to realise its potential, an example being the lack of reference to substantive equality.

4.2.3 The MAI in the OECD Setting: Arbitrariness, Transparency, and Equality

The EU initially without the support of other States[35] resisted the OECD hosting the MAI negotiations, preferring the WTO,[36] since it was thought to be a more inclusive setting and one that consisted of more State parties, which had already held successful negotiations.[37] However, this preference could merely be symptomatic of the EU's perception that it could wield more influence in the WTO, as has been illustrated subsequently by its leading role in the creation of the MPIA (see Section 4.3.4). Furthermore, the disciplines of investment and trade are different, notwithstanding points of convergence between the two (see Section 4.3.1),[38] and the OECD was a leading State-centric institution for promoting negotiations and development in IIL and also was made up of States which account for the bulk of foreign direct investment (FDI) flows.[39]

Witherell argued that the OECD was the best forum for negotiations since it 'forms a group of like-minded countries at similar development levels and where liberalization is already very advanced', and where high standards can be achieved.[40] While OECD States could agree upon the substantive content containing more stringent standards protecting the interests of foreign investors (a top-down approach),[41] these standards could conflict with the States' right to regulate. Convergence of standards in IIAs, like investor protections, could be positive in reinforcing the substantive RoL

[34] ibid, p 1.
[35] The First WTO Ministerial Conference (9-13 December 1996).
[36] This resistance may have caused delays in OECD negotiations, See, Edward Graham (2000) op. cit., 24.
[37] Communication from the Commission (1995), op. cit., p 9; Trade Related Investment Measures (TRIMs), Trade Related Aspects of Intellectual Property Rights (TRIPs), and the General Agreement on Trade in Services (GATS).
[38] Peter Muchlinski (2000) op. cit., 1050.
[39] William Witherell (OECD) op. cit., p 7.
[40] ibid, p 7; Elisabeth Smythe, 'Your Place or Mine? States, International Organizations and the Negotiation of Investment Rules' (1998) 7 Transnat'l Corp 85, 101-02.
[41] William Witherell (OECD) op. cit., p 7.

elements of consistency and predictability in practice.[42] However, 'a high degree of convergence of standards'[43] to 'allow better treatment for investors to prevail'[44] as opposed to convergence through sustainable development may not be positive (as explained in Chapter 3.2.2). This could favour investors which could heighten inequalities contrary to the RoL between State and investor, and could conflict with other RoL elements like when States initiate measures to protect human rights. Application of corporate social responsibility (CSR) by putting responsibilities on investors could further equalise these formal and substantive inequalities between State and investor interests. The OECD has created CSR initiatives like the OECD guidelines,[45] although there were non-binding and lacked enforcement powers to hold MNCs accountable for all the abuses they commit (see Chapter 2.7).

Moreover, although similar States could more likely agree upon the substantive content of a multilateral instrument, it would limit inclusiveness, representation, diversity, and unification as most States are not OECD parties.[46] The 25 OECD States in September 1995 for the first negotiating MAI group meeting were mostly wealthy States from Europe,[47] Oceania,[48] and North America.[49] It was claimed the US favoured non-inclusive negotiations as it considered the OECD council a 'safe body' made up of rich States.[50] The US at the time may have favoured stringent standards in the MAI,[51] as it was then by far the largest capital exporting State.[52] Yet improving market access and investor protections in developing States was a purpose of the MAI, the very group not represented in OECD membership.[53] The OECD would be unable to reinforce an IRoL through its attempt to make IIL multilateral if international actors like developing States, which could highlight international issues like substantive inequalities, were absent from developments. There were suggestions that non-OECD

[42] For discussion on convergence of IIAs, see, Stephan Schill (2011), op. cit., 893.
[43] William Witherell (OECD) op. cit., p 9.
[44] ibid, p 13.
[45] The Organisation for Economic Co-operation and Development (OECD) Declaration and Decision on International Investment and Multinational Enterprises (1976) 15 ILM 967.
[46] Peter Muchlinski (2000) op. cit., 1039.
[47] Europe made up 19/25 State parties.
[48] Oceania (Australia and New Zealand) made up 2/25 State parties.
[49] North America (Canada, Mexico, US) made up 3/25 State parties. Japan was the only other OECD State party.
[50] 'Multilateral Agreement on Investment' (Global Policy) <https://www.globalpolicy.org/globalization/globalization-of-the-economy-2-1/multilateral-agreement-on-investment-2-5.html> accessed 3 June 2020.
[51] Peter Muchlinski (2000) op. cit., 1039.
[52] 'World Integrated Trade Solutions' (World Bank) <https://wits.worldbank.org/CountryProfile/en/Country/WLD/Year/1995/TradeFlow/EXPIMP/Partner/by-country/Product/UNCTAD-SoP4> accessed 23 July 2020.
[53] Peter Muchlinski (2000) op. cit., 1039.

States could participate through consultation,[54] although not to engage in formal discussion, but rather for the purpose of encouraging accession to the agreement once concluded.[55] This disregards procedural fairness and seems unduly manipulative.

In 1997 an MAI Draft was leaked by Multinational Monitor, an NGO, which revealed that the OECD had been conducting effectively secret negotiations relating to the MAI.[56] Secrecy goes against the substantive RoL element of transparency, and the OECD's own Declaration and Decisions on International Investment and Multinational Enterprises (1976) which strives for an open and transparent environment for international investment.[57] While entities like Business and Trade Committees were 'kept well informed during the negotiations',[58] the dissemination of information does not mean they actively participated, and the exclusionary nature of the negotiations suggests that non-OECD member and developing State participation was limited.[59]

Moreover, even OECD members may not have effectively participated as the negotiations were left to low-ranked bureaucratic individuals who had limited negotiating power or access to high-ranking State officials, and business communities were unaware of these negotiations.[60] This contrasts with other developments in IEL around the same period as the MAI such as the Uruguay round,[61] and North American Free Trade Agreement (NAFTA),[62] where the higher-ranking State officials led negotiations.[63] The problem is that NGOs and other public actors treated these MAI negotiations as significant, non-transparent, non-inclusive, and with suspicion, and this subsequent negative narrative flowed into the public sphere.[64]

[54] 'OECD Begins Negotiations on a Multilateral Agreement on Investment' (OECD) op. cit.; William Witherell (OECD) op. cit., p 13. Witherell believed consultations with non-OECD States could occur in the OECDs Advisory Group on Investment and its Policy Dialogue Workshops.
[55] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2nd edn, CUP 2004) 291, 293; Eric Neumayer, 'Multilateral Agreement on Investment: Lessons for the WTO from the Failed Oecd-Negotiations' (1999) 46(6) Wirtschaftspolitische Bloetter 618.
[56] Peter Muchlinski (2000) op. cit., 1039-1040; 'Multilateral Agreement on Investment' (Global Policy) op. cit.
[57] 'OECD Declaration and Decisions on International Investment and Multinational Enterprises' <https://www.oecd.org/investment/investment-policy/oecddeclarationanddecisions.htm> accessed 4 June 2020.
[58] Edward Graham (2000) op. cit., 18-20. The OECD also released statements about the negotiations and negotiations are generally private.
[59] Muthucumaraswamy Sornarajah (2004) op. cit., 291, 293.
[59] Eric Neumayer (1999) 46(6) op. cit.
[60] Edward Graham (2000) op. cit., 17-18.
[61] The Uruguay round is where the WTO took over from GATT.
[62] NAFTA is a trade agreement between Canada, Mexico, and the US.
[63] Edward Graham (2000) op. cit., 17-19.
[64] Peter Muchlinski (2000) op. cit., 1040; Edward Graham (2000) op. cit., 39-41; 'Multilateral Agreement on Investment' (Global Policy) op. cit.

4.2.4 MAI Provisions in the context of the environment and State sovereignty and NGO influence in the public sphere

The MAI provides an interesting example of how non-state actors have influenced negotiations and decision-making in a state-centric system containing rich States, and how reform in IIL must be inclusive, transparent, and promote international co-operation. Once the MAI draft was exposed, the MAI was rejected by NGOs, citizens groups and governments of global south countries. They believed it disregarded national laws, citizens' rights and State sovereignty, and would lead to a 'race to the bottom' in environmental and labour standards.[65] NGOs were eventually invited to negotiations, but they were only intent on its demise rather than helping to amend the draft instrument.[66] Regular NGO led protests were held against the MAI,[67] which influenced the abandonment of the negotiations in the OCED, and ultimately prevented the EU's attempt to move negotiations to the WTO.[68]

The tension created after the leaked negotiations created a distraction from the MAI being a work in progress that was open to change. In summary, the last MAI draft before negotiations collapsed consisted of twelve major sections: the general provisions and preamble;[69] scope and application;[70] treatment of investors and investments;[71] investment protection;[72] dispute settlement;[73] exceptions and safeguards;[74] financial services;[75] taxation;[76] country-specific exceptions;[77] relationship with other international agreements;[78] implementation and operation;[79] and final provisions.[80]

The preamble in Section I outlined the goals, purpose, and intention of the MAI. The agreed preamble contents at that stage were to: enhance friendship and economic cooperation; recognise IIL is growing; indicate good treatment of foreign investors can enhance employment possibilities and increase citizens standard of living; build a fair, transparent and predictable investment regime; and establish a broad multilateral framework for IIL with high standards for the liberalisation of investment

[65] 'Multilateral Agreement on Investment' (Global Policy) op. cit.
[66] Edward Graham (2000) op. cit., 47.
[67] ibid, 39-41. Protests held from 1998 outside the OECD offices in Paris, and WTO ministerial meetings, in particular Geneva in June 1998 and Seattle in November 1999.
[68] ibid, 48-49.
[69] The Multilateral Agreement on Investment, (Draft Consolidated Text, 22 April 1998), s 1.
[70] ibid, s 2.
[71] ibid, s 3.
[72] ibid, s 4.
[73] ibid, s 5.
[74] ibid, s 6.
[75] ibid, s 7.
[76] ibid, s 8.
[77] ibid, s 9.
[78] ibid, s 10.
[79] ibid, s 11.
[80] ibid, s 12.

regimes and investment protection and with effective dispute settlement procedures.[81] There was intention to include environmental and sustainability considerations,[82] which the MAI outlined that sustainable investment, environmental policies, and economic growth link together. However, there was no guarantee they would be included in a final draft.[83] Furthermore, although a preamble could have interpretive significance,[84] it is not binding and merely a statement of goals.[85] Sustainability and environmental considerations are only meaningful if contained in the binding provisions of the MAI, but their only reference was in the contemplation of a 'not lowering standards' provision which prohibits parties lowering environmental standards to encourage investment.[86]

Yet investment can limit environmental-related considerations as seen in the context of solidarity rights (see Chapter 2.6.4).[87] Annex 1 and 2 of the MAI contained proposals for environmental considerations,[88] but the proposals were just recommendations submitted by one delegation which proposed extra environmental provisions,[89] or the chairman who mainly just added to the 'not lowering standards' provision.[90] Some of the proposals could be 'practically meaningless' as they did not contain the persuasive language necessary of being interpreted to protect State environmental measures over the investor protections listed in the same agreement or balancing State and investor interests.[91] For example, the OECD guidelines could have been annexed to the MAI text,[92] but the OECD Guidelines are non-binding and the MAI had no intention to make them binding.[93]

Section II included the definition of investor which covers both human beings and business enterprises.[94] The natural person must have the nationality or permanent residence of the contracting

[81] ibid, preamble, 7.
[82] ibid, preamble, 7-8. The Rio Declaration on Environment and Development (1992) UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874, and Agenda 21 could have been referenced in final draft.
[83] MAI (1998) op. cit., preamble, 7-8.
[84] Muthucumaraswamy Sornarajah (2004) op. cit., 312.
[85] Edward Graham (2000) op. cit., 56.
[86] MAI (1998) op. cit., 53-55.
[87] Declaration on the Rights of Indigenous People, GARes61/295 of 13 September 2007 (hereinafter Indigenous Declaration (2007); *Bilcon v Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability of 17 March 2015, [127], [734]-[738]. Referred to rights to a healthy environment and economic and social development; *Aguas del Tunari v Bolivia*, ICSID Case No. ARB/02/3, Petition by NGOs and people to participate as an intervening party or amici curiae of 29 August 2002, [1]. Referred to right to natural resources; The OECD Secretariat was concerned that the MAI could limit the possibilities for negotiating multilateral environmental agreements (MEAs), see, OECD Secretariat, 'Relationships between the MAI and selected Multilateral Environment Agreements' (MEAS) (OECD, 17 March 1998) <https://www.oecd.org/daf/inv/internationalinvestmentagreements/1922682.pdf> accessed 6 June 2020.
[88] MAI (1998) op. cit., annex 1, annex 2.
[89] ibid, annex 1, 119.
[90] ibid, annex 2, 139-144.
[91] Muthucumaraswamy Sornarajah (2004) op. cit., 312.
[92] MAI (1998) op. cit., annex 2, 140, [10].
[93] ibid, annex 2, 140, [10].
[94] ibid, s 2, 11.

party,[95] and the legal person must have been constituted or organised under the applicable law of the contracting States, whether private or public and profitable or non-profitable.[96] This provision related to geographical scope could promote State sovereignty and avoid extraterritoriality.

Section III outlined that contracting States should treat investors of another contracting party and their investment no less favourably than it does for both its own investors and investments and other foreign investors and their investments.[97] This represents the national treatment and most favoured nation (MFN) treatment investor protections (see Chapter 3.2.1-3.2.2). These protect non-discrimination which is an element of both the DRoL and an IRoL. Edward Graham believes the application of non-discrimination can maximise investment promotion.[98] A more modern approach since his 2000 writings is to safeguard sustainable investment (see Chapter 2.6.5). States could prefer to give certain investments protection over others,[99] but the provisions of Section III allowed these protections to apply to both the pre-entry and post-entry phase. States, due to Section III prohibiting discrimination, may be unable to adopt screening regulations that help ensure an investment comes with sustainable intentions, or benefits the host State in some capacity, or protects substantive inequalities existing between big foreign corporate firms and domestic fledging or small firms.

There was a transparency provision requiring contracting States to make publicly available any laws, regulations, rulings, polices, and international agreements that may affect the operation of the agreement.[100] This could help ensure that investors have clear and accessible laws to follow, an element of both the DRoL and an IRoL, and prevents States from acting in a discriminatory way against investors when it creates new measures. The contracting State could also ask investors for information about investments but nothing confidential like customer information. This could check whether the investment promotes sustainable development. The performance requirement provision mainly listed what a contracting State cannot do on an investor's investment in connection with the establishment, acquisition, expansion, management, operation, maintenance, use, enjoyment, and sale.[101] Muthucumaraswamy Sornarajah believes performance requirements can secure the advantages of foreign investment for the host State and can be advantageous to developing States that commonly contain State corporations and local investment codes.[102] Graham believes investments should not be

[95] ibid, s 2, 11.
[96] ibid, s 2, 11.
[97] ibid, s 3, 13.
[98] Edward Graham (2000) op. cit., 58.
[99] Muthucumaraswamy Sornarajah (2004) op. cit., 294-295.
[100] MAI (1998) op. cit., s 3, 13. Contracting States are also required to respond to other contracting States if they have questions about the new measures.
[101] ibid, s 3, 18-21.
[102] Muthucumaraswamy Sornarajah (2004) op. cit., 295-296.

used for State's national objectives in industrial policy such as export expansion, local content, and trade balancing, and that it can negatively affect States by 'distort[ing] economic decisions and render[ing] the outcomes suboptimal'.[103] These two arguments illustrate the tension between investor property rights and States promoting investment to benefit their citizens.

Sustainable investment performance requirements could offer the appropriate balance, and the MAI draft showed the possibility for environmental performance requirements, and particularly in serious cases of endangerment, if the requirements were non-arbitrary, justified, and did not restrict investment or act inconsistently to MAI provisions.[104] If negotiations continued under the MAI, its final version could have included environmental performance requirements, at least on a voluntary basis, since over 20 years later 32 export credit agencies of the OECD member States now benchmark private sector projects against the International Finance Corporation's (an organisation of the World Bank) voluntary performance standards on environmental and social sustainability, known as the Equator Principles.[105] Graham was concerned there were no specific MAI provisions limiting investment incentives, which is where States encourage investors such as through subsidies to invest within their borders rather than others.[106] The 'not lowering standards' provisions discussed above could limit certain investment incentives, but they were not final like whether to be binding or non-binding.[107]

There was concern that the MAI undermined State sovereignty, which is important to State citizens and the RoL. France and various NGOs considered the MAI an unacceptable threat to State sovereignty, as it contained major flaws like incorporating wide or strong investor provisions that can be protected in ISDS.[108] Some States proposed including language that supports State sovereignty like protecting natural resources.[109] Another problem linked to State sovereignty was maintaining culture within States.[110] France and Canada in particular aimed to protect culture while other States like the US were less keen.[111] Culture is protected under international human right treaties and could protect local communities in ISDS.[112] Annex 1 of the MAI draft recognised that protecting culture may be

[103] Edward Graham (2000) op. cit., 60, 61.
[104] MAI (1998) op. cit., s 3, 22.
[105] 'Equator Principles Financial Institutions' (IFC, 2020) <https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/company-resources/sustainable-finance/equator+principles+financial+institutions> accessed 11 September 2020.
[106] Edward Graham (2000) op. cit., 63-67; MAI (1998) op. cit., s 3, 45.
[107] MAI (1998) op. cit., s 3, 53-54, annex 1, 119-120, annex 2, 139-144.
[108] Peter Muchlinski (2000) op. cit., 1049; Edward Graham (2000) op. cit., 72.
[109] MAI (1998) op. cit., preamble, p 7, s 3, p 42.
[110] Edward Graham (2000) op. cit., 33.
[111] ibid, 31-32.
[112] International Covenant on Economic, Social and Cultural Rights (ICESCR), Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); Indigenous Declaration (2007) op. cit.; Agreement establishing the Fund for the Development of the Indigenous Peoples of Latin America and the

limited without appropriate provisions,[113] like substantive cultural exceptions. The MAI was abandoned before State sovereignty issues could be resolved. Nonetheless, these differences at the domestic level show the disparities between States' conception of the DRoL, even between States considered western and rich. These problems may require States to concede some elements of their DRoL or even add elements to their DRoL, to help build consensus capable of forming at the international level a system that reinforces an IRoL.

4.2.5 Disputes over investor protections and ISDS

Section IV outlined the investor protections which could impede State sovereignty in ISDS.[114] Sornarajah believes disagreement between developed States on investment protection norms contributed to the MAI failing.[115] The general treatment protection covered FET, and 'full and constant protection and security', and also no 'treatment less favourable then that required by international law',[116] which linked to national treatment, MFN, and non-discrimination displayed in Section III of the MAI.[117] There was also an expropriation protection which outlined that expropriation can happen only if it is in the public interest, non-discriminatory, met with due process of law, and prompt, adequate and effective compensation.[118] Other investor protections included: permitting investors to transfer capital and information in and out of the State,[119] allowing subrogation,[120] and protecting existing investments yet to be agreed.[121] These are common investor protections found in IIAs (see Chapter 3.2.2), although slightly wide. For example, the word 'constant' included in fair protection and security (FPS) could be unreasonable if States had to employ someone to ensure an investor's physical or intangible property was constantly protected or secured.[122] Some academics believe the MAI investment provisions resemble those under NAFTA.[123]

Caribbean, Madrid, 24 July 1992; Gus Van Harten, *The Trouble with Foreign Investor Protection* (OUP 2020) 121.

[113] MAI (1998) op. cit., annex 1, 127.

[114] Peter Muchlinski (2000) op. cit., 1049; Edward Graham (2000) op. cit., 72; Muthucumaraswamy Sornarajah (2004) op. cit., 313-314.

[115] Muthucumaraswamy Sornarajah (2004) op. cit., 297.

[116] MAI (1998) op. cit., s 4(1.1), 56, s 4, 57.

[117] ibid, s 3, 13.

[118] ibid, s 4(2.1), 56.

[119] ibid, s 4, 58-60.

[120] ibid, s 4, 60.

[121] ibid, s 4, 61.

[122] ibid, s 4(1.1), 56. Although it might be reasonable if the investment was under regular foreseeable attack, see, *Ampal-American Israel Corporation and others v Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss of 21 February 2017, [604].

[123] Muthucumaraswamy Sornarajah (2004) op. cit., 291-292; The MAI would be wide as NAFTA has since been amendedment to limit investment protections, see, Gus Van Harten (2020) op. cit.,142-143.

The MAI may have strongly focused on investor protections, since the negotiators were motivated by the (perhaps problematic) objective that governmental power over business must be reduced, even though there was increased privatisation, national law deregulation, and de-nationalisation.[124] Focus should have shifted towards investors as potential polluters, market power abusers, State official corruptors, worker exploiters, and human rights violators, rather than one consigned to governmental power and control. OECD State governments aimed to 'promote a favourable environment for investment flows',[125] but seemingly disregarded the need for *sustainable* investment flows. The MAI developed upon the principle that foreign investment is good for economic development and must be protected. Yet, the MAI appears to overlook that investment benefits are neutralised if their negative impacts, such as environmental and human rights abuses, are not limited through robust CSR mechanisms and other related international instruments like on labour and the environment.[126]

The dispute settlement provisions contained in Section V MAI provide options for either State-State dispute settlement or ISDS.[127] Both procedures, especially the State-State option, encouraged consultation before arbitration in settling disputes.[128] Moreover, both procedures outlined 'awards shall be final and binding between the parties to the dispute'.[129] The State-State dispute section contained annulment proceedings identical to the ICSID annulment provisions (see Chapter 3.4.2),[130] while the ISDS proceeding awards are 'subject to its post-award rights under the arbitral systems utilised'.[131] Sornarajah argued that 'the dispute resolution provisions of the MAI are more extensive than those commonly used in investment treaties'.[132] Graham believed both these dispute procedures were more closely modelled on NAFTA than the WTO, and that MAI negotiators envisioned that the ISDS proceedings would be the one used and the State-State procedures would be invoked only if problems arose after ISDS such as failure of the respondent State to comply with the ISDS award,[133] even though State-State procedures appear in the MAI before investor-State.[134] State-State dispute settlement is problematic in investor-State conflicts as investors are reliant on its home State to make a claim and to represent them on their behalf rather than further its own interests (see Chapter 2.8).[135]

[124] Peter Muchlinski (2000) op. cit., 1049.
[125] William Witherell (OECD) op. cit., p 5.
[126] Muthucumaraswamy Sornarajah (2004) op. cit., 276.
[127] MAI (1998) op. cit., s 5.
[128] ibid, s 5(b)(1-4), 62-63, s 5(d)(2), 69.
[129] ibid, s 5(c)(6)(f), 66, s 5(d)(16)(c), 75.
[130] ibid, s 5(c)(7)(a), 67.
[131] ibid, s 5(d)(16)(c), 75.
[132] Muthucumaraswamy Sornarajah (2004) op. cit., 296.
[133] Edward Graham (2000) op. cit., 74.
[134] MAI (1998) op. cit., s 5.
[135] Edward Graham (2000) op. cit., 74; *Panevezys-Saldutiskis Railway (Estonia v Lithuanaia)* (1939) PCIJ Series A/B 76, ICGJ 328 (1939), [16]; Article 1 of the International Law Commission's (ILC's) Articles on Diplomatic

ISDS in the MAI allowed arbitral resolution under common methods of the International Convention on the Settlement of Investment Disputes (ICSID), the ICSID additional facility, the United Nations Commission on International Trade Law (UNCITRAL), and the International Chamber of Commerce (ICC).[136] In the appointment of qualified arbitrators each side would pick an arbitrator and mutually agree upon a presiding third.[137] This is a common procedure for arbitration in IIL, although this requires reform (see Chapters 1, 3.5, and 5). The MAI draft envisaged a selection of arbitrators to choose between rather than any arbitrator under BITs.[138] This could enhance consistency if similar minds are hearing disputes for a specified term. Section 5 also allowed interested third parties to have some part in the proceedings,[139] which could enhance access to justice, and to call expertise,[140] which could help ensure a fair and just award is made. This section aimed to prevent parallel proceedings,[141] which could protect the *lis pendens* rule (see Section 4.3.1),[142] although Sornarajah considered this to be a light-hearted parody of the exhaustion of local remedies rule (see Chapter 2.8).[143]

NGOs were concerned that the ISDS section gave foreign investors special privileges that enabled them to evade legitimate national laws and regulations by claiming before an international tribunal that States violated the protective standards of IIAs.[144] This is analogous to the difficult task of balancing the rights of investors with the State's right to regulate.

In *Ethyl Corporation v Canada*,[145] Ethyl disputed Canada's ban on gasoline additive MMT. Ethyl asserted that the ban violated their rights as investors under NAFTA and claimed breaches of indirect expropriation, national treatment, and performance requirements. This was compounded by the leaked MAI Draft during this dispute that had similar provisions like ISDS and investor protection as NAFTA, specifically its Chapter 11. The case settled before the tribunal found any breaches of Ethyl's investor rights with Canada lifting the ban and paying Ethyl $13-$15 million. NGOs saw this

Protection adopted by the ILC's at its 58th session, in Report of the International Law Commission, UN GAOR, 61st Sess, Supp No 10, UN Doc A/61/10 (2006), p 16; *Mavrommatis Palestine Concessions* (1924) PCIJ Ser A, No 2, p 12; Clyde Eagleton, *Responsibility of States in International Law* (New York: New York University Press 1928); Richard Lillich, *International Law of State Responsibility for Injuries to Aliens* (Charlottesville: University Press of Virginia 1983); Rudolf Dolzer, 'Mixed Claims Commissions' (1992) 3 Encyclopedia of Public International Law 438.

[136] MAI (1998) op. cit., s 5(d)(2)(c).

[137] ibid, s 5(d)(7)(a), 71.

[138] ibid, s 5(d)(7)(c), s 5(c)(2)(f).

[139] ibid, s 5(d)(12), 73.

[140] ibid, s 5(d)(13), 73-74.

[141] ibid, s 5(d)(9), 72.

[142] 'Italian Supreme Court news: the rise of the Italian Torpedo' (Lexology, 19 July 2013) <https://www.lexology.com/library/detail.aspx?g=8c7b00c4-80dd-43e4-89f3-fdd453a19420> accessed 1 May 2021.

[143] Muthucumaraswamy Sornarajah (2004) op. cit., 296.

[144] Peter Muchlinski (2000) op. cit., 1046.

[145] *Ethyl Corporation v Canada*, UNCITRAL, Decision Regarding the Place of Arbitration of 28 November 1997.

development as an indicator of how investors could prevent beneficial environmental measures, stop the promotion of public health, and dictate government policy, while being paid millions for doing so.

A similar scenario was developing the same year in *Metaclad v Mexico*,[146] again under NAFTA. In this case Mexico, unlike Canada, did not settle and the tribunal favoured the investor even though State regulation was supposedly for the benefit of the environment.[147] Metaclad claimed that Mexico committed acts of indirect expropriation and breached the principle of FET and minimum standard of treatment, including through denial of justice and full protection and security (FPS), as a result of Mexico's interference and restriction of their hazardous waste landfill investment. The tribunal upheld all these claims even though Mexico believed enforcing such an award would breach public policy.[148]

These cases confirmed that investors held a significant amount of power before ISDS tribunals, and the interpretation of investor protections appeared to override State sovereignty and State regulations. Critics believed that the MAI was 'NAFTA on steroids' or a 'bill of rights for investors' and their MNCs designed to further put investor interests in trade and investment over concerns related to the environment, labour, and public health.[149] These cases illustrated RoL tensions between both formal and substantive aspects of the DRoL and an IRoL. Tensions between investor property right protections set within an IRoL context through an IIA provision such as legal expropriation designed to provide justice for investors, against more substantive considerations of the State's right to regulate within the DRoL in the form of democratic measures, designed to enforce public policy interests such as to protect the environment which should benefit its State citizens.

Perhaps an argument overlooked by actors like NGOs in this period was that ISDS operated to reinforce the content of IIAs that form part of an IRoL, but that some nuance was required in ISDS to better balance State sovereignty against these investor rights. Moreover, although NGOs presented Canada and Mexico as innocent parties, this was not entirely true. The interprovincial MTT ban could benefit Canada financially at the expense of foreign investors, and the alternative to MTT was not scientifically

[146] *Metaclad v Mexico*, ICSID Case No. ARB(AF)/97/1, Notice of Claim of 2 January 1997.
[147] *Metaclad v Mexico*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000; *Metaclad v Mexico*, ICSID Case No. ARB(AF)/97/1, Supplementary Reasons for Judgment of 31 October 2001.
[148] Howard Mann, 'Metalclad v. Mexico' (ITN, 18 October 2018) <https://www.iisd.org/itn/en/2018/10/18/metalclad-v-mexico/> accessed 18 October 2020.
[149] Barbara Guardino, 'Politician: MAI is NAFTA on steroids' (DJC Oregon, 26 October 1999) <https://djcoregon.com/news/1999/10/26/politician-mai-is-nafta-on-steroids/> accessed 28 August 2020; Jane Kelsey, 'Recolonisation or decolonsiation – where does our future lie?' (Bruce Jesson Memorial Lecture, 2003) <https://www.brucejesson.com/jane-kelsey-2003-recolonisation-or-decoloniation-where-does-our-future-lie/> 2 September 2020.
[149] Michelle Sforza-Roderick, Scott Nova, and Mark Weisbro, 'Writing the Constitution of a Single Global Economy: A concise guide to the Multilateral Agreement on Investment' (The Preamble Collaborative) <http://nonprofits.accesscomm.ca/srvoice/news/Dec97No3.html> accessed 2 September 2020.

proven to be environmentally better. Moreover, the ban had been successfully challenged in domestic proceedings by a provisional government with the backing of some domestic companies,[150] and although it was a non-binding recommendation,[151] Canada defending the ban in ISDS given domestic conflict would be harder.

Peter Muchlinski has likened the MAI negotiations to an anachronism describing it as old right/left(capitalism/communism) cold war politics designed to keep power over investments in decolonised and developing States.[152] Muchlinski criticised its outdated understanding of the international landscape.[153] Conflict of interests at the OECD between developed States significantly contributed to the demise of the MAI. This conflict can be illustrated by the controversial Helms-Burton Act[154] which initiated tensions between the US and other members. It was implemented soon after the shooting down of two aircrafts of Brothers to the Rescue based in Miami by Cuba over international waters killing all four crew members onboard.[155] This legislation provided the legal basis for the US embargo against communist Cuba in response to the past supposedly unlawful expropriation of US national property in Cuba (now controlled by other States, such as in the EU and other north American States). This Act, reminiscent of measures taken during the Cold War, allowed US citizens to make claims for property expropriated by Cuba under Title 3.[156] Title 3 allows claims even if US citizens were Cuban at the time of the expropriation, which is contrary to common principles of expropriation within international law.

Unsurprisingly, this Act received criticism from European and north American States, including at the MAI negotiations, on the basis that it was discriminatory, acted contrary to the purpose of a comprehensive MAI containing higher standards, and rose issues of extraterritoriality which the MAI wanted to prohibit.[157] The Helms-Burton Act still causes international tension between the US and Cuba. Cuba argues that determining Title 3 activation is a violation of international law and its State sovereignty. In support of Cuba, the EU threatened to bring a case to the WTO against the US and the Helms-Burton Act.[158] During MAI negotiations there seems little criticism of ISDS voiced by states,

[150] Agreement on Internal Trade (Canada), Report of the Article 1704 Panel concerning the Dispute between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act (Report of the Article 1704 Panel) (2 June 1998).
[151] Gus Van Harten (2020) op. cit.,107.
[152] Peter Muchlinski (2000) op. cit., 1049.
[153] ibid, 1049.
[154] Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms–Burton Act).
[155] The unarmed civilian aircrafts were going to drop unpleasant leaflets about the Cuban government.
[156] Title 3 of the Act could create a private cause of action allowing US. nationals to make claims in US courts for confiscated property in Cuba against persons that may have trafficked or be trafficking in that property.
[157] Edward Graham (2000) op. cit., 28-30, 57.
[158] Lioman Lima, 'Helms-Burton Act: US firms face lawsuits over seized Cuban land' (BBC News, 3 May 2019) <https://www.bbc.co.uk/news/world-us-canada-48113549> accessed 29 July 2020; On a side note the EU had

notwithstanding concerns advanced by France. Arguably, since no States made any comments against the ISDS provision in the MAI draft document like they had for other provisions is evidence of their silent acquiescence and indeed support for the proposed model of ISDS.[159] Also, State-State disputes, the alternative to ISDS, may not be appropriate given the limitations that can be identified in the WTO DSB (see Section 4.3).

4.2.6 Lessons Learned from the MAI: Arbitrariness, Transparency, and Equality

The failed MAI negotiations show that future reform discussions must be more inclusive, transparent, diverse, equal, and unified. This could enhance the possibility to achieve international consensus and enhance the DRoL and an IRoL. The OECD only represented developed capital exporting States, although other States can help identify substantive inequalities that operate contrary to the RoL. The MAI aimed to maximise investor protections (benefit to capital exporting States) without considering the State's right to regulate (benefit to capital importing States). As discussed in Chapter 3.2.1, FDI involves capital exporting and capital importing States and as a result, rules in an IIA despite obtaining formal equality could in practise have different effects on States to the IIA causing substantive inequalities. Citizens of State A could more frequently invest in State B than State B's citizens invest in State A which means the IIA rules could be more frequently relied upon in State B, and State B should be more wary of foreign investments' impact on local and regional interest, such as domestic competing businesses. Sornarajah argues State sovereignty must be protected better in future developments than that in the MAI to appease, in particular, developing States and NGOs.[160] It may appear that this balance was achievable in the MAI with the right diverse participation, since surely business communities especially in capital exporting States would have supported the MAI if they felt the MAI would offer advantages.[161]

The OECD is slowly redressing its lack of diversity in membership with seven States from Eastern Europe, Western Asia, and South America becoming members since 2010.[162] While membership still is only comprised of 37 states, the OECD and its key partners now represent approximately 80% of

already bought a WTO complaint against the US due to the Helms-Burton Act when the act was first implemented, see *United States — The Cuban Liberty and Democratic Solidarity Act*, (European Communities v United States) 1996-1998, WT/DS38. The panel suspended its work on the request of the EU after the US entered private negotiations with the EU.

[159] MAI (1998) op. cit., p 70-75.

[160] Muthucumaraswamy Sornarajah (2004) op. cit., 313-314.

[161] Edward Graham (2000) op. cit., 49.

[162] Eastern European States of Estonia, Latvia, Lithuania, and Slovenia. Western Asian State of Israel. South America States of Chile and Colombia. Colombia became a member on April 2020.

world trade and investment.[163] However, negotiations of reform proposals require more than just inclusion of a few developing States located outside of Western Europe and North America.[164] A more balanced view is needed to increase the chance of creating rules that reinforce substantive equality. The WTO and UN institutions such as UNCITRAL or the World Bank including ICSID offer a more diverse membership forum.

Reform discussions should not only include different States (geographical and development level) and business communities (investors) which are disputing parties in ISDS but also NGOs and civil society groups which can highlight less financial focused incentives related to sustainable investment. NGOs criticised the MAI for placing insufficient regulatory responsibilities on investors compared to the rights they obtained. The MAI focused on promoting investment for economic development and growth rather than highlighting that investors could commit abuses. A better balance was needed between investor protection and CSR capable of benefitting both developed and developing and capital exporting and importing States, and environmental and human rights-orientated NGOs and business communities. This remains a problem in international law with non-binding CSR rules, although a soft-hard law continuum has been proposed (see Chapter 2.7).

IIAs are hard law mechanisms between States involving private commercial corporate aspects that should reinforce an IRoL. Yet IIL involve more public aspects that are not necessarily directly linked to these money-making commercial and corporate aspects. As important to the DRoL and an IRoL are democratic participation, States' right to regulate, sustainability, human rights, and environmental considerations, which are commonly soft law mechanisms. The MAI did not include an appellate body that could ensure an IRoL is reinforced and for an appellate body and two-tier body to consider wider international principles it must be accepted by its member States.

4.3 Appellate Bodies in IEL Systems: WTO

This section will firstly present the WTO and its dispute settlement body (DSB) including its AB in the context of the dispute settlement understanding (DSU).[165] It will outline the reasons and then the impact of the current crisis facing the WTO as its AB ceased to function in December 2019. This section will analyse the AB crisis with a focus on how actors in international trade law shape and inform

[163] 'Where: Global reach' (OECD) <https://www.oecd.org/about/members-and-partners/> accessed 9 August 2020.
[164] Also, one of the newest States, Slovenia, was developed and could be considered more of a central European State than an eastern one.
[165] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization (1994) 1867 UNTS 154, 33 ILM 1144 (hereinafter WTO), (signed on 15 April 1994, entered into force 1 January 1995); DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization (1994), Annex 2, 1869 UNTS 401, 33 ILM 1226 (hereinafter DSU).

responses to that crisis. The section will evaluate the multi-party interim appeal arbitration arrangement (MPIA) and assess whether this form of arbitration will serve as a sustainable model for dispute settlement until the AB functions once more.

It is important to evaluate the international trading regime since like investment it is a discipline of IEL. While the WTO is the main organisation governing and regulating international trade, the international investment regime lacks a comparable centralized or unified system. Moreover, the WTO has an appellate body whereas the IIL system does not have a multilateral appellate body. It is beneficial to assess the strengths and weakness of the WTO's dispute resolution system when considering ISDS reform. This is especially so in the context of the currently defunct AB even though it has a more limited State-State dispute settlement format. Lessons could be learned from the WTO's dispute resolution body which could be considered alongside developing IIL. The MPIA offers additionally insights when responding to problems in an appellate system.

4.3.1 WTO's DSB, DSU, and AB

It is important to investigate the set-up, procedures, and function of the WTO's dispute resolution system to explore how an investment organisation employing a multilateral two-tier system could operate. Noemi Gal-Or argued for an international appellate system to be fair and just it should avoid multiple proceedings in other separate systems competing for jurisdiction (vertical consistency).[166] Currently, multiple international courts operate that deal with different disciplines of international law which can sometimes overlap such as investment and trade.[167] Although synergies exist between IIL and international trade law (ITL), they are separate systems. Goods and services concern both trade and investment, but ITL disputes are State-State while IIL is investor-State. Both IIL and ITL can apply comparable measures, but with different obligations, rights, and interests at stake. A recent example in the multilateral context relates to the plain packaging of tobacco products on the grounds of public health.

In this case, Philip Morris not only initiated ISDS proceedings against Australia for its Tobacco Plain Packaging Act 2011,[168] but also responded to a claim regarding this legislation through WTO

[166] Noemi Gal-Or, 'The Concept of Appeal in International Dispute Settlement' (2008) 19(1) The European Journal of International Law 43, 60-61.
[167] ibid, 43, 46-47, 49-53.
[168] *Philip Morris Asia Limited v Australia*, PCA Case No. 2012-12, Notice of Claim of 22 June 2011; *Philip Morris Asia Limited v Australia*, PCA Case No. 2012-12, Notice of Arbitration of 21 November 2011.

proceedings,[169] which may have interfered with the *lis pendens* rule.[170] The WTO favoured the Australian legislation,[171] which was also important for other States aiming to limit tobacco product marketing sales on public health grounds.[172] Although ISDS proceedings also favoured Australia, the legislation was not considered as Philip Morris's claim constituted an abuse of rights, failing on jurisdiction grounds.[173] Philip Morris later unsuccessfully challenged Uruguay's tobacco legislation,[174] but due to IIL's current complexity there is no guarantee another ISDS tribunal would favour the Australian legislation,[175] and there is no prerequisite for ISDS tribunals to act on awards from the WTO. Fairness and justice will be limited if there are concerns with multiple proceedings involving different areas of international law which restrict finality of awards.[176] Finality is limited if the international system includes partial overlaps of substantive and procedural rules and bodies competing for supremacy.[177]

The Intersection between trade and investment is also evident in free trade agreements (FTAs), which increasingly incorporate investment chapters. Where a dispute arises, the matter may be resolved in two different settings, or arbitrated under the FTA. For example, the sugar dispute between Mexico and the US involved claims under the rules of NAFTA, Chapter 11, concerning IIL and ISDS, and Chapter

[169] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS467/15, Request for the Establishment of a Panel by Indonesia of 3 March 2014. Claim against Australia by Indonesia with backing of other States.
[170] The *lis pendens* rule is that once a dispute resolution forum is chosen for the settlement of a dispute, it should not be adjudicated in another forum while that first chosen forum hears the dispute.
[171] *Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R; WT/DS441/R; WT/DS458/R; WT/DS467/R, Report of the Panels of 28 June 2018; *Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R; WT/DS441/AB/R, Report of the Appellate Body of 9 June 2020.
[172] Simon Chapman, 'World Trade Organisation gives Australia's plain tobacco packs the (draft) thumbs up' (The Conversation, 5 May 2017) <http://theconversation.com/world-trade-organisation-gives-australias-plain-tobacco-packs-the-draft-thumbs-up-77234> accessed 26 April 2018; 'Australia wins landmark WTO tobacco plain packaging case' (ABC, 5 May 2017) <http://www.abc.net.au/news/2017-05-05/australia-wins-landmark-wto-tobacco-packaging-case/8498750?WT.mc_id=newsmail&WT.tsrc=Newsmail> accessed 26 April 2018.
[173] *Philip Morris Asia Limited v Australia,* PCA Case No. 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015 [585]-[588]. The Australian subsidiaries were only acquired by Philip Morris to gain protection under the Hong Kong-Australia BIT; *Philip Morris Asia Limited v Australia*, PCA Case No. 2012-12, Final Award Regarding Costs of 8 July 2017.
[174] *Philip Morris Products SA and Abal Hermanos SA v Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, [590]. A reason for favouring Uruguay was that there could not be indirect expropriation as business was not sufficiently devalued and was valid legitimate public policy objectives
[175] Gary Born, arbitrator for the claimant, in the Philip Morris v Uruguay case dissented, see, *Philip Morris Products SA and Abal Hermanos SA v Uruguay*, Concurring and Dissenting Opinion of Arbitrator Mr Gary Born of 8 July 2016, [197].
[176] Noemi Gal-Or (2008), op. cit.
[177] Ibid.

18, concerning ITL and State-State WTO dispute settlement.[178] The recent EU FTAs of EU-Vietnam[179] and CETA,[180] and the stalled TTIP,[181] incorporate both trade and investment provisions and models for dispute settlement to resolve disputes arising under those agreements (see Chapter 4.4).

However, there are convergences and divergences between ITL and IIL which can lead to peculiar outcomes in disputes. These systems can have separate treaty obligations giving rise to different jurisprudence,[182] and even if similar the different dispute settings can interpret obligations/laws differently. Thus, there can be inconsistent rulings on the legality of certain government measures which could cause substantive conflicts. It seems the current complexity and fragmentation in IIL and ISDS is causing inconsistency, incorrectness, and uncertainty. This may act contrary to the RoL. The multilateral system of the WTO could provide insights into responding to arbitrariness, transparency, and equality.

The Marrakesh Agreement signed by 123 nations on 15 April 1994 marked the culmination of the 8-year-long Uruguay Round establishing the World Trade Organization, which was officially created on 1 January 1995, building on the General Agreement on Tariffs and Trade (GATT) administration that was established on 30 October 1947.[183] The WTO now governs many aspects of trade, including but not limited to services, intellectual property, trade-related aspects of investment, and non-tariff barriers.[184] The WTO has a limited but not insignificant investment dispute resolution function. Aims of the preamble in the Marrakesh Agreement Establishing the World Trade Organization include 'sustainable development', 'protect and preserve the environment', and 'economic development' of 'developing countries' and especially least developed countries (LDCs). The DSU sets the rules and

[178] *Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup from the United States*, WT/DS132/AB/RW, Report of the Appellate Body of 22 October 2001; *Mexico-Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, Report of the Appellate Body of 6 March 2006; *Midland v Mexico*, ICSID Case No. ARB (AF)/04/5, Award of 21 November 2007; *Corn Products v Mexico*, ICSID Case No. ARB (AF)/04/1, Award of 18 August 2009; *Cargill v Mexico*, ICSID Case No. ARB(AF)/05/2, Award of 18 September 2009; WTO believed sugar drink tax contrary to WTO rules. ISDS tribunals also found Mexico liable to breaching investor protections. There was also a dispute between US and Mexico on US import tax on Mexican sugar.

[179] Free Trade Agreement between the European Union and the Socialist Republic of Vietnam EU-Vietnam, Investment Protection Agreement (published 24 September 2018) (Signed 30 June 2019) (EU-Vietnam).

[180] Comprehensive Economic and Trade Agreement Between Canada and the European Union (CETA), (Signed on 30 October 2016, Provisionally Effective 21 September 2017).

[181] European Union, 'Proposal for Investment Protection and Resolution of Investment Disputes, Transatlantic Trade and Investment Partnership' (EU published 12 November 2015) (TTIP Draft Proposal) (Signed 30 June 2019).

[182] Mélida Hodgson, 'Proceedings of the Annual Meeting' (2014) 108 ASLI 251, 251, 254.

[183] The WTO, as of August 2020, has 164 members representing 98% of world trade with 25 observers.

[184] i.e services can be regulated through General Agreement on Trade in Services (GATS) and its mode 3 allow reach of commercial presence, in the territory of any other Member, see, Marrakesh Agreement, art XI,

procedures governing the DSB, and provides surveillance of implementation,[185] and cross-retaliatory measures,[186] in cases of non-compliance of recommendation and rulings.

Article 2(1) DSU created the DSB to administer the DSU rules and procedures in dispute settlement.[187] Joost Pauwelyn, a leading scholar of WTO law and EU nominated arbitrator for the MPIA, has described the DSB as 'the umbilical cord between the political and judicial branch … a crucial interface and forum of contestation or voice to which both panels and the Appellate Body are most receptive'. [188] Joshua Paine has described the DSB as 'the diplomatic body, consisting of representatives of all WTO members',[189] which has a voice function that 'enables members to provide regular feedback to WTO adjudicators, and helps sustain the dispute settlement system's internal legitimacy', but 'can be used in ways that undermine judicial independence', especially the powerful WTO members such as the US (e.g. like the US blocking of AB membership discussed below (Section 4.3.2)).[190] Paine argues 'at the heart of the current crisis over AB appointments, is the imbalance between legislative and judicial power within the WTO' which has 'a very strong judicial arm' in part due to reverse consensus 'alongside a largely inactive negotiating arm' in part due to consensus decision making (e.g. US refusal to appoint AB members).[191]

Under Article 2(1) DSU, the DSB will 'adopt panel and Appellate Body reports' which means these reports will not become binding on the disputing parties, and legally persuasive for other WTO members, until the DSB adopts them.[192] The DSB theoretically has the final say on dispute settlement. Articles 6(1), 16(4), 17(14), 22(6), and 22(7) DSU outlines the DSB in the steps it takes in a dispute, such as establishing a panel or adopting reports, will operate in a reverse consensus manner.[193] All States would have to reject the DSBs dispute settlement steps which is unlikely to happen as there will always be at least one member, the complainant, who would favour the relevant decision being taken. However, away from dispute settlement steps, the DSB will make decisions by consensus, which requires the acceptance of every member at the meeting where the decision takes place.[194] These

[185] DSU op. cit., art 21.
[186] ibid, art 22.
[187] ibid, art 2(1).
[188] Joost Pauwelyn, 'The Transformation of World Trade' (2005) 104 Mich L Rev 1, 49.
[189] Joshua Paine, 'The WTO's Dispute Settlement Body as a Voice Mechanism' (2019) 20(6) The Journal of World Investment & Trade 820, 821.
[190] ibid, 860.
[191] ibid, 832-833.
[192] *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Appellate Body Report of 4 October 1996, 14 (regarding panel reports); *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Article 21.5 – Malaysia)*, WT/DS58/AB/RW, Appellate Body Report of 22 October 2001, [109] (regarding AB reports); Joshua Paine (2019) op. cit., 827.
[193] DSU op. cit., arts 6(1), 16(4), 17(14), 22(6), 22(7).
[194] WTO, art 2(4).

include the appointment of AB members under Article 17(2),[195] where problems have occurred (see Section 4.3.2).

Contracting States can appeal panel reports under Article 17 DSU so the AB could help achieve 'providing security and predictability to the multilateral trading system' under Article 3(2) DSU, and help ensure reports enrich an IRoL.[196] The AB should be composed of seven persons serving 4-year terms with the possibility for reappointed once and three will serve on an individual dispute.[197] Thus no 'double-hatting' or arbitrator conflict of interest should occur. However, the members being part-time could affect whether this objective is achieved as they may have other employment or professional or business interests.[198] Elements of RoL in predictability, certainty, transparency, and accountability could be achieved through a permanent rotation of AB panellists with the option to do a second term where appropriate and notwithstanding the need to ensure representation across all WTO Members under Article 17(3) and ensure that reports reinforce the RoL. This ability to ensure representation is limited as there are only seven AB members and currently 164 WTO member States. Moreover, given the scarce representation, the appellate process could be time-consuming depending on case load. This is an ongoing problem in WTO dispute settlement which could impede RoL elements of due process and access to justice (see Sections 4.3.2 and 4.3.4). Article 17(3) also emphasises AB members 'shall be unaffiliated with any government',[199] which implies the AB should be impartial and independent.

Appeals are 'limited to issues of law covered in the panel report and legal interpretations developed by the panel'.[200] This seems like the AB can review substantive issues. It is important appellate mechanisms have both formal and substantive review functions to reinforce both the formal and substantive RoL (see Chapters 3.3.4 and 3.4.2).[201] The unconditional adoption of appellate reports through reverse consensus under Article 17(14) suggests AB reports are enforceable between the disputing parties. However, some academics think otherwise, possibly due to the wording of Article

[195] DSU op. cit., art 17(2).
[196] ibid, arts 3(2), 17.
[197] ibid, arts 17(1)-17(2).
[198] WTO, 'Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes', WT/DSB/RC/1, (11 December 1996); WTO, 'Post-Employment Guidelines Communication from the Appellate Body', WT/AB/22, (16 April 2014).
[199] ibid, art 17(3).
[200] ibid, art 17(6).
[201] This includes the ability to uphold, modify, or reverse the legal findings and conclusions of the panel under art 17(13).

19,[202] which only recommends parties to address measures that have been concluded as inconsistent by the AB.[203]

Some academics believe like GATT, WTO rules are 'not "binding" in the traditional sense' as the WTO 'relies upon voluntary compliance', and 'the genius of the GATT/WTO system is the flexibility with which it accommodates the national exercise of sovereignty, yet promotes compliance with its trade rules through incentives'.[204] From this academic argument it seems the word 'recommend' could be used on purpose to balance State sovereignty with State compliance, and this thesis has argued finding this balance is important. However, others believe firstly that GATT adopted panel reports were treated as legally binding,[205] and more importantly that 'an adopted dispute settlement report establishes an international law obligation upon the member in question to change its practice to make it consistent with the rules of the WTO Agreement and its annexes', and compensation occurs in the event of noncompliance.[206] This argument implies recommendations should be followed, but if a State fails to, compensation is necessary in some form. Retaliation for a State's non-compliance may occur from the member granted authorisation to retaliate in accordance with the DSU rules. Thus, it could be that the State maintains the sovereignty not to follow, but will be punished in some capacity to encourage State compliance on that State and other States. This could encourage mutually agreed solutions between WTO State parties which is accepted under Article 3(6) DSU.[207]

In *US-Upland Cotton*, Brazil seemed more content for their farmers to be compensated rather than getting the US offensive trade measure removed.[208] Consequently, no suspension of concessions or other obligations pursuant to the authorization previously granted by the DSB applied and no further action needed under Article 21(5) DSU based on a disagreement as to the existence or consistency of any measure taken to comply with the DSB recommendations and rulings.[209] Having both binding rules and the option to pay compensation could be a better balance between State sovereignty and State compliance in an international system than non-binding rules.

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[202] Judith Bello, 'The WTO Dispute Settlement Understanding: Less Is More' (1996) 90 AJIL 416; John Jackson, 'The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation' (1997) 91(1) AJIL 60.
[203] DSU, op. cit., art 19.
[204] Judith Bello (1996) op. cit., 416-417.
[205] John Jackson (1997) op. cit., 62.
[206] ibid, 60-61.
[207] DSU op. cit., art 3(6).
[208] *United States — Subsidies on Upland Cotton*, WT/DS267/46, Mutually acceptable solution on implementation notified on 16 October 2014.
[209] 'DS267: United States — Subsidies on Upland Cotton' (WTO) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm#> accessed 15 September 2020.

However, sometimes suspension of concessions and obligations are applied,[210] and is it appropriate for a system that was built to encourage trade to allow its members to avoid reversing their strict trade measures if they pay compensation? Article 3(7) DSU suggests it is expected that the member State will act upon a report if it is deemed liable and that compensation is only temporary while the measure is removed. [211] Similarly, Article 21(1) indicates that '[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members'.[212] This implies member States will carry out the recommendation rather than rely on the alternate option of paying compensation. Articles 3(7), 22(1)-22(2), 22(8), and 26(1) all suggest that members are expected to comply with reports.[213] John Jackson has argued that WTO rules and reports are binding in international law, and also in the domestic setting although not always in the 'statutelike' sense, since they do not 'ipso facto' become part of the domestic jurisprudence, but would certainly impact domestic jurisprudence.[214]

This explains the relationship of the DRoL and an IRoL in the context of the WTO. The WTO reports should make up and reinforce an IRoL and the AB should assist this. The WTO reports are binding on States, since 'the role of international law is to reinforce, and on occasions to institute, the rule of law internally'.[215] Yet an IRoL may not enrich the DRoL immediately in dualist States, since the member State would need to interpret then implement the WTO reports into their legal system before it becomes applicable. This means the international standards of the WTO might be interpreted slightly differently once implemented at the domestic level to accommodate justice within that State's border, which could show that the DRoL and an IRoL are symbiotic, but operate in a different way.

However, the WTO reports will at the very least impact its member States, since an IRoL is supposed to assist the DRoL. Member States should be bound to utilize the international law obligations of the WTO in its interpretation of national law, since the WTO as an international setting containing 164 member States is designed to achieve justice across State borders, which is also the purpose of an IRoL. If a State refuses to honour an IRoL it will have international pressure and be demanded to pay some form of compensation or have trade concessions suspended.[216] Similarly, for an IIL system, the international award would expect to be followed by the disputing State parties and its members even after it is interpreted in their domestic systems, since that IIL system is designed to achieve justice in

[210] *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/26, Communication from Antigua and Barbuda of 25 April 2013.
[211] DSU op. cit., art 3(7).
[212] ibid, art 21(1).
[213] ibid, arts 22(1), 22(8), 26(1).
[214] John Jackson (1997) op. cit., 63-64.
[215] James Crawford, 'International Law and the Rule of Law' (2003) 24 ADL 3, 8.
[216] DSU, op. cit., arts 22(2), 22(3)(a).

the international sphere, and the appellate body can act as extra insurance that the award reinforces an IRoL.

4.3.2 Standstill at the WTO Appellate Body

After 'a very successful launch',[217] the WTO is now facing its most significant legitimacy crisis, in part because of the perceived judicial activism of its AB. It is important to learn how and why the AB has reached a standstill to avoid these mistakes from occurring in the IIL setting. The US made it difficult to elect members to the WTO Appellate Body (AB) since 2016 when it refused to reappoint Seung Wha Chang of South Korea and outright refused to elect or reappoint members since 2017. This effectively brought the dispute settlement system to a standstill due to consensus decision making under Article 2(4) DSU. A reason the US blocked the reappointment of AB members is that it alleged it is losing cases because there is an issue of representation in AB members, as for example 'other countries have most of the judges', even though the US has a good win-loss ratio before the AB and the US is privileged to always have an American member in the AB.[218] Other reasons for the US 'asphyxiation of the AB' relate to procedural aspects of dispute settlement including: the DSB should decide whether members whose terms have expired continue pending appeals under 17(2) DSU not the AB under Rule 15 of the AB's working procedures,[219] AB reports made after the 90-day lapse should not be adopted pursuant to the reverse consensus procedure,[220] the AB should not decide member State domestic law under Article 17(6) DSU,[221] the AB should not make unnecessary *obiter dictum* comments in cases that could act persuasively to increase or limit State member rights,[222] and the AB should use past decisions as persuasive and not binding precedent.[223]

Another reason is the US belief that the WTO unduly restricts its State sovereignty. There seems to be a perception in the US that the DSB, and especially the AB, is implementing an activist interpretive

[217] John Jackson (1997) op. cit., 60.
[218] Tom Miles, 'U.S. blocks WTO judge reappointment as dispute settlement crisis looms' (Reuters, 27 August 2018) <https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC19O> accessed 5 August 2020; Robert Farley, 'Trump Wrong About WTO Record' (Factcheck, 27 October 2017) <https://www.factcheck.org/2017/10/trump-wrong-wto-record/> accessed 11 September 2020.
[219] DSB, Minutes of Meeting Held on 31 August 2017, WT/DSB/M/400, [5.4]-[5.5]; DSB Minutes of Meeting Held on 28 February 2018, WT/DSB/M/409, [7.4]-[7.8]; WTO AB, 'Working Procedures for Appellate Review', WT/AB/WP/6 (16 August 2010), 15.
[220] DSB, Minutes of Meeting Held on 22 June 2018, WT/DSB/M/414, [5.2]-[5.22].
[221] DSB, Minutes of Meeting Held on 27 August 2018, WT/DSB/M/417, [4.2]-[4.17]; DSB, Minutes of Meeting Held on 26 September 2018, WT/DSB/M/419, [4.7]-[4.11].
[222] DSB, Minutes of Meeting Held on 29 October 2018, WT/DSB/M/420, [4.2]-[4.19].
[223] DSB, Minutes of Meeting Held on 18 December 2018, WT/DSB/M/423, [4.2]-[4.25].

approach that goes beyond both the text of agreements and consent to WTO dispute proceedings.[224] It has been argued that 'the United States, however, did not agree to abdicate its authority to implement and enforce laws and regulations within its borders',[225] although this assertion is baseless. Consenting to WTO membership means consenting to dispute settlement which does have a possible outcome of enforcing rules and regulations which inherently impinges on the State's ability to adopt unilateral trade measures. Furthermore, cases against the US are not initiated by the WTO but WTO Members, although there is evidence to show that disputes are often brought by the Member on behalf of multinational corporations.

However, there could be justification for US criticism. Some WTO States declared cases can take so long that the 'dispute settlement mechanism risked becoming "toothless", as a delay of this kind was effectively a denial of remedy'.[226] Delays mean no due process or access to justice can occur within WTO dispute settlement. A reason for the US blocking of AB member appointments is 'the repeated issuance of Appellate Body reports beyond the 90-day deadline mandated in the DSU' under Article 17(5).[227] *US — Tuna II (Mexico)*,[228] emphasises delayed WTO dispute proceedings. It took ten years from the panel being formed in 2009,[229] to the last dispute settlement proceedings in 2018.[230] Every report the panel made was appealed, but more importantly every report made from both the panel and AB was delayed.[231] Although towards the end of the dispute the AB outlined that 'owing to the current vacancies on the Appellate Body' (due to the AB membership election standstill) that the AB report would be delayed,[232] most of the delayed reports could not have the AB standstill as an excuse. A multilateral two-tier ISDS must avoid delays and time-consuming litigation to provide justice and due process to parties no matter their substantive inequalities in power or resources.

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[224] Daniel Pickard and Tessa Capeloto, 'The WTO Is Inappropriately Usurping American Sovereignty' (Wiley, 14 July 2017) <https://www.wiley.law/article-The-WTO-Is-Inappropriately-Usurping-American-Sovereignty> accessed 12 July 2020.
[225] ibid.
[226] DSB, Minutes of Meeting held on 31 August 2015, WT/DSB/M/367, [13.2]–[13.23].
[227] DSB, Minutes of Meeting Held on 22 June 2018, WT/DSB/M/414, [5.2]-[5.22].
[228] *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381.
[229] *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/4, Request for the Establishment of a Panel by Mexico of 10 March 2009.
[230] *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/RW/USA, WT/DS381/AB/RW2, Recourse to Article 21.5 of the DSU by the United States, Report of the Appellate Body of 14 December 2018.
[231] 'DS381: United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products' (WTO) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm> accessed 16 September 2020.
[232] *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/RW/USA/Add.1, WT/DS381/AB/RW2/Add.1, Recourse to Article 21.5 of the DSU by the United States, Report of the Appellate Body Addendum of 14 December 2018, annex e-1, 36.

Thomas Graham, a former AB member and a US national, argued that the AB departed from its 'proper role' that was 'negotiated by governments and written into the WTO Dispute Settlement Understanding'.[233] He believed that the AB exceeded its powers beyond the scope designated by the WTO agreement and the intentions of the negotiators that created it. The US Trade Representative questioned the WTO's flexibility, membership control, transparency, and its interpretation measures.[234] Yet for a State that criticises WTO dispute settlement, especially its AB, the US continues to initiate claims against other States intending for change in those States' policies and commonly appeals panel reports.[235]

The US appealed a report on 18 December 2019,[236] although one-week earlier on 11 December 2019 there was only one appellate body member, since the other member's terms had expired. This means States can no longer in practice exercise their right to appeal panel reports under Articles 16 and 17 DSU. Furthermore, the US forced restrictions on the AB budget mean that it will be out of funds and thus out of business even if there were enough members.[237] It is important to understand the impact a standstill can have on a dispute resolution system when parties continue appealing reports to show why this must be avoided in IIL. These developments have concerned the EU since the European Commission believes WTO members could 'avoid binding rulings and hence escape their international obligations'.[238] This is because 'when a panel report is appealed but the Appellate Body cannot function, the dispute will be put into a legal void and will remain unresolved'.[239] In other words, States can appeal panel reports knowing that the process will come to a standstill and remain pending until appellate members are elected to hear the appeal. Consequently, if States abuse this system of appeal, the WTO legal system will be unable to produce final recommendations and the trade rules will not be enforced which will seriously compromise the legitimacy of the multilateral trading system.

[233] 'Farewell speech of Appellate Body member Thomas R. Graham' (WTO, 5 April 2020) <https://www.wto.org/english/tratop_e/dispu_e/farwellspeechtgaham_e.htm> accessed 12 July 2020.
[234] 'U.S. Proposals in WTO Dispute Settlement Understanding Negotiations' (Office of the United States Trade Representative) <https://ustr.gov/issue-areas/enforcement/us-proposals-wto-dispute-settlement-understanding-negotiations> accessed 8 August 2020.
[235] Robert Farley (2017) op. cit.
[236] 'United States notifies decision to appeal compliance panel ruling in steel dispute with India' (WTO, 16 January 2020) <https://www.wto.org/english/news_e/news20_e/ds436oth_17jan20_e.htm> accessed 12 July 2020.
[237] Farewell speech of Appellate Body member Thomas R. Graham (2020) op. cit.
[238] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules', Brussels 12 December 2019 COM (2019) 623 final 2019/0273 (COD), s 1 p 2.
[239] ibid, s 1 p 2.

It is possible that 'the WTO will partly revert to the situation that prevailed in the GATT, as a losing party would be able to block the adoption of a panel report',[240] since under Article 16.4 DSU 'the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal'. Moreover, without an operational AB a State cannot effectively appeal against another State for non-compliance of the panel's recommendation. This concurrent impact resulting from the AB standstill is a reason the US appealed the above report in December 2019. The rationale behind the US appeal seems to have been to safeguard national interest in its domestic steel industry discussed in section 4.3.3. Even the EU nearly one year after the AB stalled still appeal panel reports.[241] The other party Russia declared that 'the matter was being appealed "into the void." The EU was seeking to escape its obligations by not trying to resolve the dispute.'[242]

A relevant dispute involving both the US and EU on this matter is Boeing-Airbus and the subsidy of their airlines. In the respective claims against one another the WTO criticised both for failing to follow the recommendations of the DSB.[243] In these cases the US and EU could use the blocking of the AB as a strategic move to deploy countermeasures against one another for failing to implement earlier DSB recommendations and rulings on subsidies to their airlines, and appealing means the dispute will come to a standstill as the AB is currently not in operation. As there is a standstill in the dispute both parties could continue to subsidise their airlines in a manner contrary to WTO law and deploy countermeasures against one another to seek competitive advantages. With the US-China trade frictions ongoing, the US-EU air subsidy disputes could create further tensions in the multilateral trading system.

4.3.3 The US Moving the Goal Posts in International Trade Law

[240] Joshua Paine (2019) op. cit., 844.

[241] 'EU appeals panel report on EU dumping methodologies, duties on Russian imports' (WTO, 28 August 2020) <https://www.wto.org/english/news_e/news20_e/ds494apl_28aug20_e.htm> accessed 31 August 2020. Saudi Arabia is another State that has appealed panel reports on 28 July 2020 in *Saudi Arabia — Measures concerning the Protection of Intellectual Property Rights* (DS567).

[242] 'Panel established to review EU safeguard measures on steel imports' (WTO, 28 August 2020) <https://www.wto.org/english/news_e/news20_e/dsb_28aug20_e.htm> accessed 15 September 2020.

[243] For the EU claim against the US subsidy of Boeing, see, 'WTO Boeing dispute: EU issues preliminary list of U.S. products considered for countermeasures' (Europa, 17 April 2019) <https://ec.europa.eu/commission/presscorner/detail/fi/ip_19_2162> accessed 8 August 2020. The EU has now been authorised by WTO members to deploy countermeasures against the US, see, 'Members grant EU authorization to impose countermeasures against US in Boeing dispute' <https://www.wto.org/english/news_e/news20_e/dsb_26oct20_e.htm> accessed 5 November 2020; For the US claim against the EU subsidy of Airbus, see, 'DS316: European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft' (WTO, 23 January 2020) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm> accessed 8 August 2020. The EU has since appealed the panel report.

It is important to note not only the impact the AB standstill can have on an international system but also the fall out in domestic systems, such as in the US. When there is no operational AB in a multilateral two-tier system, authoritative States which have governments opposing that binding system could undercut it and create a more individualistic system. Without enforceable WTO rules through its DSB and DSU, it seems Trump's US government turned to the US's domestic bilateral track dispute settlement investigations under Section 232 Trade Expansion Act 1962[244] and Section 301 Trade Act 1974.[245] They are likely to reinforce the US DRoL, since they only achieve justice within the US border.[246] These protectionist measures advance US interests at the expense of other States, which could erode an IRoL especially if used illegitimately.[247] Their increasing use since 2018 indicate developing US trade frictions with China,[248] and possibly the EU,[249] as well as US dissatisfaction with the WTO. The US has criticised the WTO for lacking transparency to the public, since 'civil society and Members not party to a dispute have been unable to observe the arguments or proceedings that result in these recommendations or rulings', and 'the public has a legitimate interest in the proceedings'.[250]

Disputes can impact State citizens and influence other disputes which can impact other State citizens, and fully understanding the arguments and proceedings could enhance legal certainty. The US argues a public eye on proceedings emits 'confidence that the recommendations and rulings are the result of a fair and adequate process'.[251] This could help protect due process. The US argued that observing proceedings 'would assist Members, including developing countries, in understanding the issues involved as well as gaining greater familiarity and experience with dispute settlement' and therefore

[244] Trade Expansion Act of 1962, s 232 (Pub.L. 87–794, 76 Stat. 872, enacted October 11, 1962, codified at 19 USC ch. 7).
[245] Trade Act of 1974, s 301 (Pub.L. 93–618, 88 Stat. 1978, enacted January 3, 1975, codified at 19 USC ch. 12).
[246] Using Section 232, tariffs were imposed on aluminium and steel on national security grounds. It was claimed the socio-economic rights of US citizens were limited by these imports as it led to less domestic employment opportunities in aluminium and steel industries which were crucial for military purposes, see, Lori LaRocco, 'Department of Defense says unfair steel and aluminum imports are a risk to US national security' (CNBC, 22 February 2018) <https://www.cnbc.com/2018/02/22/department-of-defense-says-unfair-steel-and-aluminum-imports-are-a-risk-to-us-national-security.html> accessed 6 August 2020.
[247] Ibid. The legitimacy of tariffs for aluminium and steel on national security grounds were questioned, see, Eliana Johnson and Andrew Restuccia, 'Trump administration withholds report justifying 'shock' auto tariffs' (Politico, 20 March 2019) <https://www.politico.com/story/2019/03/20/trump-tariffs-automobiles-commerce-1228344> accessed 6 August 2020.
[248] Section 301 was used against China to in reaction to Chinas supposed unfair trade practices against the US resulting in tariffs on billions worth of imports, see, 'Tariffs in the time of Covid-19' (Shearman, 9 April 2020) <https://www.shearman.com/perspectives/2020/04/tariffs-in-the-time-of-covid-19> accessed 7 August 2020.
[249] Section 232 led to tariffs on foreign cars, which may have been aimed at the EU, in particular Germany, see, Eliana Johnson and Andrew Restuccia (2019), op. cit.
[250] 'Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency' (Office of the United States Trade Representative), p 1, <https://ustr.gov/sites/default/files/asset_upload_file396_7702.pdf> accessed 8 August 2020.
[251] ibid.

be 'better informed about disputes generally'.[252] This could lessen substantive inequalities as it gives developing States a better chance to effectively represent themselves and present their case if a dispute arises. These are plausible RoL points made in the context of international trade law in an IRoL setting. But it seems the US has not taken these RoL points made in the context of international trade into its own DRoL setting like by keeping its justification for tariffs on foreign cars private.[253] The WTO can use transparency deficiencies to question the justifications of safeguarding measures like on foreign cars such as in *Ukraine–Passenger Cars*.[254] Some notions of transparency are built into the procedural WTO rules, but with the AB stalled, dispute resolution can no longer promote transparency and an IRoL across the WTO spectrum.

Ukraine–Passenger Cars [255] illustrates the vulnerability of developing countries in WTO DSB proceedings. It has been observed that 'the Ukrainian authorities' published report was scarce in argumentation and providing evidence despite the long investigation process, which could show the difficulties of the policymakers in developing States to follow the investigation procedures required by the WTO.[256] Appropriate assistance such as capacity building could have prevented the dispute.[257] Capacity building could be strengthened through encouraging developing State participation at DSB meetings,[258] and utilising the WTO Advisory Centre (see Chapter 2.5.2). Although these States may financially struggle to attend DSB meetings,[259] the meetings allow States to transmit their views across the WTO spectrum.[260] DSB meetings could influence developments such as systematic and procedural

[252] ibid, p 2.
[253] Eliana Johnson and Andrew Restuccia (2019), op. cit.
[254] *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R, Panel Report adopted 20 July 2015.
[255] Ibid.
[256] Arevik Gnutzmann-Mkrtchyan and Simon Lester, 'Does Safeguards Need Saving? Lessons from the Ukraine–Passenger Cars Dispute' (2017) 16(2) World Trade Review 227, 238, 246. It seems these academics believe that 'Ukrainian domestic producers did not sustain injury due to the increased imports. But they could have sustained injury due to the trade concessions that made the FDI into domestic manufacturing unattractive'.
[257] Although all safeguard measures that have gone to the WTO have been found in violation of WTO rules, there are over 100 more that have not gone to the WTO DSB. See, ibid, 247.
[258] Cosette Creamer and Zuzanna Godzimirska, 'Deliberative Engagement within the World Trade Organization: A Functional Substitute for Authoritative Interpretations' (2016) 48 NYU J Intl L & Pol 413, 458; Joshua Paine (2019) op. cit., 825; There is also the Advisory Centre on World Trade Organization Law (ACWL) which can help capacity building especially for developing and least-developed States (see Chapter 2.5.2).
[259] Cosette Creamer and Zuzanna Godzimirska (2016) op. cit., 438. The WTO is in discussions about encouraging developing State participation within the WTO in general, see, 'WTO members discuss participation of developing countries in world trade' (WTO, 14 September) <https://www.wto.org/english/news_e/news20_e/devel_14sep20_e.htm> 15 September 2020.
[260] Joshua Paine (2019) op. cit.

change which could have occurred when members pressured panels and the AB not to consider amicus curiae briefs especially unsolicited ones.[261]

Article 10 DSU contains provisions of third parties, but it refers only to other member States.[262] The DSU contains no provisions about amicus curiae,[263] while in IIL Rule 37(2) of ICSIDs Arbitration Rules seems to allow amicus curiae briefs. The AB and especially the panel seem reluctant to hear unsolicited submissions,[264] possibly due to State resistance[265] Yet entities like NGOs could help developing State and LDC governments present case arguments and build evidence which could reduce substantive disparities between developed States in dispute settlement at the WTO.

From a rule of law perspective, the US-China trade frictions illustrate the tensions between the DRoL and an IRoL. It is questionable whether the US uses Sections 232 and 301 legitimately as to avoid seriously undermining an IRoL. The WTO panel found such restrictions on Chinese goods contravene WTO law.[266] Equally, the panel suggested in obiter that the Chinese restrictions on US goods, in the mist of these 'unprecedented global trade tensions', also were probably imposed contrary to WTO law, and consequently recommended the parties seek 'mutually agreed and satisfactory solutions'.[267] The US appealed the panel report,[268] but without a functioning AB it is hard to see where these 'mutually agreed and satisfactory solutions' can come from. This thesis submits that a functioning AB can serve an important role in reconciling those tensions in the multilateral setting. Panel reports will no longer be appealed into the legal void, and the AB can check that panel reports reinforce an IRoL.

[261] DSB, Minutes of Meeting held on 23 October 2002, WT/DSB/M/134; WTO General Council, Minutes of Meeting Held on 22 November 2000, WT/GC/M/60; Joshua Paine (2019) op. cit., 842-843.
[262] DSU op. cit., art 10(2).
[263] 'Participation in dispute settlement proceedings' (WTO) <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm#fnt3> accessed 2 September 2020.
[264] *United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, Report of the Appellate Body of 10 May 2000, [36]-[42].
[265] WTO General Council, Minutes of Meeting held on 22 November 2000, WT/GC/M/60. It should be noted that the US supported the inclusion of amicus curiae briefs in WTO dispute settlement at paragraphs [74]-[77] of that document. DSB, Minutes of Meeting held on 23 October 2002, WT/DSB/M/134; Participation in dispute settlement proceedings (WTO) op. cit. Although the AB has held that both itself and panels have the power to accept unsolicited amicus briefs (see eg *United States-Import of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body of 12 October 1998, [107]-[108] and [110]).
[266] *United States- Tariff Measures on Certain Goods from China*, WT/DS543/R, Panel Report of 15 September 2020, [8.1]-[8.4].
[267] ibid, [9.1]-[9.5].
[268] 'United States appeals panel report regarding US tariffs on Chinese goods' (26 October 2020) <https://www.wto.org/english/news_e/news20_e/ds543apl_26oct20_e.htm> accessed 5 November 2020.

There are proposals made by WTO States from around the world that aim to amend the DSU.[269] These amendments mainly focus on Article 17 DSU. Some suggested reforms include: holding annual meetings between the DSB and AB, increasing the ABs time to produce reports, the DSB to decide on former members hearing AB disputes, allowing former members to hear if an appeal had started orally during their term, for the AB to avoid including in its report 'off-topic' or *obiter dictum* findings not directly relevant to the dispute, limiting AB authority to conduct findings regarding the meaning of domestic law, to stop disputes lasting longer than 90 days without party consent, and to increase AB members from 7 to 9. Other proposals include replacing reverse consensus with majority voting when adopting reports and the panel forming different interpretations of WTO law than that of the AB, which could make WTO dispute settlement less legally enforceable and more uncertain. These above amendments could be designed to encourage the US to unblock appellate body appointments.

However, the US still will not support a process to elect AB members which acts contrary to the wishes of at least 121 WTO member States.[270] This means international trade tensions cannot be reconciled. Moreover, it seems the relationship between the US and other WTO members that are dominant in international trade law remains frosty like the EU with both accusing one another of taking different positions on issues and initiating meritless appeals.[271] These tensions are heightened by the unresolved and long-running Airbus-Boeing subsidies disputes,[272] and there is also the on-going US-China trade frictions. With continued tensions it might be more likely that the US leaves the WTO than elect new AB members.[273] The US is not afraid in attempting to leave important international

[269] 'Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to The General Council' (11 December 2018) WT/GC/W/752/ Rev.2; 'Communication from the European Union, China, India and Montenegro to the General Council' (11 December 2018) WT/GC/W/753/Rev.1; 'Communication from Japan, Australia and Chile' (26 April 2019) WT/GC/W/768/Rev.1; 'Communication from Australia, Singapore, Costa Rica, Canada and Switzerland' (11 December 2018) WT/GC/W/754/Rev.2; 'Communication from Honduras' (21 January 2019) WT/GC/W/758. Also its 759, 760, and 761 communications; 'Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu' (13 February 2019) WT/GC/W/763; 'Communication from Brazil, Paraguay and Uruguay' (25 April 2019) WT/GC/W/767/Rev.1; 'Communication from Thailand' (26 April 2019) WT/GC/W/769; 'Communication from the African Group' (26 June 2019) WT/GC/W/776.

[270] Panel established to review EU safeguard measures on steel imports (2020) op. cit.

[271] 'EU Statement at the Regular DSB meeting – 29 JUNE 2020' (30 June 2020) <https://eeas.europa.eu/delegations/world-trade-organization-wto/81752/eu-statement-regular-dsb-meeting-%E2%80%93-29-june-2020_en> accessed 9 July 2020.

[272] For the EU claim against the US subsidy of Boeing, see, 'WTO Boeing dispute: EU issues preliminary list of U.S. products considered for countermeasures' (2019) op. cit.; For the US claim against the EU subsidy of Airbus, see, 'DS316: European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft' (2020) op. cit.

[273] Keith Johnson, 'U.S. Effort to Depart WTO Gathers Momentum' (Foreign Policy, 27 May 2020) <https://foreignpolicy.com/2020/05/27/world-trade-organization-united-states-departure-china/> accessed 9 August 2020.

organisations that it no longer respects as seen in the initial US notification to leave the World Health Organisation (WHO) due to its criticism of the WHOs handling of covid-19.[274]

US Trade Representative Robert Lighthizer even suggested changing the WTO from a two-tier system into a one-tier system similar to commercial arbitration with ad hoc tribunals that issue rulings which only apply to the parties.[275] Yet, this thesis has already shown that ad hoc arbitration in a commercial arbitration setting (see Chapters 1 and 3.5.3), may be unable to adequately reinforce the RoL, since such bilateralism will be unstable causing fragmentation and limit in particular the RoL elements of predictability and legal certainty. I suggest that multilateral dispute resolution remains the better option, and an appellate body in international trade law is necessary to reinforce an IRoL in international relations.[276] It is on this basis that I argue for an appellate body in IIL, since it could make a substantial contribution to reinforcing an IRoL.

4.3.4 Multi-party interim appeal arbitration arrangement

Some WTO States favour the creation of the MPIA to be used at the WTO as an interim safeguard measure in response to the stagnated AB.[277] The MPIA can be used as guidance if problems occur in a multilateral international investment two-tier dispute resolution system. The MPIA ensures that WTO Members can continue to benefit from a functioning two-tier dispute settlement system within the WTO that includes an independent and impartial appeal stage; albeit, the notion of appeal traditionally understood in WTO terms is now replaced by an arbitration mechanism.[278] These WTO States believe 'independent and impartial appeal stage must continue to be one of its essential features' and regard an 'Appellate Body as a matter of priority'.[279] The MPIA will operate under the WTO framework of Article 25 DSU. The usual WTO rules will generally be used in MPIA to keep its core features, such as the rules in Article 17 DSU, but with some amendments and additions that aim to

[274] 'Coronavirus: Trump moves to pull US out of World Health Organization' (BBC, 7 July 2020) <https://www.bbc.co.uk/news/world-us-canada-53327906> accessed 9 August 2020.
[275] Terence Stewart, 'WTO Dispute Settlement Body Meeting of August 20 2020- How disputes are being handled in the absence of reform of the Appellate Body' (Current thoughts on Trade) <https://currentthoughtsontrade.com/2020/08/29/wto-dispute-settlement-body-meeting-of-july-28-2020-how-disputes-are-being-handled-in-the-absence-of-reform-of-the-appellate-body/> accessed 15 September 2020; Noah Manskar, 'US trade rep Robert Lighthizer outlines plan to revamp World Trade Organization' (NY Post, 21 August 2020) <https://nypost.com/2020/08/21/us-trade-rep-robert-lighthizer-outlines-plan-to-revamp-wto/> accessed 15 September 2020.
[276] Joshua Paine (2019) op. cit., 857. See also, 'Concept Paper: WTO Modernisation' (September 2018) <http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf> accessed 16 September 2020.
[277] 'Interim appeal arrangement for WTO disputes becomes effective' (Brussels, 30 April 2020) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143> accessed 24 June 2020.
[278] 'EU Statement at the Regular DSB meeting – 29 JUNE 2020' (2020) op. cit.
[279] 'Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (27 March 2020), 1 <https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158685.pdf> accessed 24 June 2020.

enhance procedural efficiency. One of the new measures gives arbitrators 30 days longer from the notice of appeal to the submission of the arbitration award than under Article 17(5) DSU.[280] Although extra time could enhance the possibility of arbitrators reaching an award that reinforces an IRoL, it would be more time-consuming for both disputing parties and this extra time might lead to added financial implications for what is already a very expensive legal process.[281]

Appellate review under MPIA will generally operate *mutatis mutandis* to the WTO and DSU. The MPIA is different and separate from the standard WTO AB procedure. Appeals on WTO matters will not be brought under Articles 16.4 and 17 but through the MPIA. The MPIA is designed to be a short-term measure that will cease to exist once the standard WTO appellate body is operational again.[282] Once it is operational again WTO parties will bring appeals under Articles 16.4 and 17 and not through the MPIA. As of December 2020, 24 WTO members including the EU representing its member States have joined the MPIA,[283] and disputing parties have already agreed to use the MPIA as an appeals mechanism.[284] The MPIA and its members encourage other WTO States to join to enhance its inclusivity.[285] The US is yet to join, preferring to focus on achieving meaningful reform within the WTO dispute settlement system, and for parties to agree upon dispute settlement within the WTO without an appeal option.[286] Yet without this appeal option there is no international safeguard to ensure that the panel reinforces an IRoL.

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[280] ibid, 5, annex 1, [12]; Both time periods can be extended by the parties, see, 6, annex 1, [14]

[281] Although the time might be different in practice, WTO proceedings are already time-consuming, see, Arevik Gnutzmann-Mkrtchyan and Simon Lester (2017) op. cit., 249.

[282] 'Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (27 March 2020) op. cit., 1, [1]; 4, annex 1, [2].

[283] Terence Stewart (Current thoughts on Trade) op. cit. 'International trade dispute settlement WTO Appellate Body crisis and the multiparty interim appeal arrangement' (Europa, April 2021) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690521/EPRS_BRI(2021)690521_EN.pdf> accessed 1 November 2021. Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, the EU including its Member States, Guatemala, Hong Kong, Iceland, Macao SAR, Mexico, Montenegro, New Zealand, Nicaragua, Norway, Pakistan, Singapore, Switzerland, Ukraine, Uruguay. Japan is yet to become a party to MPIA and there were already 19 States party to MPIA at its launch in 30 April 2020.

[284] Simon Lester, 'China Agrees To Use Arbitration Appeal Mechanism in WTO Canola Seed Dispute With Canada' (China Trade Monitor, 28 September 2021) <https://www.chinatrademonitor.com/china-agrees-to-use-arbitration-appeal-mechanism-in-wto-dispute-with-canada/> accessed 26 October 2021.

[285] 'Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (27 March 2020) op. cit., 2, [12]; Panel established to review EU safeguard measures on steel imports (2020) op. cit.

[286] 'Statements by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, August 28, 2020' (Geneva Mission) <https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug28.DSB_.Stmt_.as-deliv.fin_.public.pdf> accessed 15 September 2020; 'Understanding between the Republic of Korea and the United States regarding Procedures under Articles 21 and 22 of the DSU', 6 February 2020, WT/DS488/16, [4]; Other States have agreed not to appeal, see, 'Understanding between Indonesia and Chinese Taipei regarding Procedures under Articles 21 and 22 of the DSU', 11 April 2019, WT/DS490/3, [7]; 'Understanding between Indonesia and Vietnam regarding Procedures under Articles 21 and 22 of the DSU', 22 March 2019, WT/DS496/14, [7]; 'Minutes of the Meeting of the Dispute Settlement Body on January 27, 2020', 27 January 2020, WT/DSB/M/440, [4.2]-[4.3].

The composition of the tribunal will consist of three persons on rotation from a pool of ten independent standing arbitrators which have been nominated and elected through consensus by the MPIA parties,[287] rather than 7 permanent AB members under Article 17(1) DSU.[288] Three extra members could act to help speed up dispute procedures. Once this pool is formed members will be encouraged to discuss interpretation, practice, and procedure amongst themselves to promote consistency and coherence in decision-making,[289] such as members hearing appeals conveying their thoughts to the rest of the pool.[290] If set monthly formal meetings are arranged then convergence in legal thinking between members could be formed which could better promote consistency and coherence. Moreover, these appellate arbitrators will have administrative and legal support separate from the WTO secretariat staff and its divisions to help guarantee quality and independence.[291] If arbitrators can manage their own team, it could better enhance quality and accountability, while support given by expert individuals on an *ad hoc* basis when necessary could improve independence.[292]

A limitation of the MPIA is that non-party WTO States can still stall panel reports by appealing to the non-operational AB system,[293] even if the other disputing party is a member of the MPIA, like when the US appealed a report involving China.[294] The European Commission aims to expand its enforcement regulation from inducing States to respect awards, to inducing States to stop them blocking adjudication procedures in dispute settlement such as appealing to the currently defunct AB system.[295] These countermeasures are aimed to be proportionate in working around non-cooperative

[287] Statement on a Mechanism for Developing, Documenting, and Sharing Practices and Procedures in the Conduct of WTO Disputes, JOB/DSB/1/Add.12/Suppl.5, 31 July 2020; 'Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (27 March 2020) op. cit., 1, [4]; The EU put forward Prof. Joost Pauwelyn, see 'EU puts forward its candidate for the pool of arbitrators in the multi-party interim appeal arbitration arrangement and encourages more WTO members to join, 13 May 2020' (13 May 2020) <https://eeas.europa.eu/delegations/world-trade-organization-wto/79286/eu-puts-forward-its-candidate-pool-arbitrators-multi-party-interim-appeal-arbitration_en> accessed 9 July 2020.
[288] DSU op. cit., art 17(1).
[289] 'Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (27 March 2020) op. cit., 2, [5].
[290] ibid, 5, annex 1, [5].
[291] ibid, 2, [7].
[292] Another issue linked to the panels support was the exact role of the secretariat. China and EU may prefer replicating the role of the AB secretariat since this could favour consistency and coherence, (presumable because it copies what is already there into the MPIA), whereas, other States may not be so keen, see, Jesse Kreier, 'The MPIA and the WTO Secretariat' (International Law and Policy Blog, 13 May 2020) <https://ielp.worldtradelaw.net/2020/05/the-mpia-and-the-wto-secretariat.html> accessed 8 August 2020.
[293] This has occurred in the dispute between Thailand and Philippines about customs and fiscal measures on cigarettes, see, 'EU Statement at the Regular DSB meeting – 29 JUNE 2020' (2020) op. cit.
[294] United States appeals panel report regarding US tariffs on Chinese goods (2020) op. cit.
[295] European Commission, 'Proposal for a Regulation of the European Parliament….' (2019) op. cit, s 1 p 4; An authority that could support this proposal is International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, General Assembly, Official Records, Fifty-fifth

States to enforce international trade agreements,[296] and correspond to trade tensions such as tariffs.[297] The countermeasures were first used against the US in response to its import duties on steel and aluminium (discussed above in Section 4.3.3).[298] Such conflict between dominant actors in international trade emphasises the precautious situation and current uncertain future of resolving the problems surrounding the WTOs dispute settlement system. It may not be viable for an investment facilitation agreement at the WTO (see Chapter 2.8),[299] or separately for ISDS to occur at the WTO.[300] Although the WTO is a 'beacon for other international dispute settlement proceedings',[301] it has serious problems like legitimacy challenges of its AB which must be avoided in future ISDS reform.

Perhaps the way forward in IIL for an appellate review system is to encourage regular constructive dialogue between States whatever their differences through mediation to increase understanding and help avoid the tensions seen around the WTO. Arguably, UNCITRAL could be attempting to do this through the initiation of Working Group III (WGIII) and its supposed emphasis on inclusivity and participation (see Chapter 5). Graham believed that outright dismissal of any US critique of the WTO and the 'deeply troubling' distain to those that agreed with the criticism caused 'the downfall of the Appellate Body', rather than the blocking of new appointments.[302] He believed 'that blocking of appointments was a reaction to the unwillingness of others to listen a last-ditch effort to force a dialogue that others were refusing to have'. In his opinion, '[t]he Appellate Body, as we have known it, is gone and is not returning'. Thus, open dialogue without distain could be pivotal in the quest for an appellate review mechanism in IIL.

Session, Supplement No. 10 (A/56/10), chp.IV.E.1, ch II, and, introductory commentary (1), arts 50(2)(a), 55, 52(3)(b), 52(4), and commentaries (2), (8) and (9).

[296] The substantive legal basis of the EU enforcement amendment is Article 207 Treaty of the Functioning of the European Union (TFEU).

[297] 'Report from the Commission to the European Parliament and the Council: Review of the scope of the Regulation No 654/2014 of the European Parliament and of the Council of 15 May 2014' (European Commission, Brussels, 12.12.2019 COM (2019) 639 final), p 2 <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-639-F1-EN-MAIN-PART-1.PDF> accessed 12 July 2020.

[298] ibid, p 4.

[299] 'Brazil's Experience on Investment Facilitation' (WTO) <https://www.wto.org/english/tratop_e/invest_e/01_opening_remarks_arabe_neto_brazil.pdf> accessed 13 March 2018.

[300] Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law (2018) 112(3) The American Society of International Law 361, 191.

[301] Jaemin Lee, 'Mending the Wound or Pulling It Apart? New Proposals for International Investment Courts and Fragmentation of International Investment Law' (2018) 39 Nw J Int'l L & Bus 1, 4-5, 20. It can address fragmentation and legitimacy.

[302] Farewell speech of Appellate Body member Thomas R. Graham (2020) op. cit.

4.4 EU's Model Trade Agreements and its Investment Court Proposal

This section will examine proposals for dispute settlement mechanisms in recently negotiated FTAs. Its focus will be on two EU agreements: CETA with Canada,[303] and the EU FTA with Vietnam,[304] as well as the mega-regional of CPTPP.[305] The section will highlight relevant provisions accompanied by their critique. This means the purpose, structure, procedure, and function of the agreements will be considered. In so doing, this section considers the significance of the two-tier dispute settlement provisions in EU agreements, while the CPTPP will be considered to illustrate the approach of Canada and Vietnam towards dispute settlement mechanisms in negotiations with other States. This section will consider whether these agreements could act as models for an IRoL to reinforce formal and substantive elements of the RoL, or whether they unnecessarily encroach upon the DRoL, so that the DRoL could be used as a reason to oppose these agreements. The other possibility is that these agreements reinforce an IRoL and the DRoL in complementary ways. It will also compare these agreements with the MAI and each other, and explore the agreements' potential significance to UNCTIRAL WGIII, since the EU agreements are being considered as models for reform at WGIII.[306] The EU submitted at WGIII these agreements as guidance for an investment court system (see Chapters 5.2-5.3) and the agreements have similar dispute procedures to the draft provision on appellate mechanism and enforcement (see Chapter 5.5.3).

4.4.1 CETA

Preamble

The preamble of CETA resolves to further build upon the parties' respective rights and obligations under the WTO, create a secure market for their goods and services through removing barriers to trade and investment, and establish clear, transparent, predictable and mutually-advantageous rules to govern their trade and investment.[307] This shows that CETA intends to use the WTO as a basis for promoting investment and trade through reinforcing RoL elements of transparency and predictability.

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[303] Comprehensive Economic and Trade Agreement Between Canada and the European Union, (CETA) (Signed on 30 October 2016, Provisionally Effective 21 September 2017).
[304] Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam (EU-Vietnam), Investment Protection Agreement (published 24 September 2018) (EU-Vietnam) (Signed 30 June 2019).
[305] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (Signed on 8 March 2018, Effective on 30 December 2018).
[306] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-seventh session, New York, 1–5 April 2019, <https://undocs.org/A/CN.9/WG.III/WP.159/Add.1> accessed 18 November 2020; Rob Howse, 'Designing a Multilateral Investment Court: Issues and Options' (2017) 36(1) Yearbook of European Law 209, 210-215. 235-236; Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) 18 Journal of World Investment & Trade 585, 589-590.
[307] CETA (2016) op. cit., preamble, 2.

The preamble reaffirms the Universal Declaration of Human Rights (UDHR) which is a crucial source of human rights norms (see Chapter 2.6.1),[308] recognising human rights in general and also the 'rule of law for the development of international trade and economic cooperation'. [309] The preamble recognises further elements that relate to the RoL in public health and the environment.[310] It indicates cultural industries must be protected which is unsurprising given the parties to the agreement are Canada and the EU (which includes France from the MAI negations discussed in Section 4.2 where both France and Canada argued for the protection of culture).[311] Moreover, the preamble recognises State sovereignty, reaffirms sustainable development, and encourages CSR.[312] The preamble lists elements that are crucial for a system to effectively reinforce the formal and substantive RoL. This preamble could be used as inspiration for developments in IIL particularly at WGIII.

Investor Protections

Chapter 8 CETA governs investments.[313] The EU Commission indicates that 'CETA runs in parallel with the system of investment protection (substantive and procedural) established by EU law'.[314] This suggests CETA is designed to favour EU values/interests. Investments are not required to contribute to the host States economic development (a solidarity right, discussed in Chapter 2.6.4)[315] like in some developing and least developed economies.[316] Investors under covered agreements will be unable to claim discriminatory treatment related investor protections (under Sections B and C of CETA) for State measures made within governmental authority.[317] Differences in exceptions to Sections B and C exist per party with the EU protecting audio-visual services and Canada protecting cultural industries.[318] Although this seems inconsistent, it shows how these States have compromised on one another's DRoL to reach an international agreement that should be designed to enrich an IRoL. This sort of compromise could be what is required at WGIII if any meaningful ISDS reform will occur.

[308] ibid, preamble, 2.
[309] ibid, preamble, 3.
[310] ibid, preamble, 3.
[311] ibid, preamble, 2.
[312] ibid, preamble, 2.
[313] ibid, ch 8.
[314] Igor Materljan, 'Investment Court System under CETA and the Autonomy of EU Law' (European Commission), 201.
[315] CETA (2016) op. cit., s a, art 8.1.
[316] Pan-African Investment Code (2016), art 4; Model Text for the Indian BIT 2016, art 1.4.
[317] CETA (2016) op. cit., art 8.2(2)(b). Section B and C cover 'Establishment of investments' and 'Non-discriminatory treatment'. CETA Section E Article 8.15 contains further exceptions mostly towards Sections B and C. The EU parliament says governmental authority includes the police and justice-related services, such as judges, public attorneys, see, 'CETA and public services' (European Parliament, February 2017) <https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/599268/EPRS_IDA(2017)599268_EN.pdf> accessed 4 November 2021. 'Governmental authority' could be used to protect the public interest or to justify/enforce anti-democratic and unconstitutional executive power.
[318] CETA (2016) op. cit., art 8.2(3).

The CETA performance requirements under Section B on what a State cannot do to an investor's investment are almost identical to the MAI draft,[319] but unlike the MAI draft, there are some exceptions.[320] The wording of national treatment and MFN under section C[321] is analogous to the MAI draft with the exception that CETA has 'in like situations',[322] rather than 'in like circumstances',[323] and the word conduct is added for CETA in the list when these situations/circumstances arises. These situations/circumstances can arise at both the pre-entry and post-entry investment stage,[324] which gives investors a wider scope to make a claim. Yet the MFN provision contains some exceptions in CETA like excluding procedural treatment and limiting the treatment of substantive obligations.[325]

The substantive RoL element of State sovereignty is not one of the exceptions,[326] but it is reinforced in Section D affirming the States 'right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity'.[327] This reinforces other substantive aspects of the RoL such as human rights in the form of culture which has its own international human rights Convention.[328] CETA refers to human rights twice, in the fourth and fifth preambular recitals as discussed above,[329] and only once in the context of investment in Annex 8-E.[330] CETA does not contain an 'essential elements' clause like most EU-FTAs,[331] and some academics argue 'the CETA text does not contain a binding human rights clause'.[332]

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[319] ibid, s b, art 8.5(1); MAI (1998) op. cit., s 3, 18-21. These include export expansion, local content, and trade balancing.

[320] Exceptions to these performance requirements are under CETA (2016) op. cit., arts 8.5(4), 8.5(5)(a), 8.5(5)(b). More performance requirements exist under Article 8.5(2) with other exceptions under Article 8.5(3).

[321] CETA (2016) op. cit., arts 8.6-8.7. Since these protections are under Section C they could be limited by governmental authority under Article 8.2(2)(b).

[322] ibid, arts 8.6(1)-8.7(1).

[323] MAI (1998) op. cit., s 3, 13.

[324] Pre-establishment activities could be a trend led in IIAs by Canada and the US, whereas, EU States only covered the post-establishment phase in their IIAs, see, Makane Mbengue and Mohamed Negm, 'An African View on the CETA Investment Chapter' in Makane Mbengue and Stefanie Schacherer, *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer 2019) 249.

[325] CETA (2016) op. cit., art 8.7(4). MFN will not apply in respect of other IIAs in ISDS for 'procedures' and 'that Substantive obligations' 'do not in themselves constitute treatment'.

[326] The Pan-African Investment Code (2016) articles 8(2) and 10(2) outlines that legitimate public welfare objectives, like public health, safety, and the environment, are exceptions to MFN or National Treatment.

[327] CETA (2016) op. cit., art 8.9(1).

[328] ICESCR (1966) op. cit.

[329] The fifth recital recognises the importance of the RoL and human rights.

[330] CETA (2016) op. cit., annex 8-E. It indicates measures related to maintaining international peace and security, like Arts 8(16), 9(8) (Denial of benefits) and 28(6) (National security), include protecting human rights.

[331] Lorand Bartels, 'The European Parliament's Role in relation to Human Rights in Trade and Investment Agreements' (European Parliament Studies, February 2014), [14]-[20].

[332] Lisa Diependaele, Ferdi De Ville, and Sigrid Sterckx, 'Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System' (2019) 24(1) New Political Economy 37, 50, 51.

Human rights could be invoked under Article 8.31 as 'other rules and principles of international law applicable between the Parties', although this might be unlikely to occur,[333] since ISDS tribunals are reluctant to consider human rights (see Chapters 1 and 2.6). Article 8.9(2) further protects State sovereignty by outlining that under Section D an investor cannot claim a State regulation negatively affects their investment or interfered with their expectations.[334] This is interesting as Section D covers investor protections like FET,[335] FPS,[336] and expropriation,[337] for investors and covered investments that are commonly used by investors as a justification to initiate ISDS. Lisa Diependaele and others seem to believe that the substantive RoL standard of States right to regulate restricts investor protections.[338]

FET covers 'denial of justice in criminal, civil or administrative proceedings',[339] fundamental breach of due process, including breach of transparency in judicial and administrative proceedings,[340] 'manifest arbitrariness',[341] discrimination,[342] and abusive treatment of investors, such as coercion, duress, and harassment.[343] These are commonly included in an FET definition and reinforce formal and substantive elements of the RoL like due process and promoting transparency (see Chapter 3.2.2). Although an exhaustive list could stop abuses in litigation,[344] legal certainty or predictability and legitimate expectations could be missing from this FET definition unless interpreted as implicit within one of the above categories. However, the content of FET will be reviewed regularly by the parties which could lead to recommendations by the Committee on Services and Investment to include these and other elements.[345]

Although Article 8.9(2) seeks to avoid protecting an investor's expectations in Section D,[346] 'the Tribunal may take into account' under Article 8.10(4) an investor's *legitimate* expectations.[347] This could give tribunals flexibility and discretion but could also lead to inconsistency and unpredictability if arbitrators value legitimate expectations differently. Article 10(4) offers a basic legitimate expectation definition which can reinforce formal and substantive elements of the RoL such as

[333] ibid, 50, 51.
[334] CETA (2016) op. cit., art 8.9(2).
[335] ibid, art 8.10.
[336] ibid, art 8.10.
[337] ibid, art 8.12.
[338] Lisa Diependaele and others (2019) op cit., 50, 51.
[339] CETA (2016) op. cit., art 8.10(2)(a).
[340] ibid, art 8.10(2)(b).
[341] ibid, art 8.10(2)(c).
[342] ibid, art 8.10(2)(d).
[343] ibid, art 8.10(2)(e).
[344] Makane Mbengue and Mohamed Negm in Mbengue and Schacherer (2019) op. cit., 253
[345] CETA (2016) op. cit., arts 8.10(2)(f), 8.10(3).
[346] ibid, art 8.9(2).
[347] ibid, art 8.10(4).

prevention of arbitrariness and transparent information that is consistent (see Chapters 3.2.2). Article 8.10(5) relates to FPS,[348] although the emphasis of the Article on the word 'physical' could mean this protection is restricted to only tangible investments. This definition could still reinforce formal and substantive elements of the RoL with the State being subject to the law through protecting investor property rights (see Chapter 3.2.2).

Some academics say CETA has a modern approach to expropriation that clearly takes into consideration investor rights and the State's right to regulate.[349] A legal direct or indirect expropriation occurs when completed 'for a public purpose,[350] under due process of law,[351] in a non-discriminatory manner,[352] and on payment of prompt, adequate and effective compensation'.[353] This is a very common definition of expropriation,[354] and should reinforce both formal and substantive elements of the RoL in enforcement before the courts and fairness and justice (see Chapter 3.2.2). Compensation is calculated through the common fair market value method,[355] and similarly to the MAI, compensation requires payment without delay.[356]

Annex 8A represents common definitions of direct and indirect expropriation such as title transfers and substantial deprivations (see Chapter 3.2.2).[357] Factors taken into consideration when determining whether measures constituted an indirect expropriation include economic impact, duration, investors legitimate expectation, and its purpose.[358] Furthermore, non-discriminatory measures designed to protect 'legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations' except in rare circumstances when measures appear manifestly excessive in light of their purpose.[359] This means ISDS in CETA has a modern approach of inspecting the effect and purpose of the State measure through construction and application rather than just whether the measures effect is tantamount to expropriation.[360] Although

[348] ibid, art 8.10(5).
[349] Arnaud de Nanteuil, 'Expropriation' in Makane Moïse Mbengue and Stefanie Schacherer, *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer 2019), 129-130.
[350] CETA (2016) op. cit., art 8.12(1)(a).
[351] ibid, art 8.12(1)(b).
[352] ibid, art 8.12(1)(c).
[353] ibid, art 8.12(1)(d).
[354] Arnaud de Nanteuil in Mbengue and Schacherer, (2019) op. cit., 131.
[355] CETA (2016) op. cit., art 8.12(2).
[356] ibid, art 8.12(3).
[357] ibid, annex 8A, [1].
[358] ibid, annex 8A, [2].
[359] ibid, annex 8A, [3]. CETA's annex 8A paragraph 3 has also been supported in ISDS, see, *Philip Morris Products SA and Abal Hermanos SA v Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, [300].
[360] Tribunals have indicated that there is a divide in application between considering only the measures impact on an investors property or in addition considering the character and object of the State measure, see, *Azurix v Argentina*, ICSID Case No. ARB/01/12, Award of 14 July 2006, [309].

ISDS evaluating State sovereign actions seems problematic,[361] this could protect State measures that reinforce RoL elements like human rights and environmental considerations. This could both deter States from disguising anti-democratic and unconstitutional executive power through public policy measures and deter investors from preventing States to regulate for the public purpose,[362] thus creating a balance between State sovereignty and investor property rights,[363] which would reinforce the DRoL and an IRoL.

Other investor protections in Section D include the ability of investors to transfer capital and information in and out of the State,[364] and to allow subrogation.[365] Section E includes reservations and exceptions,[366] and similarly to the MAI, the contracting State can ask investors for information about the investment, [367] but in CETA information requests should be reasonable and not unduly burdensome', [368] whereas, under the MAI it outrightly excludes information requests that are confidential like customer information.[369] On investment information the CETA provision promotes transparency better which is a substantive element of the RoL.

Dispute Resolution

Section F covers the resolution of investment disputes between investors and States.[370] Investors can submit to a tribunal constituted under this section if the State caused a breach under Section C or D.[371] When investors make claims they must meet certain obligations like come to the dispute with clean hands such as the investment was not made fraudulently.[372] This could reinforce the RoL by enhancing fairness and justice.[373] Disputing parties must attempt to settle their differences amicably through consultation before ISDS proceedings can take place under Article 8.23. [374] To enhance the effectiveness of the consultation process an investor shall submit a background report about themselves, their investment, the breach, the State measure, and the expected remedy,[375] in order to

[361] A standard of review that reviews State sovereign actions could be both beneficial and controversial, see discussion in context of standard of review at WTO, Andrew Gutzman, 'Determining the Appropriate Standard of Review in WTO Disputes' (2009) 42 Cornell International Law Journal Article 45 (Article 3).
[362] Expropriation in CETA could be based on proportionality, see, Arnaud de Nanteuil in Mbengue and Schacherer, (2019) op. cit., 141-142; 150-153.
[363] ibid, 155.
[364] CETA (2016) op. cit., art 8.13; MAI (1998) op. cit., s 4, 58-60.
[365] CETA (2016) op. cit., art 8.14; MAI (1998) op. cit., s 4, 60.
[366] CETA (2016) op. cit., s e.
[367] ibid, art 8.17; MAI (1998) op. cit., s 3, 13.
[368] CETA (2016) op. cit., art 8.17.
[369] MAI (1998) op. cit., s 3, 13.
[370] CETA (2016) op. cit., s f.
[371] ibid, arts 8.18(1)(a)-8.18(1)(b).
[372] ibid, arts 8.18(2)-(3). Investors must also prove loss/damage was sustained by the measure.
[373] ibid, arts 8.18(2)-(3).
[374] ibid, arts 8.19, 8.22.
[375] ibid, art 8.19(4).

allow the respondent to effectively engage in consultations and prepare its defence.[376] A consultation claim must be made within three years of the alleged breach or be submitted within two years after the conclusion of domestic proceedings,[377] since a respondent should not have a threat of a claim for too long. Article 8.22(1) may attempt to balance the differences in obligations between investor and State by issuing certain criteria on investors to meet before they can initiate ISDS.[378] These obligations are like the MAI such as requiring 90 days of consultation before ISDS proceedings could be initiated, although it is 60 in the MAI.[379]

Investors can make an ISDS claim under the common rules of the ICSID Convention and Rules of Procedure for Arbitration Proceedings, ICSID Additional Facility Rules,[380] UNCITRAL Arbitration Rules, or any other rules on agreement of the disputing parties.[381] States have the right to object their claim through preliminary objections dealing with claims manifestly without legal merit,[382] and claims unfounded as a matter of law.[383] These preliminary objections are similar to Rule 41 ICSID 2006 Amendments which could reinforce substantive elements of the RoL (see Chapter 3.4.1). Moreover, there are time bars as proceedings will be discontinued if investors are inactive for 180 consecutive days.[384] This could stop investors using the dispute settlement as a mechanism to pressure the host State through time and money into agreeing to an investor's preferred dispute resolution terms.[385]

The CETA Joint Committee will appoint fifteen tribunal Members, five nationals from each of the EU, Canada, and third States.[386] One national of each of the EU, Canada, and a third-party will make up a division to hear cases, with the third-party national always chairing it.[387] In theory, there is an even balance of arbitrators between the treaty parties when a dispute arises between a host State and an investor from the contracting home State which promotes equality. However, this resembles similarities with the current problematic ISDS process where each party picks their own arbitrator and agrees upon a third with the exception that the investor's home State will pick the arbitrator instead

[376] ibid, art 8.19(5).
[377] ibid, art 8.19(6).
[378] ibid, art 8.22(1).
[379] MAI (1998) op. cit., s v, 62.
[380] A claim may be submitted under the ICSID Additional Facility Rules if the conditions for proceedings pursuant to paragraph (a) do not apply (the ICSID Convention and Rules of Procedure for Arbitration Proceedings).
[381] CETA (2016) op. cit., art 8.23(2); If the respondent States does not agree with the other rules option then the investor under Article 8,23(3) would pick either ICSID, its Additionally Facility or UNCITRAL.
[382] ibid, art 8.32.
[383] ibid, art 8.33.
[384] ibid, art 8.35.
[385] This is similar to Italian Torpedoes, see, 'Italian Supreme Court news: the rise of the Italian Torpedo' (2013) op. cit.
[386] CETA (2016) op. cit., art 8.27(2). This composition of member numbers is the same as in the TTIP draft.
[387] ibid, art 8.27(6).

of the investor and the disputing parties cannot control which arbitrators on the tribunal will make up a division to hear the specific dispute.[388] Some academics have questioned whether adjudicators in CETA can be independent or impartial.[389] This may turn on the presence of third-party nationals who may be crucial, especially as there are only two parties to the agreement (Canada and the EU). Although these third-party nationals may favour a particular party to the agreement, it is likely a member that is a national to a State party to CETA would be more biased in favouring their own State or union or the investor that shares their nationality or union. Academics argue that adjudicators must 'operate independently of the states that have appointed them',[390] but if adjudicators were not biased towards their home State and home investor, the home State may not appoint them.[391] A politicised arbitrator appointment process is probably not the right answer to the traditional disputing party arbitrator appointment process.[392]

There are provisions in CETA that try to quash fears regarding lack of impartiality and independence like the arbitrators being 'paid a monthly retainer fee',[393] which will be paid equally among the EU and Canada, promoting formal equality.[394] A retainer fee could decrease the chance of adjudicators seeking employment outside of the CETA tribunal, but it seems the adjudicators will still be paid on case load,[395] which means they could have ambitions to seek further cases within CETA.[396] However, the CETA Joint Committee can transform the retainer fee and other fees and expenses into a regular salary.[397] This could limit adjudicator conflict of interests and help improve their independence and impartiality (see Chapter 3.5). Furthermore, a 'random and unpredictable' composition of a tribunal,[398] could reinforce RoL elements like equality and fairness. Although 'random and unpredictable' seem contrary to the RoL and out of the disputing parties control, this could stop arbitrators purposely awarding cases in a certain way to attract selection from certain disputing

[388] ibid, 8.27(7). The president of the tribunal will appoint members to cases.
[389] Jose Zarate, 'Legitimacy concerns of the proposed multilateral investment court: Is democracy possible' (2018) 59(8) Boston College Law Review 2765, 2769; Makane Mbengue and Mohamed Negm in Mbengue and Schacherer (2019) op. cit., 263; Lisa Diependaele and others (2019) op cit., 51.
[390] Lisa Diependaele and others (2019) op cit., 51.
[391] It is possible that judge Merit Janow and Jennifer Hillman did not seek reappointment to the WTO because the US Trade Representatives were not fond that judges from their own country were ruling against their interests, see, Giorgio Sacerdoti, 'The Future of the WTO Dispute Settlement System: Confronting Challenges to Consolidate a Success Story' in Carlos Braga and Bernard Hoekman, *Future of the Global Trade Order* (2nd edn, European University Institute 2017).
[392] Lisa Diependaele and others (2019) op cit., 51.
[393] CETA (2016) op. cit., art 8.27(12).
[394] ibid, art 8.27(13).
[395] ibid, art 8.27(14).
[396] Gus Van Harten, 'Key flaws in the European Commission's proposals for foreign investor protection in TTIP' (2016) 12(4) LSRPS 1, 1-2.
[397] CETA (2016) op. cit., 8.27(15).
[398] ibid, art 8.27(7).

parties in future cases. Moreover, arbitrators are prohibited from having affiliation or instructions from any government or organisation in dispute settlement and forming arbitrator conflict of interests.[399] Some academics on the topic of arbitrator conflict of interests observe that the requirement that 'during their appointment, judges cannot act as counsel or expert in other cases (TTIP: Article 11; CETA: Article 8.30 (1)) is a significant advance compared to existing practices that can increase the independence and impartiality of the judges'.[400] At WGIII some problems of the constitution of a tribunal in CETA will not arise since, if a multilateral two-tier body is created, it is expected it would have multiple State parties rather than just the two in CETA which means the tribunal members should consist of multiple nationals that hear disputes involving different nationals and States.

Substantive inequalities between investors are considered since it is possible for only one arbitrator to hear the case.[401] This would save money in ISDS fees but having only one pair of eyes on a case may mean the award is more susceptible to not reinforcing the RoL. Yet it does enhance access to justice which is an element of the RoL. Similarly, third-party funding is allowed provided there is transparency of the third-party funder's details,[402] which could ensure parties have access to justice but ensure that the system can track potential abuse by third-party funders. Moreover, non-disputing parties can engage in the dispute settlement, but this includes only Canada or the EU and not NGOs, local communities, or civil society.[403] The inclusion of non-disputing parties could be 'commendable', but it 'does not ensure that the meaningful participation by all those affected is achieved'.[404]

The responding party must give the non-disputing party a variety of information,[405] and the non-disputing party could make oral and written submissions and attend the hearing.[406] This means the non-disputing party could act to clarify provisions in CETA so future disputes could be more certain and act in accordance with the drafters' intentions. NGOs and civil society could participate in disputes since the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration,[407] known as the

[399] ibid, art 8.30.
[400] Lisa Diependaele and others (2019) op cit., 50.
[401] CETA (2016) op. cit., arts 8.23(5), 8.27(9). The would be a third-party national to increase impartiality.
[402] ibid, art 8.26.
[403] ibid, art 8.38.
[404] Lisa Diependaele and others (2019) op cit., 50.
[405] CETA (2016) op. cit., art 8.38(1).
[406] ibid, art 8.38(2).
[407] UNCITRAL Arbitration Rules (2013), UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration Official Records of the United Nations General Assembly, Report of the United Nations Commission on International Trade Law, 8-26 July 2013, 68th Session, Supplement No.17 (A/68/17), Ch III (entered into force 1 April 2014).

UNCITRAL Transparency Rules (UTR), included in CETA[408] (discussed below) recognise amicus briefs,[409] although there is no obligation on the tribunal to allow them. Moreover, amicus briefs do not give victims of human rights abuses substantive rights and therefore cannot effectively give access to justice to these individuals.[410] However, they can provide arbitrators with further understanding and context as to the impact of their decisions, which could increase the chances of an award being fair and just within the international setting, enhancing an IRoL.

The CETA Joint Committee has the flexibility to alter the number of tribunal members provided an equal balance is kept between the EU, Canada, and third-party nationals.[411] Adjudicators could be increased if the system is overwhelmed with cases which is slowing dispute resolution or decreased if arbitrators are being paid to do very little due to minimal case load. These adjudicators require expertise in IIL dispute resolution, and public international law.[412] This could be recognition that IIL includes more than just commercial aspects but also public sovereign State actions and its State citizens involving environmental and human right considerations, substantive aspects of the DRoL and an IRoL.

Howse argues that international public law judges could be better served within a multilateral court set up as in CETA to protect State public policy exceptions.[413] International public law adjudicators may be better suited to protect CETA's art 8.9(1) which promotes the States' right to regulate as opposed to international commercial law adjudicators (see Chapter 3.5.3). However, international commercial law adjudicators are necessary in CETA since investor rights must be protected in some capacity as that is the initial purpose of ISDS and investor protections can reinforce the RoL (see Chapter 3.2.2). A requirement that all adjudicators require this international public law knowledge could create better consistency between the adjudicators in legal thinking which could enhance predictability in dispute resolution, another substantive aspect of the DRoL and an IRoL (see Chapter 3.5).

Diependaele and others were critical of CETA arbitrator qualifications. They believe CETA does 'not require the appointed judges to be qualified to hold judicial office in their home countries',[414] although my understanding of Article 8.27(4) suggests otherwise.[415] he judicial office in the UK has defined itself

[408] CETA (2016) op. cit., art 8.36.
[409] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, op. cit., art 4.
[410] Rhea Hoffman, 'The Multilateral Investment Court: A stumbling block for comprehensive and sustainable investment law reform' (2018) ESIL Annual Conference, Manchester 13-15 September 2018, 9.
[411] CETA (2016) op. cit., art 8.27(3).
[412] ibid, art 8.27(4).
[413] Rob Howse (2017) op. cit., 217-218, 224.
[414] Lisa Diependaele and others (2019) op cit., 50.
[415] CETA (2016) op. cit., art 8.27(4).

as 'dedicated to strengthening the rule of law',[416] and that 'its purpose is to support the judiciary in upholding the rule of law and in delivering justice impartially, speedily and efficiently'.[417] This suggests adjudicators with judicial office experience should be able to reinforce an IRoL in awards. However, putting extra requirements on individuals able to act in the capacity of adjudicators could be seen as exclusive.

A standing ISDS tribunal like CETA is significant as it gives the selection and appointment of arbitrators for resolving disputes attention which is not currently the case in the current ad hoc and bilateral ISDS (see Chapters 1 and 3.5). These issues are now also being addressed by WGIII within the context of a standing ISDS forum (see Chapter 5). Although some academics have expressed justified concern that CETA does not contemplate full-time adjudicators for ISDS,[418] Article 8.27(5) indicates adjudicators have stability of hire insofar as they have five-year terms, renewable once, and adjudicators whose terms have expired may continue to serve on cases until final awards are issued.[419] This could help enhance predictability, certainty, transparency, and accountability.

Article 8.28 concerns the appellate tribunal.[420] Under Article 8.28(2) '[t]he Appellate Tribunal may uphold, modify or reverse the Tribunal's award based on: errors in the application or interpretation of applicable law; manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b)'. Although Article 52 ICSID may not contain the substantive content to be considered an appropriate mechanism to conduct appellate review (see Chapter 3.4.2), academics believe CETA has 'broad appellate jurisdiction',[421] which allows 'an extensive review of tribunal decisions' meaning 'bad decisions can be corrected', and 'has the potential to improve both the quality and consistency of arbitration awards' and enhance legitimacy of ISDS.[422] I would concur that review of law and facts seem like more substantive functions appropriate for an appellate mechanism, and including appreciation of domestic law within appeal shows consideration of the DRoL.

[416] 'Contacts and Enquiries' (Judiciary 2000) <https://www.judiciary.uk/about-the-judiciary/international/contacts-and-enquiries/> accessed 22 October 2020.
[417] 'Judicial Office (JO)' (Judiciary 2000) <https://www.judiciary.uk/about-the-judiciary/training-support/jo-index/> accessed 22 October 2020.
[418] Makane Mbengue and Mohamed Negm in Mbengue and Schacherer (2019) op. cit., 263.
[419] CETA (2016) op. cit., art 8.27(5).
[420] ibid, art 8.28.
[421] Jansen Calamita (2017) op. cit., 602.
[422] Makane Mbengue and Mohamed Negm in Mbengue and Schacherer (2019) op. cit., 263.

The adjudicators will have the same qualifications[423] and tribunal constitution as the first-tier tribunal.[424] The administrative and organisational matters regarding the functioning of the Appellate Tribunal are not displayed in the provisions, but under Article 8.28(7) are designated to the CETA Joint Committee to make those decisions such as the number of Appellate Tribunal Members.[425] The function of the Appellate Tribunal was determined to be similar to that of the one in EU-Vietnam (see following section (4.4.2)).[426] The Committee on Services and Investment shall periodically review the functioning of the Appellate Tribunal and make recommendations,[427] which could act as a safeguard to ensure the CETA joint committee has made its decisions in line with the RoL. It does not seem that other parties such as third parties can appeal as favoured by some academics,[428] which if allowed could enhance inclusivity. An award can be appealed to the tribunal within 90 days of its issuance,[429] which should give the losing party enough time to initiate an appeal.[430]

Article 8.28(9)(b) indicates 'a disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure as regards an award under this Section'.[431] This *suggests* an award from the first-tier can only be impacted by proceedings that take place within the appellate tribunal which gives CETA a centralised forum within its control. Article 8.41(1) outlines: '[a]n award issued pursuant to this Section shall be binding between the disputing parties',[432] yet it seems the defeated disputing party can apply for the award to be set aside or annulled through the NYC or ICSID under Article 8.41(3).[433] This would seriously undermine both the binding nature of the award under Article 8.41(1) and the attempt to exclude revision and annulment of awards made in CETA under Article 8.28(9)(b)[434] (see Chapter 3.3.4-3.3.5). It seems an appellate award cannot be set aside or annulled,[435] and is considered a 'final award'.[436] However, a first-tier award is not final as it could be set aside or annulled or sent to the appellate tribunal.

[423] CETA (2016) op. cit., art 8.28(4).
[424] ibid, art 8.28(5).
[425] ibid, art 8.28(7).
[426] Decision No 1/2021 of the CETA Joint Committee of 29 January 2021 setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal [2021/264], Official Journal of the European Union, 19 February 2021.
[427]ibid, art 8.28(8).
[428] Lisa Diependaele and others (2019) op cit., 50, 51.
[429] CETA (2016) op. cit., art 8.28(9)(a).
[430] It could also avoid uncertainty of appeal against the winning party to drag on.
[431] CETA (2016) op. cit., art 8.28(9)(b).
[432] ibid, art 8.41(1)
[433] ibid, art 8.41(3)
[434] ibid, art 8.28(9)(b).
[435] ibid, art 8.28(9)(e).
[436] ibid, art 8.28(9)(d).

The type of awards available are monetary damages with interest or the restitution of property plus possible monetary damages with interest to compensate loss suffered from the properties fair market value due to the expropriation.[437] Monetary damages shall not exceed the loss suffered,[438] to ensure investors do not gain more through initiating the dispute, and the tribunal shall not award punitive damages,[439] to ensure the losing party does not receive extra punishment. In the distribution of tribunal costs the tribunal could consider formal and substantive inequalities between investor and State,[440] and substantive inequalities between investors.[441] Disputes held in the first-tier shall take no longer than 24 months from the claim submitted to the tribunal to the award,[442] but two years is quite long. The substantive RoL element of transparency is included under Article 8.36,[443] and it seems the UNCITRAL Transparency Rules UTR (see Chapter 3.3.1.2) will be the basis for proceedings, but with some amendments.[444]

These amendments could further enhance transparency by including the publication of documents not only as listed under Article 3 UTR, but also others such as decisions on challenges of tribunal Members,[445] and exhibits,[446] and documents before the commencement of arbitral proceedings under Article 2 UTR could be published subject to confidentiality. Like Article 6 UTR: '[h]earings shall be open to the public'.[447] Article 8.36(5) may go further in promoting transparency in logistical arrangements since Article 8.36(5) commits to initiating 'appropriate logistical arrangements to facilitate public access' to such hearings whereas Article 6 concedes that logistical reasons can prevent these arrangements. Article 8.37 is linked to transparency as it allows disputing parties to disclose unredacted documents to other persons in connection with the proceedings, including witnesses and experts, provided the disputing party ensures that those persons protect the confidential information contained in those documents. This could help experts for example come to the right, just, and fair conclusion while respecting the human right of privacy. CETA should reinforce transparency and thus contribute to furthering an IRoL.

[437] ibid, art 8.39(1). Monetary damages in addition to restation of property will be the fair market value of the property at the time immediately before the expropriation, or impending expropriation became known, whichever is earlier.
[438] ibid, art 8.39(3).
[439] ibid, art 8.39(4).
[440] ibid, art 8.39(5).
[441] ibid, art 8.39(6).
[442] ibid, art 8.39(7).
[443] ibid, art 8.36.
[444] ibid, art 8.36(1).
[445] ibid, art 8.36(2).
[446] ibid, art 8.36(3).
[447] ibid, art 8.36(5).

Moreover, CETA contains its own transparency Chapter.[448] This requires States to publish its laws, regulations, procedures, and administrative rulings that relate to CETA, including publishing measures the State plans to adopt, allowing time for comments on these measures, and providing requested information.[449] This seems to increase transparency in the domestic system of these State parties, thus reinforcing the DRoL. Additionally, Chapter 27 also ensures that the administrative proceedings that contribute to the administrative rulings are consistent, impartial, and reasonable, and allows the opportunity to review and appeal administrative actions. The protection of the RoL elements of consistency, impartiality, non-arbitrariness, and appellate review in the domestic setting furthers the DRoL. Moreover, Article 27.5 seems to outline a commitment to increase transparency within the wider international system of trade and investment,[450] thus reinforcing an IRoL. This commitment for transparency could be being activated at WGIII.

Neither Chapter 29 Section C on dispute settlement procedures nor Annex 29-A governing procedural arbitration rules make any reference to an appellate body which can help ensure awards reinforce an IRoL or for the award to be revised or annulled. This could be because dispute settlement can take place in the WTO.[451] However, Annex 29-A can lessen substantive inequalities as it allows amicus curiae submissions from NGOs.[452]

Article 8.29 is interesting as it covers future developments on 'the establishment of a multilateral investment tribunal and appellate mechanism' with other States.[453] Article 8.29 suggests that the CETA dispute settlement is intended to only be a temporary mechanism until an envisioned multilateral dispute resolution system in IIL comes into place. Such a development could be occurring at UNCITRAL where the EU is pushing for the creation of a two-tier multilateral investment court.[454] However, widespread support for the EU's proposals is yet to be seen. In the meantime, EU agreements like CETA and EU-Vietnam could be acting as blueprints/models to the EU response on reform in IIL and ISDS.[455]

4.4.2 EU-Vietnam

[448] ibid, ch 27.
[449] ibid, art 27(1)-27(2).
[450] ibid, art 27(5).
[451] ibid, art 29.3(1).
[452] ibid, annex 29-a, [43]-[46]. This includes unsolicited ones if the parties do not agree otherwise.
[453] ibid, art 8.29.
[454] Report of the United Nations Commission on International Trade Law, Fiftieth session (3–21 July 2017), [264], [447], <https://undocs.org/A/72/17> accessed 10 November 2020.
[455] Rob Howse (2017) op. cit., 210-215, 235-236; Jansen Calamita (2017) op. cit., 589-590.

Preamble

The EU-Vietnam trade and investment agreements are split into two: the free trade agreement,[456] and investment protection agreement.[457] This thesis will focus on the EU-Vietnam investment protection agreement. The preamble of EU-Vietnam investment protection agreement is not as dense as CETA. Similar to CETA it includes the promotion of sustainable development in its economic, social and environmental dimensions, protection of the UDHR, and a predictable investment framework. But unlike CETA it does not mention CSR values or expressly refer to the RoL, and transparency is only mentioned in terms of trade. Equally the preamble includes that environmental and labour standards must be considered during the promotion of investment, but does not outline the importance of State sovereignty or the States' right to regulate to achieve these public policy benefits. This preamble reinforces some formal and substantive elements of the RoL, but not to the extent of CETA.

Investor Protections

Like CETA, claims apply to certain covered investments and investors,[458] subsidies do not apply to national treatment or MFN.[459] EU-Vietnam contains the exception of audio-visual services for national treatment and MFN, [460] which was a specific designated EU exception in CETA for covered investments.[461] This implies that the EU might be exercising their better bargaining position over Vietnam. EU-Vietnam goes further than CETA by not only excluding national treatment and MFN from activities performed in the exercise of governmental authority, [462] but also services supplied. [463] Furthermore, EU-Vietnam excludes 'mining, manufacturing and processing of nuclear materials; production of or trade in arms, munitions and war material; [and] national maritime cabotage' from MFN and national treatment. EU-Vietnam could better protect State sovereignty from national treatment and MFN than CETA. EU-Vietnam and CETA both contain an 'investment and regulatory measures' Article which protects the State's right to regulate to achieve legitimate public policy objectives such as public health, human rights, and environmental protection, [464] which protect substantive elements of the RoL. Both articles suggest that these beneficial substantive RoL elements shall gain priority over an investor's expectation, such as its profits.[465] These articles could help balance substantive elements of the RoL against more commercial aspects of IIL.

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[456] Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam EU-Vietnam
[457] Investment Protection Agreement Between the European Union and the Socialist Republic of Vietnam EU-Vietnam (EU-Vietnam) (Signed 30 June 2019).
[458] ibid, art 2.1(1); CETA (2016) op. cit., art 8.2(1).
[459] EU-Vietnam (2019) op. cit., art 2.1(3); CETA (2016) op. cit., art 8.15(5)(b).
[460] EU-Vietnam (2019) op. cit., art 2.1(2)(a).
[461] CETA (2016) op. cit., art 8.2(3).
[462] CETA (2016) op. cit., art 8.2(2)(b).
[463] EU-Vietnam (2019) op. cit., art 2.1(2)(f).
[464] ibid, art 2.2(1); CETA (2016) op. cit., art 8.9(1).
[465] EU-Vietnam (2019) op. cit., art 2.2(2); CETA (2016) op. cit., art 8.9(2).

The MFN and national treatment provisions in EU-Vietnam seem much narrower than in CETA.[466] The 'no less favourable treatment' rule is only applied to operations of the investor or their covered investment,[467] whereas, CETA contains a more exhaustive list.[468] Even the operations under EU-Vietnam is under some exceptions.[469] Furthermore, MFN cannot apply to other agreements that entered into force before EU-Vietnam.[470] This could help correct past agreements negotiated by previous governments where investor protections were too strong. Moreover, MFN cannot apply to other agreements that substantially abolish all barriers to investment.[471] This limits the traditional notion of investment promotion and instead could be used to encourage sustainable investment. These limits to MFN could be justified RoL exceptions if used correctly. Like CETA and the MAI investors receive whatever is more favourable between national treatment or MFN treatment for compensation of loss in situations like war and emergency.[472] These non-discrimination related investor protections in EU-Vietnam seem limited compared to CETA. This could show the EU adjusting to Vietnams needs. The EU-Vietnam agreement seems to protect the substantive RoL element of State sovereignty, but limits the mostly formal RoL rights of investors.

The definitions of FET, FPS, and legal expropriation are akin to those in CETA, reflecting common international standards.[473] However, Article 2.7(3) contains extra provisions if Vietnam is the expropriating party.[474] This could balance substantive inequalities between Vietnam and the EU in power and wealth and create a more fair and just system that could further the substantive RoL.[475]

Dispute Settlement

EU-Vietnam Investment Protection Agreement Chapter 3 outlines dispute settlement. The State-State dispute settlement option under Section A includes WTO like procedures and language such as interim

[466] There are international airport exceptions applying to national treatment and MFN like CETA, but in CETA they apply to only covered investments although they do cover other provisions like performance requirements, see, EU-Vietnam, art 2.1(2)(e). CETA, art 8.2(2)(a).
[467] EU-Vietnam (2019) op. cit., arts 2.4(1), 3.3(1).
[468] CETA (2016) op. cit., arts 8.6(1), 8.7(1).
[469] EU-Vietnam (2019) op. cit., art 2.3(2). One exception that could be used is a measure that is adopted on or before the date of entry into force of this Agreement.
[470] ibid, art 2.4(3). Also, MFN cannot apply to certain sectors under art 2.4(2).
[471] ibid, art 2.4(4)(a).
[472] CETA (2016) op. cit., art 8.11; MAI (1998) op. cit., s 4, 57; EU-Vietnam (2019) op. cit., art 2.6(1). The provisions in EU-Vietnam seem to not cover indirect non-human causes such as natural disasters like CETA and the MAI, but do commit to prompt, adequate and effective restitution or compensation if armed forces or authorities destroy or requisition covered investment, see EU-Vietnam (2019) op. cit., art 2.6(2). Although as a developing State Vietnam may not have the funds to initiate prompt compensation to investors.
[473] EU-Vietnam (2019) op. cit., arts 2.6, 2.7(1)-2.7(2); CETA (2016) op. cit., arts 8.10, 8.12(1)-8.12(2).
[474] EU-Vietnam (2019) op. cit., art 2.7(3).
[475] On a side note, both EU-Vietnam and CETA cover provisions on free transfer of convertible currency (EU-Vietnam (2019) op. cit., art 2.8; CETA (2016) op. cit., art 8.13), and subrogation (EU-Vietnam (2019) op. cit., art 2.9; CETA (2016) op. cit., art 8.14).

report,[476] final report,[477] compliance of final report,[478] review of measure taken to comply with the final report,[479] and temporary remedies in case of non-compliance.[480] But unlike the WTO there does not seem to be an appellate mechanism for State-State disputes. ISDS is under Section B. Like CETA an investor must come to the dispute with clean hands,[481] which could reinforce the RoL. The EU-Vietnam provisions suggest initiating arbitral proceedings should be a last resort if disputes cannot be avoided through mutually agreed solutions outside arbitration,[482] and that disputes should be settled amicably even before consultation proceedings.[483] Similarly to CETA the process of consultation and preferably mediation will come before ISDS proceedings can arise.[484] The claimant must submit a notice of intent to submit a claim[485] before submitting that claim.[486]

Like CETA a claimant can submit a claim under the dispute settlement rules of ICSID Convention, its additional facility, UNCITRAL Rules, or other rules agreed upon by the parties.[487] But unlike CETA, the tribunal contains nine members, three nationals from each of the EU, Vietnam, and third States.[488] This could reflect the substantive inequalities between the parties of Canada and Vietnam as CETAs 15 members would require a lot more finance and resources to attain than the nine in EU-Vietnam. Another difference is that these members will have 4-year terms that are renewable once[489] rather than the five in CETA.[490] Apart from the number of tribunal members and their fixed terms, the provisions around the constitution and set-up of the tribunal is similar to CETA such as including the option for more and less members,[491] members having expertise in public international law as well as international investment law,[492] and three members hearing disputes,[493] with the option for just one member on a tribunal.[494] Similarly there is also the option for the Committee to transfer the retainer

[476] EU-Vietnam (2019) op. cit., art 3.10.
[477] ibid, art 3.11.
[478] ibid, art 3.12.
[479] ibid, art 3.14.
[480] ibid, art 3.15.
[481] ibid, art 3.27.
[482] ibid, art 3.1.
[483] ibid, art 3.29.
[484] ibid, art 3.30-3.33.
[485] ibid, art 3.32. This can occur 90 days from consultation proceedings. It is like the determination of respondent in CETA which only concerned the EU. This addressed whether the respondent was the EU or one of its member States. CETA (2016) op. cit., art 8.21.
[486] EU-Vietnam (2019) op. cit., art 3.33. A claim can only be submitted six months after consultation and three months after the notice of intent to submit a claim.
[487] ibid, art 3.33(2).
[488] ibid, art 3.38(2).
[489] ibid, art 3.38(5).
[490] CETA (2016) op. cit., art 8.27(5); For TTIP Draft it is 6-year renewable terms.
[491] EU-Vietnam (2019) op. cit., art 3.38(3).
[492] ibid, art 3.38(4).
[493] ibid, art 3.38(6). One national from each of the EU, Vietnam, and a third State.
[494] ibid, art 3.38(9).

fee and other fees into a regular salary.[495] The text of EU-Vietnam shows that a regular salary would mean the adjudicators would become full-time and would be barred from engaging in any other occupation apart from when exceptions are granted.[496] This could limit adjudicator conflict of interests and help improve their independence and impartiality (see Chapter 3.5.3). Damages are similar to CETA if the tribunal finds a State measure breached Chapter 2.[497] Equally to CETA, EU-Vietnam covers ethics,[498] preliminary objections,[499] claims unfounded as a matter of law,[500] and transparency.[501] Article 3.41 similarly to CETA outlines the hope for negotiation for a multilateral appellate mechanism. One difference is that a first-tier tribunal award is called a provisional award presumably because there is an option to appeal.

The Appeal Tribunal (which only operates for investor-State disputes) shall be composed of six Members; two nationals of each from the EU, Vietnam and third States,[502] like in CETA.[503] This is only three less than the first-tier tribunal. Apart from this the constitution and set up of the appellate tribunal is like the first-tier tribunal. Article 3.54 governs the appeal procedure.[504] The grounds for appeal are identical to CETA which was regarded as broad and extensive by academics.[505] It seems 'appeal under the EU's treaties is granted as of right'.[506] Furthermore, if the appeal tribunal finds that the appeal is well founded it will modify or reverse the legal findings and conclusions in the provisional award in whole or part and specify precisely how this change has occurred,[507] and could apply its own legal findings and conclusions to such facts and render a final decision.[508] These provisions suggests the appellate tribunal has substantive powers and is similar to that of CETA and has resemblances to the WTO.[509]

[495] ibid, art 3.38(17).
[496] ibid, art 3.38(17).
[497] ibid, art 3.53; CETA (2016) op. cit., art 8.39. A noticeable difference between the two is when paying monetary damages as well as restitution of property under EU-Vietnam there is no text indicating that the extra damages may reflect the loss suffered from the properties fair market value due to the expropriation.
[498] EU-Vietnam (2019) op. cit., art 3.40.
[499] ibid, art 3.44.
[500] ibid, art 3.45.
[501] ibid, art 3.46.
[502] ibid, art 3.39(2).
[503] Decision No 1/2021 of the CETA Joint Committee of 29 January 2021, op. cit.
[504] EU-Vietnam (2019) op. cit., art 3.54.
[505] Jansen Calamita (2017) op. cit., 597, 599, 602, Said in the context of TTIP at Page 597, but at page 599 Calamita said 'The jurisdiction of the Appeal Tribunal [in EU-Vietnam] mirrors that outlined in the TTIP proposal', and at page 602 says the appellate jurisdiction in CETA mirrors TTIP; Makane Mbengue and Mohamed Negm in Mbengue and Schacherer (2019) op. cit., 263.
[506] Jansen Calamita (2017) op. cit., 603.
[507] EU-Vietnam (2019) op. cit., art 3.54(3).
[508] ibid, art 3.54(4).
[509] Decision No 1/2021 of the CETA Joint Committee of 29 January 2021, op. cit.

Furthermore, appellate tribunals precisely explaining why changes from an award issued by a first-tier tribunal occurred ensures the prohibition of arbitrariness and thus helps reinforce the RoL. The time frame for appeal procedures should not exceed 180 days from notice to appeal to the appellate tribunal award and only in exceptional circumstances no longer than 270 days,[510] which is the same as CETA.[511] Six months is a long time considering only EU States and Vietnam will use this appellate tribunal and its use is dependent on potential mistakes from the first-tier. Article 3.54(6) indicates the claimant shall provide the costs of appeal which is the same as CETA,[512] and could ensure that appeals are made legitimately and in cases when they seem justified, but it may also limit access to justice if parties cannot afford to appeal.

A final award is made once neither side appeal the provisional award within 90 days of the first-tier award,[513] or once the appellate tribunal dismisses an appeal,[514] or once the provisional award modifies or amends the provisional award.[515] Also once the tribunal modifies or reverses the legal findings and conclusions of the provisional award and then refers the matter back to the first-tier tribunal, which is bound to take into consideration the appellate tribunal findings and react upon those finding and if appropriate revise its provisional award.[516] A final award shall be considered binding, and not be subject to appeal, review, be set aside, annulment or any other remedy.[517] This is arguably preferable from a RoL perspective to CETA, which compromised the final and binding nature of its award by allowing proceedings to take place under ICSID and UNCITRAL which could be capable of seriously impacting this final and binding award.[518]

4.4.3 Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP)

Appellate Review

Before investigating the preamble, investor protections and dispute resolution of CPTTP (which the EU is not party too), one of the most interesting differences between CPTPP and both CETA and EU-Vietnam is that CPTPP does not currently have an appellate mechanism in ISDS even though Canada and Vietnam agreed to such a mechanism with the EU. This could show that the inclusion of appellate review reflected the strong wishes of the EU rather than a desired mutual arranged between the

[510] EU-Vietnam (2019) op. cit., art 3.54(5).
[511] Decision No 1/2021 of the CETA Joint Committee of 29 January 2021, op. cit.
[512] ibid.
[513] ibid, art 3.55(1).
[514] ibid, art 3.55(2).
[515] ibid, art 3.55(3).
[516] ibid, art 3.55(4).
[517] ibid, art 3.57.
[518] Moreover, unlike Canada, Vietnam is not a party to ICSID.

parties. Article 9.23(11) provides for the possibility of an appellate mechanism being created in the future under other institutional arrangements such as at WGIII (see Chapter 5).[519]

This could signify that the parties recognise a unified international appellate mechanism in ISDS is building momentum and that appellate review is necessary to further reinforce the RoL, but the parties might have concerns about the added cost and time of such appeal after the first-tier proceedings, and that any appellate mechanism must have fixed transparent proceedings. These transparent proceedings could be similar to the ones in the first tier of CPTPP which suggests there is scope for flexibility to adjust if the first-tier requires improvement for example to reflect modern society values which would hopefully further reinforce an IRoL. If an appellate mechanism is created it must reinforce an IRoL and the guarantee of transparent proceedings, a substantive element of the RoL, is a start to reaching that objective. Moreover, for an appellate review mechanism to effectively reinforce an IRoL it would need the scope to investigate substantive claims (Chapters 3.3.4 and 3.4.2).

Significance of Different Agreements

It is interesting to note that Canada tried to exclude itself from ISDS in the revised NAFTA arrangements, known as the United States–Mexico–Canada Agreement (USMCA),[520] on July 2020, even though Chapter 2 showed dispute settlement of investor-State could be better than State-State resolution. This seems even more peculiar given that just a few years earlier Canada committed to an investment court system (ICS) of ISDS in CETA and old ISDS in CPTPP (no appellate review).[521] Annex 14-D USMCA describes the procedure for ISDS between only the US and Mexico.[522] Moreover, Article 14.D.3(1) further limits ISDS as it prohibits claims of indirect expropriation, and FET and minimum standards of treatment are not included on the protections that can be claimed under ISDS.[523] The effectiveness of these exclusions on ISDS and indirect expropriation claims can be limited within the wider international setting. For example, Canada and Mexico are both parties to the CPTPP which has ISDS that allows indirect expropriation claims. This means ISDS claims can still be made by a Mexican national against Canada under CPTPP even though ISDS is excluded by Canada in USMCA.

ISDS exclusions in USMCA may be further limited in the wider international setting if the US join CPTPP which is possible as it had negotiated and signed the Trans-Pacific Partnership (TPP)[524] before dropping out, leading to the remaining parties to create the similar CPTPP. Yet the ISDS exclusions in

[519] CPTPP (2018) op. cit., art 9.23(11).
[520] United States–Mexico–Canada Agreement (USMCA) (Signed 30 November 2018, Revised Version Signed 10 December 2019, Effective 1 July 2020). USMCA is a successor to NAFTA.
[521] Van Harten believes Canada also conceded to lobsided ISDS with China in 2012. China–Canada investment treaty, signed 9 September 2012. Gus Van Harten (2020) op. cit.,143.
[522] USMCA (2019) op. cit., art 14.D.1. This article indicates 'Annex Party means Mexico or the United States'.
[523] ibid, art 14.D.3(1).
[524] Trans-Pacific Partnership (TPP) (signed 4 February 2016).

USMCA should be noted as it might represent a massive policy shift on IIL and ISDS in Canada for the 2020s which could be displayed at WGIII. Alternatively, USMCA might represent Canada's unpleasant experience of ISDS in NAFTA such as in contested cases like *Bilicoin*.[525] Nonetheless, the current stance that Canada is taking on ISDS is unpredictable since it has consented to IEL agreements that will bind itself to a two-tier ISDS,[526] a one-tier ISDS,[527] and no ISDS,[528] in the space of just 3 years with the same administration in power.

The preamble of CPTPP references the State's right to regulate in the public interest, sustainability, and CSR, but it does not reference transparency, predictability, or the RoL.[529] Moreover, human rights is not directly referenced, but there is reference to elements of human rights such as gender, cultural, labour, and indigenous rights.[530] CPTPP, like EU-Vietnam and CETA, has a Transparency chapter.[531] CPTPP like CETA has a chapter on the environment,[532] but unlike CETA it does not have its own chapter on sustainable development although sustainable development is referenced in CPTPP's environmental chapter.[533] The chapters of these agreements focus more on trade than investment as investment has its own chapters. For CPTPP the investment chapter is Chapter 9.

An important innovation in the investment chapter of CPTPP is the inclusion of a CSR provision.[534] This clause, which requires States to encourage investors to voluntarily incorporate CSR into their investments internal policy, is absent from the investment chapter of CETA.[535] The CSR clause requires both State and investor cooperation which is limited compared to if the article put the obligation directly on the investors and not all States can hold investors accountable for their abuses (see Chapter 2.7). An appropriate balance would occur if not only investor rights but also investor obligations were in IIAs and trade agreements incorporating investor aspects.[536] Investors initiating ISDS claims would show their consent to the agreement's contents. The Pan-African Investment Code (PAIC) includes a

[525] Van Harten described Canada's NAFTA deal as 'the worst concession of a developed country's sovereignty to ISDS in history'. See, Gus Van Harten (2020) op. cit.,143-144.
[526] CETA (2016) op. cit.
[527] CPTPP (2018) op. cit.
[528] USMCA (2019) op. cit.
[529] This was in contrast to USMCA where the promotion of transparency and predictability were common themes in the preamble and there was reference to the RoL.
[530] There is similar to USMCA but in USMCA it encouraged increased engagement by indigenous peoples in trade and investment rather than protecting indigenous rights.
[531] CPTPP (2018) op. cit., ch 26; CETA (2016) op. cit., ch 27; Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam EU-Vietnam, ch 14.
[532] CPTPP (2018) op. cit., ch 20; CETA, ch 24.
[533] CETA (2016) op. cit., ch 22.
[534] CPTPP (2018) op. cit., art 9.17.
[535] CETA refers to CSR at Article 22.3(2)(b) (sustainability development Chapter), 24.12(1)(c) (trade and environment Chapter), and 25.4(2)(c) (dialogue and cooperation Chapter).
[536] Makane Mbengue and Mohamed Negm in Mbengue and Schacherer (2019) op. cit.,257.

whole chapter dedicated to investor obligations,[537] including CSR and human rights.[538] This puts the obligation only on the investor and not the State, so counter claims are possible under the PAIC.[539]

Like CETA and EU-Vietnam, CPTPP has its own right to regulate for legitimate policy objectives.[540] Yet while in CETA and EU-Vietnam this may only be intended to protect from claims of investor expectation, CPTPP makes no mention of investor expectation and includes quite vague and minimal detail on its effectiveness and application on investor protections. The investor protections included in CPTPP ISDS are like CETA and EU-Vietnam. A notable difference is that for no less favourable treatment circumstances in national treatment and MFN, CPTPP goes further than EU-Vietnam by including more than just an investors or their investments operation,[541] but is not as extensive as CETA.[542]

Dispute Resolution

In CPTPP, like CETA and EU-Vietnam, an investor must seek consultation before they can initiate a claim under arbitration,[543] and similarly investors can choose the rules of arbitration.[544] However, a noticeable difference is that consultation can occur without attempting to first settle the dispute in the domestic system. This could benefit the investor as the exhaustion of local remedies could be time-consuming, costly, and pointless if the investor is determined to initiate ISDS. Under CPTPP it might be more favourable for an investor not to first initiate a claim in the domestic system because under Annex 9-J some States have put exceptions to Chapter 9 that stop international claims if the same claim has already been made at the domestic level. Investors cannot submit claims to arbitration under Section B (ISDS) that Chile, Mexico, Peru or Vietnam breached obligations under Section A if investors already claimed breaches of Section A within the courts or administrative tribunals of those States.[545] This is strange for Vietnam because, in EU-Vietnam, Vietnam agreed domestic proceedings had to occur before consultation proceedings. Other interesting exceptions to Chapter 9 which can limit CPTPP's dispute resolution provisions include that if alternate IIAs allow ISDS, Chapter 9 Section B may not apply.[546]

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[537] ibid, 257-258.
[538] Pan-African Investment Code (2016), ch 4, arts 22, 24.
[539] ibid, art 43.1.
[540] CPTPP (2018) op. cit., art 9.16.
[541] ibid, arts 9.4-9.5. These articles include establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
[542] CETA (2016) op. cit., arts 8.6-8.7. CETA compared to CPTPP also includes maintenance, use, and enjoyment.
[543] CPTPP (2018) op. cit., art 9.18.
[544] ibid, art 9.19(4).
[545] ibid, annex 9-j(1)
[546] ibid, annex 9-l(a).

Amicus curiae submissions could also be limited in application as the tribunal must consult with the parties before accepting them, even though they 'may assist the tribunal' in reaching an award.[547] However, there is a transparency provision that promotes transparency except for protected information which like CETA and EU-Vietnam could help ISDS reinforce the RoL.[548] The type of award that the tribunal can make is like CETA and EU-Vietnam.[549] An award is binding on the parties,[550] but like CETA is restricted to annulment proceedings under ICSID or being set aside under UNCITRAL.[551]

Another noticeable difference between CPTPP and both CETA and EU-Vietnam is in the constitution of the tribunal. Although three arbitrators still hear the dispute, there are no fixed-term members of the tribunal and no retainer fee.[552] The disputing parties will select their preferred arbitrator and agree upon one other. This is like international commercial arbitration which is problematic as it causes arbitrator conflict of interests which could limit RoL elements of predictability, correctness, independence, and impartiality (see Chapters 1 and 3.5). However, maintaining fixed-termed members to dispute resolution could require constant funding, but this should not be a massive issue as disputing parties would commonly pay for the arbitrators in traditional ISDS arbitration although normatively this cost is shared between investor and State.[553]

Investment Courts

Another problem is multilateral agreements containing investment aspects being created with their own dispute resolution as seen with CETA and EU-Vietnam. Adjudicator membership is even more costly if there are many different agreements that a State is party to, each with its own fixed-termed adjudicator membership. For developing States such as Vietnam it could be unsustainable to fund a variety of investment courts. Moreover, Jaemin Lee, who supports the overall proposal for the creation of a multilateral investment court, has argued multiple investment courts could move away from the desired aim of multilateralization by causing further fragmentation and shifting towards bilateralism.[554] Legitimacy and predictability could be decreased in IIL as the courts create their own

[547] ibid, art 9.23(3).
[548] ibid, art 9.24.
[549] ibid, art 9.29.
[550] ibid, art 9.29(7).
[551] ibid, art 9.29(9).
[552] ibid, art 9.22.
[553] Formal and substantive equalities should be recognised in funding fixed-termed members either through its State parties to the agreement or when claims are made by investors or both. Some provisions in CETA and EU-Vietnam try to make the disputes more accessible for small-medium sized investors, i.e, EU-Vietnam (2019) op. cit., art 3.53(5); CETA (2016) op. cit., art 8.39(6); Also, assistance to low income State could be given through third-party funding (CETA (2016) op. cit., art 8.26, and, EU-Vietnam (2019) op. cit., art 3.37).
[554] Jaemin Lee (2018) op cit, 24-27.

binding rules and interpretations differently from one another, although when taking each court on its own then legitimacy and predictability would be enhanced.

However, maybe these investment courts can increase the incentive of the international community to agree upon a unified multilateral court mechanism. By contrast, and for the time being, there will be a divide in the international community between using the multilateral unified court system if created and the present arbitration process through IIAs and BITs, with the court system being limited by the present arbitration system. The current system is dominated by IIAs, and both the respondent and the investor's home State may need to be party to the unified multilateral appeal system or a multilateral instrument (see Chapter 5.5.1). A host State or investor that favours an investment court can only go to the investment court if the other party (investors home State or host State) is party to the court system or the investor or host State consents too it. This means the present arbitration mechanism could remain dominant in the IIL landscape. An inclusive negotiating forum must find consensus among States to create a central and universal ISDS system in IIL that can reinforce the RoL. This includes maintaining fixed-termed adjudicators that are full-time and permanent unlike the EU agreements, and considering substantive inequalities unlike the MAI. The next chapter considers whether this can be achieved at WGIII.

4.5 Conclusion

These developments in IEL can offer guidance regarding appropriate reform for ISDS. The attempt to introduce the MAI indicated the importance of inclusive, diverse, and transparent negotiations to help promote substantive equality and sustainable investment and thus reinforce an IRoL. The MAI draft provisions like investor protections were not far off current international standards, but the text that was agreed upon at that negotiating stage when the draft became public lacked investor obligations and failed to adequately acknowledge the State's right to regulate for legitimate public policy objectives such as human rights and environmental considerations. The OECD lacked representativity to effectively consider issues like substantive equality and failed to take the negotiations to the public domain required for consensus on the reform to be achieved.

The significance of considering State sovereignty, State compliance and the importance of a functioning appellate body is demonstrated at the WTO. In response to panel reports being appealed into the legal void which significantly limits the ability of the WTO to reinforce an IRoL, an interim appeal measure known as the MPIA was formed. It gives members that join the MPIA the ability to ensure awards reinforce an IRoL.

Recent EU instruments indicate that a two-tier system dispute mechanism which includes appellate review could reinforce the RoL. However, CETA may be limited by external enforcement and

recognition from ICSID and domestic courts which would restrict its ability to reinforce an IRoL. Furthermore, in my opinion adjudicators should have fixed salaries and be full-time to help address issues surrounding conflict of interest. The EU agreements only have a limited ability to reinforce an IRoL as it is between only two parties, and it is not sustainable to create multiple investment courts which means a unified one attracting many State parties is the way forward to reinforce an IRoL.

In the next chapter, the focus will shift to UNCITRAL where negotiations regarding ISDS are a 'live' issue. My aim will be to explore the work of UNCITRAL's WGIII and to critically assess whether this negotiating forum is likely to bring about a central and universal ISDS system that reinforces the RoL. As seen from Article 8.29 CETA and 3.41 EU-Vietnam, the EU is pushing for a two-tier multilateral investment court and WGIII is the current designated forum to achieve those aims. It seems the procedural and substantive provisions in the investment chapter of both CETA and EU-Vietnam may offer a blueprint to achieve more universal reform in ISDS.

Chapter 5: UNCITRAL Working Group III: RoL implications of a Multilateral Appellate Mechanism with capable Adjudicators in ISDS

5.1 Introduction

This chapter critically analyses the different procedural reform proposals for Investor-State Dispute Settlement (ISDS) examined by the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WGIII) up until its 40th session in February 2021. The proposals focus on *procedural* reform in dispute resolution rather than *substantive* reform in investor protections, although there are overlaps between the procedural and substantive issues in ISDS. This chapter will assess the extent to which these reform proposals might address Rule of Law (RoL) concerns relating to ISDS. The chapter will consider discussion of appellate review, multilateral reform, and the adjudicators who will oversee issuing awards that should reinforce the RoL. Furthermore, attention will be given to identifying the stakeholders attending and participating in WGIII to highlight whether it is an inclusive environment that can respond not only to economic considerations prevalent in international investment law (IIL) and ISDS but also social values important to the RoL. Overall, the purpose of this chapter is to assess whether the reforms proposed would have a greater ability to reinforce the RoL than the current systems of ISDS.

This chapter is structured to reflect the mandate of WGIII's investigation procedure for examining ISDS concerns and the desirability of remedying those concerns. The chapter will first examine the ISDS concerns identified by WGIII and assess the merits for reform (Chapter 5.2). It will then assess the reform proposals considered in WGIII, which could be recommended to the Commission, at stage 3 of its mandate. This thesis covers material available up until February 2021. Due to the quantity of materials under review by WGIII, this chapter will present the initial reform options up to WGIII's resumed thirty-eighth session (January 2020) (Section 5.3). After considering the inclusivity of WGIII discussion (Section 5.4), it will then present the more specific reform options of a multilateral instrument, appellate review, and adjudicator overhaul post WGIII's resumed thirty-eighth session until its fortieth session (February 2021) (Section 5.5). The chapter pays special attention to reform discussions that concern the adjudicators and appellate review, including references to standalone multilateral appellate review and a two-tier system/multilateral investment court (MIC). This chapter will show that, while ISDS does not currently sufficiently reinforce the RoL, some of the RoL concerns raised in this thesis could be overcome by incorporating unified appellate review, preferably within a multilateral two-tier system and with adjudicators capable of reinforcing the RoL.

5.2 ISDS Concerns and Reform Desirability

This section investigates the procedural concerns in relation to ISDS identified by WGIII. It will be shown that many of the concerns flagged by WGIII restrict the application of the RoL in ISDS awards.

After WGIII recommended solutions relating to online dispute resolution to the Commission in 2016,[1] its focus shifted towards addressing other issues in investment law. At UNCITRAL's fiftieth session the reform proposal topics were concurrent proceedings,[2] ethics,[3] and ISDS.[4] The Commission decided WGIII's focus would be ISDS.[5] The ISDS reform topic report noted strong criticism in relation to a number of aspects of ISDS, including: the appointment of arbitrators and the perception that arbitrators lacked independence and impartiality; the perceived incoherence and inconsistency of ad hoc tribunals; the lack of safeguard mechanisms to ensure arbitral awards are correct; the length and cost of proceedings; and, the lack of transparency, democratic accountability and legitimacy in proceedings.[6] Unsurprisingly, these concerns mirror those presented in the preceding chapters of this thesis and highlights the fact that ISDS is failing to advance the RoL.[7] Furthermore, the discussions on addressing concurrent proceedings,[8] and ethics,[9] are still relevant in ISDS as is evident from their

[1] Online dispute resolution for cross-border electronic commerce transactions, Note by the Secretariat, Draft outcome document reflecting elements and principles of an ODR process, United Nations Commission on International Trade Law Working Group III (Online dispute resolution) Thirty-third session New York, 29 February-4 March 2016, <https://undocs.org/en/a/cn.9/wg.iii/wp.140> accessed 9 November 2020; UNCITRAL Report of Working Group III (Online Dispute Resolution) on the work of its thirty-third session (New York, 29 February-4 March 2016), United Nations Commission on International Trade Law Forty-ninth session New York, 27 June-15 July 2016, [87], <https://undocs.org/en/a/cn.9/868> accessed 9 November 2020.

[2] For example, where an investor and its investment bring claims under different IIAs or investment contract, thus seeking relief from various forums and under different sources of law, yet seeking substantially the same relief for the same measure. Similarly, multiple claims when a State measure impacts many investors and their investment and each seek relief under different IIAs or investment contracts for the same measure. See Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration, Note by the Secretariat, United Nations Commission on International Trade Law, Fiftieth session, Vienna, 3-21 July 2017, <http://undocs.org/A/CN.9/915> accessed 9 November 2020.

[3] There is no centralised code for ethics such as impartiality and independence of arbitrators or transparency. Also, current ethics codes are mainly descriptive rather than explaining their practical implications, see, Possible future work in the field of dispute settlement: Ethics in international arbitration, Note by the Secretariat, United Nations Commission on International Trade Law, Fiftieth session, Vienna, 3-21 July 2017, [19]-[23] [40]-[43] <http://undocs.org/A/CN.9/916> accessed 9 November 2020.

[4] Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS), United Nations Commission on International Trade Law, Fiftieth session, Vienna, 3-21 July 2017, <http://undocs.org/A/CN.9/917> accessed 9 November 2020.

[5] Report of the United Nations Commission on International Trade Law, Fiftieth session (3-21 July 2017), [263]-[264] <https://undocs.org/A/72/17> accessed 10 November 2020.

[6] Possible future work in the field of dispute settlement: Reforms of ISDS, (July 2017) op cit., [10]-[12].

[7] Columbia Centre on Sustainable Investment, 1 May 2018, p 3, <https://uncitral.un.org/sites/uncitral.un.org/files/columbia_center_remarks.pdf> accessed 24 November 2020.

[8] Possible future work in the field of dispute settlement: Reforms of ISDS, (July 2017) op cit., [31ii].

[9] ibid, [19] [28] [33]-[39].

reference in both the ISDS topic proposal,[10] and during WGIII activities[11] since both play an important role in advancing the RoL through fairness and justice, and the independence and impartiality of arbitrators.[12]

In the context of the ISDS reform topic, WGIII is operating according to a three-pronged mandate: identifying ISDS concerns; assessing whether reform is desirable; and investigating, developing, and recommending pragmatic solutions to the Commission.[13] The first formal WGIII document on possible ISDS reform outlined that the process for investigating reform should be government-led, and a fully transparent process, with all stakeholders able to participate and share their expertise.[14] Indeed, interested non-state actors have argued that the three-pronged mandate must be thoroughly and extensively discussed so that all participants can reflect upon arguments and engage in the process in a meaningful way.[15] The analysis below suggests that the process has been both participatory and inclusive so far,[16] which reinforces the RoL element of legality through a 'transparent, accountable and democratic process for enacting law'.[17] For example, States can send public submissions to WGIII outside of WGIII sessions.

Other non-state stakeholders are mostly represented in WGIII by international organisations including organisations under the UN umbrella (such as the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Conference on Trade and Development (UNCTAD)), intergovernmental organisations (such as the Organisation for Economic Co-operation and Development (OECD) and the Permanent Court of Arbitration (PCA)) and non-governmental

[10] Ethics considerations and concurrent proceedings were also discussed in ICSID's potential reform options, see, Possible reform of investor-State dispute settlement (ISDS): Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-fourth session Vienna, 27 November-1 December 2017, [16], <https://undocs.org/en/A/CN.9/WG.III/WP.142> accessed 10 November 2020.

[11] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), United Nations Commission on International Trade Law, Fifty-second session, Vienna, 8–26 July 2019, [41]-[53] [64]-[108], <https://undocs.org/en/A/CN.9/964> accessed 11 November 2020.

[12] Columbia Centre on Sustainable Investment, 1 May 2018, op. cit., p 2-3.

[13] Report of the United Nations Commission on International Trade Law ((July 2017) op. cit., [263]-[264].

[14] Possible reform of investor-State dispute settlement (November-December 2017) op. cit., [3].

[15] EFILA's written comments made at the UNCITRAL Working Group on ISDS reform, June 2018, [4], <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/efilas_written_comments_for_uncitral.pdf> accessed 24 November 2020.

[16] The G77 mostly made up of developing and LDCs expressed satisfaction with how the phases were going, see, Statement of the Group of G77 and China delivered by Ms Veronica Gomez, Charge D´Affaires A.I. of the Permanent Mission of Ecuador at the UNCITRAL WG III (Investor-State Dispute Settlement Reform), 29 October–2 November 2018 <https://uncitral.un.org/sites/uncitral.un.org/files/g77wgiiifinal_291018.pdf> accessed 24 November 2020.

[17] European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, adopted at its 86th plenary session (Venice, March 2011), [41].

organisations (NGOs).[18] The Academic Forum of WGIII also plays a critical role, with academics in the field of ISDS exchanging views, exploring issues, offering test solutions, and making a constructive contribution to the ongoing discussions.[19] To evaluate the interventions made by the different stakeholders, this chapter will consider submissions sent by States and organisations to WGIII and papers published on the Academic Forum.

The findings of the ISDS reform topic report suggest procedural reform of ISDS is more likely to be successful than reform of substantive investor protections, as it is less likely that multilateral consensus will be reached on the latter.[20] Yet some academics argue the substantive investor protections limit the RoL element of equality on a global scale, and instead favour of a very small minority of individuals responsible for companies that pollute the environment.[21] One radical suggestion put forward is, the removal of investor protections which would enable States to adequately address important public policy issues like environmental issues for the benefit of its citizens.[22] This proposal, however, is unlikely to be an attractive one. Other academics suggest procedural reform may not be easier than substantive reform because the process of *ad hoc* arbitration is also a result of States failing to agree upon multilateral dispute resolution rules.[23] The multilateralization of IIL is welcomed by some States like China, which has submitted that 'regulating appeal mechanisms by formulating multilateral rules is more efficient than doing so through bilateral investment agreements [BITs], and it can minimize institutional costs'.[24]

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[18] Possible reform of investor-State dispute settlement (November-December 2017) op. cit., [10]; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018), United Nations Commission on International Trade Law, Fifty-first session, New York, 25 June–13 July 2018, [7], <https://undocs.org/A/CN.9/935> accessed 11 November 2020; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), (July 2019) op. cit, [9]; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019), United Nations Commission on International Trade Law, Fifty-second session, Vienna, 8–26 July 2019, [9], <http://undocs.org/en/A/CN.9/970> accessed 11 November 2020; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019), United Nations Commission on International Trade Law, Fifty-third session, New York, 6–17 July 2020, [8], <http://undocs.org/en/A/CN.9/1004> accessed 11 November 2020.

[19] 'Academic Forum on ISDS' <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/> accessed 19 April 2021.

[20] Possible future work in the field of dispute settlement: Reforms of ISDS, (July 2017) op cit., [14].

[21] Gus Van Harten, *The Trouble with Foreign Investor Protection* (OUP 2020) 1-13.

[22] ibid, 133-145.

[23] Julian Arato, Yas Banifatemi, Chester Brown, Diane Desierto, Fabien Gelinas, Csongor Istvan Nagy, Federico Ortino, 'Working Group No 3: Lack of Consistency and Coherence in the Interpretation of Legal Issues', (Academic Forum Concept Paper on Issues of ISDS Reform, Preliminary Draft, 30 January 2019), [7]-[8], <https://www.cids.ch/images/Documents/Academic-Forum/3_Inconsistency_-_WG3.pdf> accessed 7 December 2020.

[24] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China: Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State

However, there could be convergence of investor protections (See Chapter 3.2.2), which may not have received the attention they deserve,[25] while a permanent two-tier body could bring more coherence than ad hoc tribunals.[26] Moreover, and as WGIII has argued in reference to a report by the Centre for International Dispute Settlement (CIDS), that a permanent two-tier body (as opposed to ad hoc tribunals) would be better positioned to deal with textual differences in investor protections (investor protection are currently interpreted inconsistently, see Chapter 3.2.2).[27] If a two-tier system is more inclined to promote consistency, then *de facto* stare decisis could be achieved (indeed, this could be what has occurred at the World Trade Organisation (WTO), see Chapter 4.3.2). A focal point within the ISDS reform proposals is the creation of a standalone multilateral appellate mechanism,[28] and a MIC,[29] which were both influenced by discussion at CIDS that considered a permanent investment court and appellate review in ISDS and for the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)[30] to be a model for how States can enter such an arrangement.[31] An investment court with appellate review and a multilateral instrument forms part of the discussion below.

RoL Arguments in Defence of an Appellate Review Mechanism

The ISDS reform topic report indicated that '[a] standing or at least semi-permanent appellate body as opposed to ad hoc arbitral tribunals would pursue coherence and consistency across separate investment treaties',[32] and that an investment court will address fragmentation.[33] A standing body with 'a built-in appeal mechanism was seen as more efficient taken into consideration the public policy issues usually addressed in those cases, even if it could prolong the proceedings'.[34] These findings of the ISDS reform topic report supports the arguments made in this thesis that an appellate review mechanism and preferably a two-tier mechanism should reinforce elements of the RoL such as coherence and consistency and public policy issues like human rights, environmental considerations,

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Dispute Settlement Reform), Thirty-eighth session, Vienna, 14–18 October 2019, p 4, <https://undocs.org/A/CN.9/WG.III/WP.177> accessed 19 November 2020.

[25] Possible reform of Investor-State dispute settlement (ISDS), Submission from the Government of the Russian Federation, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session (resumed), Vienna, 20–24 January 2020, [13], <https://undocs.org/en/A/CN.9/WG.III/WP.188/Add.1> accessed 24 March 2021.

[26] Possible future work in the field of dispute settlement: Reforms of ISDS, (July 2017) op cit., [15].

[27] ibid, [15].

[28] ibid, [20]-[24].

[29] ibid, 8-14.

[30] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention), 69th Session, 7 November 2014 (69/496) (adapted 10th December 2014, enforceable 18th October 2017).

[31] Possible future work in the field of dispute settlement: Reforms of ISDS, (July 2017) op cit., [4].

[32] ibid, [20].

[33] ibid, [30].

[34] ibid, [31i].

the State's right to regulate, and sustainable development. However, the ability of an appellate review mechanism to successfully reinforce RoL elements will be dependent on the adjudicators.

When the Commission favoured WGIII investigating ISDS reform, possible stakeholders in the ICSID and the PCA sent submissions to WGIII. The PCA stated that it would agree to the proposal to design and implement an appellate review and/or a permanent investment court with the Commission *if* that reform was the outcome of the scoping exercise.[35] Some academics at the WGIII Academic Forum have argued that a permanent body or appellate mechanism could increase consistency in the methodology of interpreting investor protections,[36] and in the jurisprudence of treaty/contract relationship between State and investor.[37]

While most favoured nation (MFN) provisions are expressed differently across international investment agreements (IIAs), a permanent court or appellate review could increase consistency where the identical MFN clause and MFN protection are present (see Chapter 3.2.1 for discussion on MFN).[38] That being said, these academics have also suggested that a permanent body may not be better than ad hoc arbitration in the longer term. They argued that ad hoc arbitration is a 'bottom-up' approach that can act experimentally and correct reasoning over time, with the result that consistent awards will eventually appear. However, the time and cost implications of this approach should not be overlooked.[39] There is doubt whether ad-hoc adjudicators are capable and motivated to develop correctness and consistency in ISDS awards due to current concerns regarding arbitrator selections and appointments as argued in previous chapters and by WGIII below.

Conversely, it was argued that a permanent body offers a 'top-down' approach that may reach consistency immediately, but not reach correctness or reflect the State's sovereign choices to an IIA.[40] WGIII have recognised these concerns by outlining that in a permanent body consistency and correctness must be balanced, as discussed below in this section. Furthermore, the State's sovereignty would not be compromised since each State would have the sovereign choice to join the permanent body, and IIAs could emit substantive inequalities (see Chapter 3.2.1). Other bottom-up approaches seeking to eradicate substantive inequalities have been supported. Some scholars argue that general

[35] Possible reform of investor-State dispute settlement (ISDS): Submissions from International Intergovernmental Organizations, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-fourth session, Vienna, 27 November-1 December 2017, [20] <https://undocs.org/en/A/CN.9/WG.III/WP.143> accessed 11 November 2020.
[36] Julian Arato, Yas Banifatemi, and others (2019) op cit., [34].
[37] ibid, [43].
[38] ibid, [60].
[39] ibid, [9].
[40] ibid, [10].

citizens and local communities impacted by investment should have the same rights as rich foreign investors,[41] and be heard by host State, investor, and tribunal.[42]

In response to the ISDS reform topic, the EU has shown an interest in putting forward possible models for reform by referencing the Comprehensive Economic and Trade Agreement (CETA) and EU-Vietnam Investment Protection Agreement (EU-Vietnam).[43] As discussed in the previous Chapter (4.4.1-4.4.2), these FTA dispute settlement mechanisms offer an alternative vision for ISDS and the EU remains hopeful that it can influence the proposal for a MIC at WGIII.[44] The MIC is represented in the EU's opinions and discussions of topics throughout different WGIII sessions.[45] Even Gus Van Harten, a staunch critic of ISDS, conceded that ISDS awards not being made within a court and the lack of judicial review in ISDS constrains the RoL,[46]and that a quasi-judicial appellate body as seen by the ICS, albeit depending on the adjudicators, could correct wildly divergent interpretations.[47]

Overall, the findings presented in the first formal WGIII document on ISDS reform underscores the arguments set out in this thesis that a coherent and consistent ISDS regime could support the RoL and enhance confidence in the stability of IIL.[48] Such a regime would enhance legitimacy and credibility,[49]

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[41] Gus Van Harten (2020) op cit.

[42] James Thuo Gathii, 'Reform and Retrenchment in International Investment Law' (January 13, 2021); Nicolás Perrone, 'Making Local Communities Visible: A Way to Prevent the Potentially Tragic Consequence of Foreign Investment' in A. Santos, C. Thomas & D. Trubek, *World Trade and Investment Law Reimagined* (Cambridge University Press, 2019).

[43] Settlement of commercial disputes Investor-State Dispute Settlement Framework Compilation of comments: Note by the Secretariat, United Nations Commission on International Trade Law, Fiftieth session, Vienna, 3-21 July 2017, <https://undocs.org/A/CN.9/918> accessed 10 November 2020.

[44] Rob Howse, 'Designing a Multilateral Investment Court: Issues and Options' (2017) 36(1) Yearbook of European Law 209, 210-215. 235-236; Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) 18 Journal of World Investment & Trade 585, 589-590; Anna De Luca, Crina Baltag, Daniel Behn, Holger Hestermeyer, Gregory Shaffer, Jonathan Bonnitcha, José Manuel Alvarez-Zarate, Loukas Mistelis, Malcolm Langford, Clara López Rodríguez, and Simon Weber, 'Duration of ISDS Proceedings' (Academic Forum on ISDS Concept Paper 2020/1, 21 January 2020), 25, <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/2-duration.pdf> accessed 9 December 2020.

[45] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-seventh session, New York, 1–5 April 2019, <https://undocs.org/A/CN.9/WG.III/WP.159/Add.1> accessed 18 November 2020.

[46] Gus Van Harten (2020) op cit., 10-11.

[47] ibid, 137-138.

[48] Possible reform of investor-State dispute settlement (November-December 2017) op. cit., [31]; Possible reform of investor-State dispute settlement (ISDS): Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session, Vienna, 29 October–2 November 2018, [26], <https://undocs.org/en/A/CN.9/WG.III/WP.149> accessed 13 November 2020.

[49] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017): Part II, United Nations Commission on International Trade Law, Fifty-first session, New York, 25 June–13 July 2018, [11], <https://undocs.org/A/CN.9/930/Add.1/Rev.1>

and 'the absence of an appeals mechanism means that incorrect decisions cannot be overturned and so legal correctness cannot be ensured'.[50]

Concerns and Desirability of Reform

During the thirty-fourth to thirty-seventh sessions (2017-2019) WGIII, in accordance with its mandate given by the Commission at its fiftieth session,[51] 'identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns'.[52] Some of the ISDS concerns related to consistency in awards,[53] the independence and impartiality of arbitrators,[54] the selection and appointment processes of arbitrators,[55] the cost and time of ISDS,[56] and third party funding.[57] James Gathii has argued that although these are legitimate concerns, other issues did not receive the same attention even though they raise similar concerns regarding (in)equality, (un)fairness and (in)justice in IIL.[58]

Suggestions have been made regarding: the exhaustion of local remedies as foreign and domestic investors should have the same remedies (equality), investor and corporate social responsibility (CSR),

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accessed 12 November 2020; Possible reform of investor-State dispute settlement (October–November 2018) op. cit., [26].

[50] Possible reform of investor-State dispute settlement (November-December 2017) op. cit., [40].

[51] Report of the United Nations Commission on International Trade Law, Fiftieth session (July 2017) op. cit., [263]-[264].

[52] Possible reform of investor-State dispute settlement (ISDS): Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session, Vienna, 14–18 October 2019, [1], <http://undocs.org/A/CN.9/WG.III/WP.166> accessed 11 November 2020; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), (July 2019) op. cit., [135] [138].

[53] Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session, Vienna, 29 October–2 November 2018, <https://undocs.org/en/A/CN.9/WG.III/WP.150> accessed 16 March 2020.

[54] Possible reform of investor-State dispute settlement (ISDS): Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session Vienna, 29 October–2 November 2018, <https://undocs.org/en/A/CN.9/WG.III/WP.151> accessed 16 March 2020.

[55] Possible reform of investor-State dispute settlement (ISDS): Arbitrators and decision makers: appointment mechanisms and related issues: Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-sixth session Vienna, 29 October–2 November 2018, <https://undocs.org/en/A/CN.9/WG.III/WP.152> accessed 16 March 2020.

[56] Possible reform of investor-State dispute settlement (ISDS): Cost and duration, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session Vienna, 29 October–2 November 2018, <https://undocs.org/en/A/CN.9/WG.III/WP.153> accessed 16 March 2020.

[57] Possible reform of investor-State dispute settlement (ISDS): Third-party funding, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-seventh session, New York, 1–5 April 2019, <https://undocs.org/en/A/CN.9/WG.III/WP.157> accessed 16 March 2020. These are all similar concerns made in the chapters that, in my view, need addressing to reinforce the RoL.

[58] James Thuo Gathii (2021) op cit., 1-5.

and potential for intervention by local communities impacted by investors who currently have no guaranteed rights in the system and if so only indirectly.[59] The issue of regulatory chill through ISDS and threat of it (State sovereignty and right to regulate) has been raised.[60] It has also been observed that IIL 'allows investors to externalize rather than to internalize the massive environmental, human rights and other costs associated with their investments' (which raises issues concerning such matters as sustainability, environmental considerations, and indigenous and human rights).[61] Those issues have been considered as cross-cutting themes in WGIII, but some academics argue that they require deeper evaluation.[62]

On the other hand, some participants of WGIII did not seem to agree with the concerns identified. For example, Russia (discussed below in this section) seemed content with current ISDS even though it pulled out of the Energy Charter due to an unfavourable award against Russia in the *Yukos* Case.[63] Nevertheless, WGIII concluded it was desirable to address all those identified concerns,[64] noting that there are interlinkages between them.[65] For example, and due to the systemic nature of the concerns, as the EU argues, 'concern as regards the costs of the system is linked to the concern as regards the lack of predictability which is in turn linked to the concerns with the methods of arbitrator appointments which is in turn linked to the concerns with arbitrators' independence and impartiality'.[66]

Concerns of Consistency and Correctness in Arbitral Awards

As the preceding analysis has shown, there are many factors to consider when evaluating the diverse ways in which ISDS sustains existing and perpetuates new inequalities. Although predictability, consistency and coherence are part of the RoL in the sense that 'like cases be treated alike' and

[59] Ibid, 3.
[60] Ibid, 3
[61] ibid, 3.
[62] ibid, 3; Lisa Sachs, Lise Johnson, Brooke Guven, Jesse Coleman, and Ladan Mehranvar, 'The UNCITRAL Working Group III Work Plan: Locking in a Broken System?' (Columbia Centre on Sustainable Investment, 4 May 2021) <https://ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system> accessed 10 May 2021.
[63] Irina Mironova, 'Russia and the Energy Charter Treaty' (International Energy Charter, 7 August 2014) <https://energycharter.org/what-we-do/knowledge-centre/occasional-papers/russia-and-the-energy-charter-treaty/> accessed 17 March 2018; Amelia Hadfield and Adnan Amkhan-Banyo, 'From Russia with Cold Feet: EU-Russia Energy Relations, and the Energy Charter Treaty' (2013) 1 International Journal of Energy Security and Environmental Research 1.
[64] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), (July 2019) op. cit.; For third-party funding, see, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019), (July 2019) op. cit., [17]-[25].
[65] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), (July 2019) op. cit, [22] [23] [35] [55] [71] [104] [112] [121].
[66] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., 10.

'different cases should be treated differently',[67] the principles of legal correctness, justice, and fairness are also integral to the RoL. One concern raised by some academics at the Academic Forum is that too great an emphasis is placed on the consistency of ISDS awards when the focus should also be on its legal correctness.[68] They noted the importance of distinguishing the difference between correctness and consistency, since consistency is found when comparing other ISDS awards while correctness is found when evaluating a lone ISDS award. These academics argue correctness of ISDS awards comes from legal analysis producing legal conclusions and outcomes through the appropriate identification and precise application of relevant law.[69] However, legal correctness is nonetheless criticised in ISDS awards in relation to specific instances concerning the tribunals' identification of law and their 'erroneous interpretations of applicable law'.[70]

On the topic of consistency and correctness, WGIII argued that divergent outcomes in arbitral awards could be acceptable based on case facts, the evidence submitted by the parties, and through the Vienna Convention on the Law of Treaties (VCLT).[71] However, there will not be justifiable grounds for a distinction where the investment treaty standard, or rule of customary international law or IIL regulation (rules under ICSID or UNCITRAL) were interpreted differently without legitimate reasons.[72] This illustrates that a balance between the RoL elements of predictability and consistency, and justice and legal correctness must be achieved. WGIII recognised, that achieving a balance between many interests is not straightforward, but has noted that achieving consistency should not limit the correctness of awards, 'and that predictability and correctness should be the objective rather than uniformity'.[73] This thesis finds WGIII's findings persuasive and endorses this view.

Divergent ISDS awards based on the VCLT may not be universally justifiable since WGIII found most IIAs 'contained very similar if not identical language'.[74] This further supports the theory of

[67] Julian Arato, Yas Banifatemi, and others (2019) op cit., [3].
[68] Anna De Luca, Mark Feldman, Martins Paparinskis, and Catharine Titi, 'Responding to Incorrect ISDS Decision-Making: Policy Options', (Academic Forum on ISDS Concept Paper 2020/1, 21 January 2020), 2, <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/4-responding.pdf> accessed 16 December 2020.
[69] ibid, 5.
[70] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Ecuador, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session, Vienna, 14–18 October 2019, [11], <https://undocs.org/A/CN.9/WG.III/WP.175> accessed 18 November 2020.
[71] Vienna Convention on the Law of Treaties (VCLT), (signed on 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 31-33.
[72] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018) (June–July 2018) op. cit., [21] [32]; Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters, (October–November 2018) op. cit., [6]-[7].
[73] ibid, [8].
[74] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017): Part II, (June–July 2018) op. cit., [27].

convergence of investor protections (see Chapter 3.2.2). However, it has been argued that Article 31 VCLT requires tribunals to 'consider a number of factors in addition to the ordinary meaning of treaty text; as a result, similar or even identical provisions in two different treaties might be applied differently'.[75] Depending on the significance and importance of the factors to the provisions and whether these factors reinforce both formal and substantive equality, such a method could be used to either justify divergence through correctness or unjustifiably promote inconsistency. The success of this method relies on the adjudicators obtaining relevant expertise and being impartial and independent; the presumption of which cannot be made in the current ISDS regimes (see proposed reforms at WGIII at Sections 5.3 and 5.5). This could enable adjudicators to use Article 31(3)(c) to consider international human rights treaties and declarations,[76] environmental declarations,[77] Sustainable Development Goals (SDGs),[78] or CSR (see Chapters 2.6-2.7).[79] Awards could then have a higher chance of preventing arbitrariness and promoting transparency and equality which can further reinforce the RoL.

WGIII, in a manner consistent with concerns raised in Chapters 3.3.4 and 3.4.2 of this thesis, considered that the review of ISDS awards available in IIL under ICSID and New York Convention (NYC) was too limited and narrow. Annulment or setting aside actions only evaluate procedural aspects of the dispute and not its substance when reconsidering the resolved case.[80] They are only 'designed to address significant deficiencies in the arbitral proceeding before an award was enforced'.[81] Thus, and as argued in this thesis, there is currently no appellate review mechanism capable of ensuring the correctness and consistency of ISDS awards in IIL,[82] or to address incorrect or inconsistent awards,[83]

[75] Anna De Luca, Mark Feldman, and Others (2020) op cit., 3.
[76] UN General Assembly, Universal Declaration of Human Rights (UDHR), 10 December 1948, 217 A (III); International Covenant on Civil and Political Rights (ICCPR). Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); International Covenant on Economic, Social and Cultural Rights (ICESCR), Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); Declaration on the Rights of Indigenous People, GARes61/295 of 13 September 2007; Declaration on the Granting of Independence to Colonial Countries and Peoples, GARes 1514 (VX) of 14 December 1960
[77] Rio Declaration on Environment and Development (1992) UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874.
[78] SDG UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1 (entered into force 1 January 2016) (SDG)
[79] United Nations Guiding Principles on Business and Human Rights (2011); United Nations Global Compact (31 January 1999); The Organisation for Economic Co-operation and Development (OECD) Declaration and Decision on International Investment and Multinational Enterprises (1976) 15 ILM 967.
[80] Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters, (October–November 2018) op. cit., [24].
[81] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), (July 2019) op. cit., [58].
[82] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018) (June–July 2018) op. cit., [40].
[83] Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters, (October–November 2018) op. cit., [21].

or to harmonise existing jurisprudence in ISDS.[84] In the absence of a safeguard mechanism capable of ensuring the RoL is enforced in ISDS awards, there remain many variables that can result in an ISDS outcome undermining the RoL.

Some academics argue 'appellate mechanisms would offer opportunities to reconsider the existing limited scope of review of ISDS decisions'.[85] WGIII found that the absence of correctness and the lack of consistency in interpretation of investor protections is problematic and that they interlink as 'consistency of awards could be derived from their correctness',[86] but solutions should not impact the finality of the award or increase cost and time.[87] This suggests that the purpose of an appellate review mechanism is to ensure correctness and consistency through binding decision-making, while being sensitive to time and cost.[88] Academics argue '[i]f an appellate mechanism is appropriately designed' and articulated, 'it could have a neutral impact on the ISDS system regarding the duration of proceedings',[89] and costs.[90] This is because if the appellate review mechanism ensures correctness and consistency then 'certain issues need little or no discussion because the appellate body has adopted a clear position, this may significantly reduce costs related to the time counsel spends addressing fundamental issues'.[91] WGIII argued the lack of consistency and correctness in ISDS awards should be addressed.[92]

Concerns Regarding the Role of Arbitrators in ISDS awards

WGIII also identified arbitrators as a point of concern, as arbitrators may play a role in perpetuating inconsistencies and incorrectness in ISDS,[93] since they are the primary decision makers and interpreters of the substantive investor protections. Adjudicators in ISDS have been labelled part of the so-called 'ISDS industry'[94] or 'transnational capitalist class' (tcc)[95] who have a vested interest in

[84] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018) (June–July 2018) op. cit., [39].
[85] Anna De Luca, Mark Feldman, and Others (2020) op cit., 24.
[86] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018) (June–July 2018) op. cit., [41].
[87] ibid, [42].
[88] Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters, (October–November 2018) op. cit., [44]-[45].
[89] Anna De Luca, Crina Baltag, and Others (2020) op cit., 25.
[90] Gabriel Bottini, Julien Chaisse, Marko Jovanovic, Facundo Pérez Aznar, and Catherine Titi, 'Excessive Costs and Recoverability of Cost Awards in Investment Arbitration', (Academic Forum on ISDS Concept Paper 2019/9, 17 September 2019), 12, <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/1-exceccive-costs.pdf> accessed 11 December 2020.
[91] ibid, 9.
[92] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), (July 2019) op. cit., [40], [53], [63].
[93] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017): Part II, (June–July 2018) op. cit., [31].
[94] Gus Van Harten (2020) op cit., 11-13, 133-136, 140-142
[95] James Thuo Gathii (2021) op cit., 8-15.

the system flourishing in terms of many ISDS disputes that can bring money and employment protection (see Chapter 3.5.3. Furthermore, there is concern that arbitrators can generate conflicts of interests when engaged in double hatting whereby they act as arbitrator, counsel, and expert in different cases and that an elite small group of connected individuals dominate ISDS proceedings which raises further questions of inclusiveness and diversity (see Chapter 3.5)[96] Moreover, there have been concerns that 'arbitrators did not regard themselves as under a general duty towards an international system of justice, to act in the public interest, or to take into account the rights and interest of non-disputing parties'.[97] This could link to ISDS adjudicators coming from a commercial law background rather than one that greater considers public interests (see Chapter 3.5.3) Consequently, arbitrators may not be adequately reinforcing the RoL in ISDS like considering solidarity rights of local communities impacted by investments (see Chapters 2.6.4-2.6.5). These concerns relate to the prevention of arbitrariness, transparency, and equality (see Chapter 3.5) On the topic of arbitrators, WGIII held it was desirable to address concerns of: independence and impartiality of arbitrators;[98] transparency and challenges;[99] diversity;[100] and the constitution of the tribunal with reference to qualifications and party appointments.[101]

Ecuador has expressed concerns about the independence and impartiality of arbitrators in ISDS and the potentially adverse ways arbitrators may influence the arbitration proceedings.[102] Ecuador has highlighted that arbitrators might make awards that benefit themselves, for example, by enabling their future appointment in other ISDS cases and that there are inconsistent standards for arbitrator qualifications.[103] This suggests arbitrators could make awards with a view to being appointed in future disputes or to benefit parties in other disputes who they represent as counsel (see Chapter 3.5). As such, proposed reform should inspect the disqualification, conflict of interests, and integrity of arbitrators. [104] Similarly, China has highlighted that not enough arbitrators with expertise in

[96] Malcolm Langford, Daniel Behn, and Runar Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 Journal of International Economic Law 301; Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 European Journal of International Law 387.
[97] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), (July 2019) op. cit., [35].
[98] ibid, [83].
[99] ibid, [90].
[100] ibid, [98]
[101] ibid, [108].
[102] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Ecuador, (October 2019) op. cit., [16]-[17].
[103] For arbitrator disqualification on independence and impartiality under Article 57 ICSID Arbitration Rules 2006, it is 'manifest lack', and under Article 12 of the UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006, it is 'justifiable doubts'.
[104] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Ecuador, (October 2019) op. cit., [18]-[22].

international public law hear ISDS cases[105] and it has expressed concern at the absence of an arbitrator code of conduct, the phenomenon of 'double hatting', and the potential conflict of interest.[106] China has further noted the lack of inclusiveness and diversity of arbitrators, since the pool of ISDS arbitrators is very small. It has called for 'greater participation of experts from developing countries', and greater transparency in the appointment process of arbitrators to enable concerns about representation to be identified and addressed.[107]

Commentators at the Academic Forum agree that there are problems with arbitrator diversity,[108] arbitrator qualifications and expertise[109] and that arbitrators when 'double-hatting' may favour a position they adopted as counsel in another case, or supported as expert or in service of their institution or court, or vice-versa.[110] Other commentators criticise party appointment, inappropriate contact between arbitrators and parties, multiple appointments, and issue conflict.[111] There is also criticism of implicit pro-investor bias due to the structure of investment arbitration, staff and secretariat loyalties, and mixing of roles as arbitrator and a member of ICSID annulment committees.[112] It is concerning that independence and impartiality are questioned in ISDS, as myself and academics argue they are crucial elements of the DRoL and an IRoL which helps ensure effective access to justice.[113]

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[105] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China, (October 2019) op. cit., p 3.
[106] ibid, p 3.
[107] ibid, p 3.
[108] Andrea Bjorklund, Daniel Behn, Susan Franck, Chiara Giorgetti, Won Kidane, Arnaud de Nanteuil and Emilia Onyema, 'The Diversity Deficit in International Investment Arbitration', (Academic Forum on ISDS Concept Paper 2020/1, 21 January 2020), 21-22, <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/5-diversity.pdf> accessed 24 January 2021.
[109] Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti, 'The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement', (Academic Forum on ISDS Concept Paper 2019/12, 13 October 2019), 1, 26 <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/langford-behn-malaguti-models-trade-offs-isds-af-isds-paper-12-draft-14-october-2019.pdf> accessed 3 February 2021.
[110] Chiara Giorgetti and Mohammed Wahab, 'A Code of Conduct for Arbitrators and Judges', (Academic Forum on ISDS Concept Paper 2019/12, 13 October 2019), [18], <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/giorgetti-wahab-code-of-conduct-af-isds-paper-8-final--14-oct-2019-1.pdf> accessed 28 January 2021.
[111] Chiara Giorgetti, Steven Ratner, Jeffrey Dunoff, Shotaro Hamamoto, Luke Nottage, Stephan Schill, and Michael Waibel, 'Independence and Impartiality in Investment Dispute Settlement: Assessing Challenges and Reform Options', (Academic Forum on ISDS Concept Paper 2020/1, 21 January 2020), 12-23, <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/6-independence.pdf> accessed 27 January 2021.
[112] ibid, 12-23.
[113] ibid, 2; Andrea Bjorklund, Marc Bungenberg, Manjiao Chi and Catharine Titi, 'Selection and Appointment of International Adjuducators: Structural Options for ISDS Reform', (Academic Forum on ISDS Concept Paper 2019/11, 17 September 2019), 1, <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-

Russia has submitted that the creation of an investment court would not resolve the identified concerns but would instead create new problems in the handling of investment disputes.[114] Rather than facing the challenges of creating an investment court,[115] Russia asserts that the current system should be kept subject to certain tweaks that might address and resolve the identified concerns.[116] Perhaps Russia's preference to retain the existing system as international commercial arbitration is because ISDS is a more private forum.[117] It has been suggested that, while Russia agrees that inconsistency in the interpretation of substantive investor protections might arise from different arbitrators, it does not think that the appointment of arbitrators process should be reformed extensively such as to require arbitrators to have international public law expertise, for example.[118]

Russia's perspective appears to be informed by the notion that IIL was built on the foundation of international commercial law and thus ISDS as a private international law is better suited to address the nature of investment disputes over a public international law one.[119] Even Russian academics in their writing refer to ISDS as international commercial arbitration,[120] even though it involves substantial public law elements and RoL concerns such as the State's right to regulate for the public benefit, the promotion of human rights and the need to address environmental considerations. IIAs are creations of public international law whereby public actions and public authority are questioned through a vertical relationship between State and individual.[121] Typically, such systems should have a mechanism for appellate review.[122] Public orientated disputes adopt court like solutions to reinforce RoL elements and objectives of independence and impartiality (adjudicators) and correctness and predictability (appellate review).[123]

Moreover, Russia has submitted that inconsistencies in ISDS can be a positive outcome, since it shows the flexibility of different IIAs and enables regional interests and political relations to be taken into account.[124] Academics have argued identical situations governed by different rules may reinforce the

forum/papers/papers/11-bjorklund-et-al-selection-and-appointment-isds-af-11-2019.pdf> accessed 2 February 2021.

[114] Possible reform of Investor-State dispute settlement (ISDS), Submission from the Government of the Russian Federation, (January 2020) op cit., [4], [12].

[115] ibid, [23]-[29].

[116] ibid, [30]-[32].

[117] Gus Van Harten (2020) op cit., 137-138.

[118] Dmitry Labin and Alena Soloveva, 'The Elephant in a Dark Room? Russia and the ISDS Reform' (2020) 6(2) China and WTO Review 241, 254-255.

[119] ibid, 250-254.

[120] ibid, 250.

[121] Colin Brown, 'A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches' (2017) 32 ICSID Review 673, 676.

[122] ibid, 676.

[123] ibid, 677.

[124] Dmitry Labin and Alena Soloveva (2020) op cit., 250-254.

importance of State sovereignty, which 'responds notably to ideas of decentralized self-governance and democracy'.[125] However, this approach overlooks important distinctions that exist in the global economy. For example, when substantive inequality exists between States in the international setting, IIAs can work against developing States (see Chapter 3.2.1) which is also supported by Morocco.[126] The State's public right to regulate in the domestic setting can be compromised, although in the international setting the State negotiates IIAs through its State sovereignty. However, many IIAs would have been negotiated by past government administrations of the State.

For now, Russia seems reluctant to commit to enhancing transparency in IIL since their future guidance on BITs recommends *excluding* the UNCITRAL Rules on Transparency, and instead, proposes to introduce a duty of confidentiality with respect to any information about the dispute.[127] From a RoL perspective, the failure to engage with transparency limits the substantive elements of RoL. It is not entirely clear why Russia appears to be taking such a different approach to ISDS. One reason might be that it has yet to develop as a 'major international arbitration jurisdiction',[128] although it does have economic and political influence in the international setting. Russia has not properly engaged in the system as 'so far Russia has not enforced a single arbitral award issued against it by an international investment tribunal',[129] and is absent from the ICSID Convention. It will certainly be interesting to see how Russia's approach to ISDS develops in the future.

Advancing the RoL in ISDS by Enhancing Transparency

Many States like those in the G77 and EU, along with organisations such as the European Federation for Investment Law and Arbitration (EFILA), do support enhanced transparency in ISDS and favour the UNCITRAL Transparency Rules.[130] The general consensus at WGIII was that 'transparency was a key

[125] Julian Arato, Yas Banifatemi, and others (2019) op cit., [7].
[126] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Morocco: Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-seventh session, New York, 1–5 April 2019, [5] [7], <https://undocs.org/en/A/CN.9/WG.III/WP.161> accessed 23 November 2020.
[127] Regulation on Entering into International Treaties on the Encouragement and Mutual Protection of Investments (No 992 Regulation of The Russian Federation, 30 September 2016).
[128] Steven Finizio and Kenneth Beale, 'Eastern approaches' (ICLG, 2 October 2014) <https://iclg.com/cdr/expert-views/5215-eastern-approaches> accessed 26 November 2020; Alexander Vaneev, Dimitriy Mednikov and Maxim Kuzmin, 'Russia' (Global Administrative Review, 18 October 2019) <https://globalarbitrationreview.com/review/the-european-arbitration-review/2020/article/russia> accessed 26 November 2020. The 2015-2016 Arbitration Reform in Russia has received mixed responses.
[129] Dmitry Labin and Alena Soloveva (2020) op cit., 257.
[130] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Morocco, (April 2019) op. cit., [9] [14] [27] Annex 2 [7] [9d] [9e]; Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [3.5] [3.8] [3.11]; Statement of the Group of G77 and China delivered by Ms Veronica Gomez, Charge D´Affaires A.I. of the Permanent Mission of Ecuador at the UNCITRAL WG III (October–November 2018) op. cit., [3]; Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China, (October 2019) op. cit., p 2-3, 5.; Submission by the European Federation for Investment Law and Arbitration (EFILA) to the UNCITRAL

element of the rule of law, and of access to justice' (another element within the RoL),[131] and that furthering transparency in ISDS awards 'will allow for a better understanding of the interpretations given by arbitral tribunals to investment protection standards. This, in turn, may lead to increased consistency and a meaningful opportunity for public participation in the proceedings possibly enhancing the public understanding of the process'.[132] Transparent awards that are consistent and correct can enhance further RoL elements of equality since both State and investor can understand their obligations and rights.[133] States could better understand whether their regulatory activities breach IIAs and investors would better understand how to conduct their investment under IIAs.[134] Similarly academics argued that a lack of consistency limits the potential for private and public actors to plan their business relationship which will raise their business costs, 'potentially, dampening FDI [Foreign Direct Investment] flows in the long run precisely the opposite of what investment treaties and ISDS set out to accomplish'.[135]

However, a core argument of this thesis is that IIAs and ISDS should seek to further sustainable and inclusive investment. Although FDI can assist to 'invest in least-developed countries' (LDCs) under Sustainable Development Goal (SDG) 17,[136] FDI may not on its own 'assist developing countries in attaining debt sustainability',[137] 'encourage effective partnerships',[138] or 'enhance SDG capacity in developing countries'.[139] WGIII has articulated that a predictable investment environment could make it easier for investments to be managed in a way that adhere to the SDGs,[140] and consistency and correctness enhances legitimacy and can assist sustainable investment.[141] Notably, 'Morocco believes

Working Group No III on ISDS Reforms, Brussels 15 July 2019, Ensuring Equitable Access to all Stakeholders: Critical Suggestion for the MIC, [23], <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_efila.pdf> accessed 24 November 2020.

[131] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017) Part I, United Nations Commission on International Trade Law, Fifty-first session, New York, 25 June–13 July 2018, [80] <https://undocs.org/en/A/CN.9/930/Rev.1> accessed 11 November 2020.

[132] Possible reform of investor-State dispute settlement (November-December 2017) op. cit., [27].

[133] Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters, (October–November 2018) op. cit., [28].

[134] ibid, [28].

[135] Julian Arato, Yas Banifatemi, and others (2019) op cit., [4].

[136] SDG UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1 (entered into force 1 January 2016) (SDG), Goal 17.5.

[137] ibid, Goal 17.4.

[138] ibid, Goal 17.17.

[139] ibid, Goal 17.9.

[140] Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters, (October–November 2018) op. cit., [31]; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018) (June–July 2018) op. cit., [13].

[141] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), (July 2019) op. cit., [28] [30].

that ISDS reform is likely to lead to responsible international investment that will promote achievement of the Sustainable Development Goals'.[142]

There is recognition for 'the importance of the Working Group's mandate for developing States in light of the impact of investment and ISDS on sustainable development'. [143] This current lack of accountability, transparency, consistency, coherence, and an effective review mechanism[144] limits for example reaching SDG 16's target to 'promote the rule of law and ensure equal access to justice',[145] 'develop effective, accountable and transparent institutions',[146] 'ensure responsive, inclusive and representative decision-making',[147] and 'ensure public access to information and protect fundamental freedoms'.[148] In these ways, the intention of WGIII to recommend remedies of ISDS concerns to the Commission could promote the achievement of the SDGs and the attainment of sustainable development.[149]

States from different regions and development levels have expressed at least some desire for appellate review,[150] and that appellate review could improve both procedural and substantive aspects of ISDS,[151] and help ISDS reinforce the RoL.[152] Appellate review could enhance more substantive

[142] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Morocco, (April 2019) op. cit., [4].
[143] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018) (June–July 2018) op. cit., [13].
[144] ibid, [13].
[145] SDG, op. cit., Goal 16.3.
[146] ibid, Goal 16.6.
[147] ibid, Goal 16.7.
[148] ibid, Goal 16.10.
[149] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019), (July 2020) op. cit., [99].
[150] Possible reform of investor-State dispute settlement (ISDS): Appellate and multilateral court mechanisms, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session (resumed), Vienna, 20–24 January 2020, [7]-[8], <https://undocs.org/en/A/CN.9/WG.III/WP.185> accessed 19 November 2020; Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [42]-[43]; Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China, (October 2019) op. cit., p 3-4.
[151] ibid
[152] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China, (October 2019) op. cit., p 3-6; Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Ecuador, (October 2019) op. cit., [28], [4]-[14]; Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Morocco, (April 2019) op. cit., [5] [34].

related elements or outcomes of the RoL in consistency, correctness, and fairness,[153] and its impact could be greater in a two-tier system.[154]

This section has illustrated the different themes emerging from WGIII's scoping exercise on ISDS and it has identified the various procedural and substantive concerns that may undermine the RoL. In the following section, the focus will shift to an analysis of the proposals for appellate review put before WGIII.

5.3 RoL Dimensions of WGIII's Analysis on Appellate Review in ISDS

At the WGIII's resumed thirty-eighth session in 2020, WGIII emphasised that appellate review must be wider than the review offered in ICSID and NYC, but limits should be placed on appeal to prevent abuse of the system.[155] The grounds for appeal should include errors in the interpretation or application of law and cover errors in the finding of any relevant facts.[156] However, whether there should be appeal on a wide scope of facts or type of law (i.e IIAs), or issue of law (i.e investor protections), or damages, was yet to be determined.[157]

Ecuador has put forward arguments in favour of 'merits of cases to be reviewed',[158] but has also submitted that 'appeals should be limited to errors made in the application of the law' to prevent parties from using appellate review either improperly or to delay the enforcement of an award.[159] Similarly, some academics recognise that the larger the scope of appeal the longer the proceedings are likely to take,[160] and this could increase costs.[161] WGIII has found that appellate review for only errors in law will be much faster to resolve than addressing errors in fact, since the latter requires parties to present their case again. Conversely, law and fact might be connected and thus difficult to

[153] Possible reform of investor-State dispute settlement (ISDS): Appellate and multilateral court mechanisms, (January 2020) op. cit., [8]; Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China, (October 2019) op. cit., p 3-4.
[154] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Resumed, thirty-eighth session, Vienna, 20–24 January 2020, [22] <https://undocs.org/en/A/CN.9/1004/Add.1> accessed 16 November 2020.
[155] ibid, [26].
[156] ibid, [27]-[28].
[157] ibid, [27]-[28].
[158] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Ecuador, (October 2019) op. cit., [12].
[159] ibid, [13].
[160] Anna De Luca, Crina Baltag, and Others (2020) op cit., p 25.
[161] Gabriel Bottini, Julien Chaisse, and Others (2019) op cit., 9.

differentiate.[162] In this respect, WGIII deliberated on the different scope of review,[163] and standard of review[164] requirements for other international appellate mechanisms.[165]

Similarly, it was not clear whether appellate review would constitute a 'de novo' review,[166] or whether it would be limited to 'manifest error'.[167] Furthermore, whether current review mechanisms under ICSID and NYC should come under appellate review to avoid fragmentation and ensure efficiency was not discussed.[168] The EU submitted that the grounds for appellate review should include errors of law (including serious procedural shortcomings) and manifest errors in the appreciation of the facts, but not a de novo review of the facts.[169] On the subject of appeals, WGIII explained that appellate review should include a review of the merits of a case, and possibly procedural and jurisdiction issues[170] but probably not interim measures.[171] On the procedural aspect, WGIII asserted that certain procedural

[162] Possible reform of investor-State dispute settlement (ISDS): Appellate and multilateral court mechanisms, (January 2020) op. cit., [12].
[163] The Working Group believed the following appeals were limited to law; Article 17 (6) of Annex 2 of the WTO Agreement on Understanding on rules and procedures governing the settlement of disputes; Article 17(2) of Southern Common Market (Mercosur); Article 58 of the Statute of the Court of Justice of the European Union. The Working Group believed the following appeals included law and fact; Article 3.19 of the EU-Singapore Investment Protection Agreement; Article 3.54 of the EU-Vietnam Investment Protection Agreement; Article 8.28 of the Comprehensive Economic and Trade Agreement (CETA); Article 81 (1) of the Rome Statute of the International Criminal Court; Article 25 (1) of the Statue of the International Criminal Tribunal for the Former Yugoslavia; Article 26 (1) of the Statute of the Special Tribunal for Lebanon; Article 20 of the Statute of the Special Court for Sierra Leone; Rule 57 of the Procedural Rules of the Court of Arbitration for Sport. Procedural errors are an additional ground for appeal under Article 81 (1) of the Rome Statute and Article 20 of the Statute of the Special Court for Sierra Leone.
[164] The Working Group believed review of law is rarely limited, see, Article 17 (6) of Annex 2 of the WTO Agreement on Understanding on rules and procedures governing the settlement of disputes; Article 17(2) of Southern Common Market (Mercosur); Article 58 of the Statute of the Court of Justice of the European Union. The Working Group believed review of fact is frequently limited, see, Article 3.19 of the EU-Singapore Investment Protection Agreement; Article 3.54 of the EU-Vietnam Investment Protection Agreement; Article 8.28 of the Comprehensive Economic and Trade Agreement (CETA); Article 20 of the Statute of the Special Court for Sierra Leone; Article 26 (1) Statute of the Special Tribunal for Lebanon.
[165] Possible reform of investor-State dispute settlement (ISDS): Appellate and multilateral court mechanisms, (January 2020) op. cit., [13]-[17].
[166] This would break from the tradition of the WTO Appellate Body (AB), see, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, AB-2000-11, WT/DS135/AB/R, Report of the Appellate Body of 12 March 2001, [159]. Referenced from, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ('*United States – Wheat Gluten*'), WT/DS166/AB/R, Report of the Appellate Body of 19 January 2001, [151].
[167] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [29].
[168] ibid, [30].
[169] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [14].
[170] If appeal on jurisdiction can be claimed there was question marks over whether that appeal would be pursued after the final award (tribunal looks at merits- actual case) or during the proceedings (probably after the decision on jurisdiction).
[171] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [31]-[34].

decisions already have review mechanisms, which may include challenges under ICSID rules and the NYC through domestic courts.[172]

However, the domestic system reviewing an international award limits an IRoL (See Chapters 3.3.3-3.3.5), since it is suggested 'the role of international law is to reinforce, and on occasions to institute, the rule of law internally'.[173] If the appellate mechanism is an addition to ICSID annulment and NYC sets aside proceedings, it will add significant costs and cause delays to dispute resolution and become 'a de facto third instance of ISDS proceedings'.[174] If appellate review takes over from annulment and set aside proceedings to consider the challenges to awards based on the existence of a procedural irregularity as well as the inclusion for well-defined errors of law, appellate review would not excessively prolong the procedure.[175] Including errors of fact within a narrow definition could likely lengthen the proceedings and costs, but this depends on the structure and efficiency of appellate review.[176] Although an enlarged scope of review is likely to take longer than say, annulment proceedings, the domestic system evaluating set aside proceedings might still be slower than an appellate mechanism in issuing an award.[177] Some domestic systems have a backlog of cases, including developed States like Italy.[178]

In the context of first-tier ISDS awards, WGIII suggested 'that decisions made by ISDS tribunals handling disputes arising out of investment treaties should be subject to appeal'.[179] Moreover, WGIII indicated that an appellate tribunal 'should be able to affirm, reverse or modify the decision of the first-tier tribunal and to render a final decision based on the facts before it',[180] and that 'an appeal should temporarily suspend the effect of the first-tier decision'.[181] This is similar to the EU agreements

[172] ibid, [32].
[173] James Crawford, 'International Law and the Rule of Law' (2003) 24 ADL 3, 8.
[174] Anna De Luca, Crina Baltag, and Others (2020) op cit., 24-25.
[175] ibid, 22.
[176] Ibid, 22. About time; Gabriel Bottini, Julien Chaisse, and Others (2019) op cit., 9, 12. About Costs.
[177] Anna De Luca, Crina Baltag, and Others (2020) op cit., 22.
[178] See discussion on Italian Torpedoes, see, 'Italian Supreme Court news: the rise of the Italian Torpedo' (Lexology, 19 July 2013) <https://www.lexology.com/library/detail.aspx?g=8c7b00c4-80dd-43e4-89f3-fdd453a19420> accessed 1 May 2021. See also *Yukos v Russia*, PCA Case No. 2005-04/AA227, Final Award of 18 July 2014, Judgment of Hague District Court of 20 April 2016, Judgment of the Hague Court of Appeal of 18 February 2020, and, Decision of Supreme Court of the Netherlands of 25 September 2020. An arbitral award made on 18 July 2014. Respondent commenced set aside proceedings in the Hague, with the Hague District Court rendering the award on 20 April 2018, which was appealed successfully in part by the investors in the Hague Court of Appeal. Russian then appealed to the Hague Supreme Court with the case now being referred to the Hague court of appeal on allegations of corruption from the investors.
[179] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [37] It was uncertain whether 'disputes arising out of investment contracts or domestic investment laws should also be subject to appeal. It was suggested that if such disputes were included, they should be subject to different procedural rules'.
[180] ibid, [40].
[181] ibid, [43].

(see Chapter 4.4), and also in international trade law that until an appealed dispute is adjudicated by the WTO appellate body (AB), the measure can remain in place (see Chapter 4.3.2). Apart from that there were still many questions over the scope and effect of appeal.[182] One of which was precedent, as without stare decisis existing in international public law, ad hoc tribunals in the current system are not bound to follow awards of other ad hoc tribunals.[183]

For an international appellate system to be fair and just it has been argued that the creation of precedent is necessary to discourage unnecessary litigation such as issues to be tried and re-tried by the same parties on the same facts and legal issues (promoting horizontal consistency).[184] This is because issues of consistency are common in international dispute systems.[185] Gal-Or argued international law seems to reject horizontal consistency theoretically and limits vertical consistency like through the haphazard design of an appeal architecture and processes including the uncertainty on the purpose and function on which appellate review in the international system rests.[186] However, she proposed the application of appellate review principles in the DRoL to the international system that could create a more effective IRoL.[187] Addressing consistency in an international appellate system can decrease costs and time of procedure in appellate review.

Within WGIII discussions, there have been suggestions that although appellate review awards could persuasively influence ad hoc tribunals when interpreting similar provisions, inconsistency would remain in ISDS since not all States will be party to appellate review, and appellate review on its own will not address bilateral IIAs being decided by ad hoc tribunals in the first instance.[188] BITs can act contrary to substantive equality (see Chapter 3.2.1) and similarly Morocco has argued that BITs could work against developing States especially in finance and expertise.[189]

Moreover, WGIII reiterated the appellate mechanism must be designed to balance RoL elements, like consistency, correctness, due process, access to justice, inclusiveness, human rights, and

[182] This includes topics on whether the appellate mechanism includes annulment and set aside award to avoid duplication, remand, domestic courts, precedent, reversing appellate review awards, State interpretation of IIAs, investment contracts and time bars, see, ibid, [39]-[61].
[183] Julian Arato, Yas Banifatemi, and others (2019) op cit., [1].
[184] Noemi Gal-Or, 'The Concept of Appeal in International Dispute Settlement' (2008) 19(1) The European Journal of International Law 43, 61-62.
[185] ibid, 46-47, 53-54.
[186] Ibid, 47-48.
[187] Ibid, 55-60, 64.
[188] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [45].
[189] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Morocco, (April 2019) op. cit., [5] [7].

independence and impartiality, for it to effectively address concerns.[190] Some of these elements relate to enforcement, cost, adjudicators, and the system that appellate review will operate in, discussed below.

Enforcement by a two-tier Permanent Body

WGIII explained that 'enforcement was a key feature of any system of justice and essential to ensure its effectiveness',[191] but that there remained conflict over the enforcement of awards. More specifically, there was disagreement on whether internal enforcement mechanisms of a permanent body should be based on ICSID article 54,[192] or whether the role for domestic courts in the NYC to reject awards (contrary to State public policy) should be preserved.[193] Russia supports the review of ISDS awards by domestic courts as it enables States to protect public policy issues like human rights and environmental considerations.[194] This could be because Russia as discussed above sees ISDS as a form of international commercial law, and it has been argued domestic review of commercial arbitration awards is suitable as commercial arbitration has lighter procedures.[195]

However, the EU disagrees with this approach and asserts that 'the instrument creating a standing mechanism should create its own enforcement regime, which would not provide for review at domestic level'.[196] The EU favours the international system to adjudicate and enforce investor-State disputes rather than relying on domestic remedies and reviews.[197] In my view, international remedies are sensible *so long as* the adjudicators in the reformed procedural ISDS (discussed below) are equipped to deal with public policy issues arising during ISDS and have the authority to reinforce the RoL in awards. A multilateral instrument alongside enforcement of appellate review awards will be further discussed in the section below.

Some academics have argued that '[a]n appellate mechanism could also ensure the expeditious enforcement of arbitral awards' through dealing with issues of enforcement of an arbitral award pending the appeal,[198] and 'if the appellate mechanism is designed as a limited and final second

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[190] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [49].
[191] ibid, [62].
[192] ibid, [64].
[193] ibid, [67].
[194] Possible reform of Investor-State dispute settlement (ISDS), Submission from the Government of the Russian Federation, (January 2020) op cit., [11].
[195] Colin Brown (2017) op cit., 689.
[196] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [31].
[197] ibid, [30].
[198] This includes making the parties provide financial security for the cost of the first award while the appeal is pending

instance within the ISDS system, enforcement ought to be automatic'.[199] Moreover, it is questionable whether domestic courts should have the authority to simply ignore international awards (see Chapters 3.3.3 and 3.3.5). Additionally, ISDS awards made in an MIC 'should not be subject to domestic review', since international court awards are not commonly subject to domestic review before acceptance.[200] A permanent body must be set up in a way that the award would not seriously interfere with State public policy, through considering the RoL and elements like sustainable investment, human rights, environmental considerations, and the State's right to regulate for the public benefit.

WGIII has suggested that if appellate review were introduced to inspect arbitral awards, the existing arbitration regime could be used as it already serves this function and thus the NYC would apply.[201] This thesis agrees that appellate review could use the review provisions outlined in the NYC and ICSID; however, the appellate mechanism should have its own enforcement powers to avoid it being limited by these arbitral regimes and these regimes do not actually conduct a substantive review like an appellate mechanism. Appellate review can save time and reduce costs in making and enforcing new and final awards, as annulment committees under ICSID do not have powers to make or enforce new arbitral awards.[202] The committee can only reject arbitral awards, which means new claims can be submitted into ISDS and the whole procedure starts again. The NYC putting too much authority in domestic courts is problematic for the promotion of an IRoL. In this regard, the EU asserts that creating a standing appellate review mechanism means there is 'no need for review of awards at the domestic level or through ad hoc international mechanisms' (review under NYC and ICSID).[203] WGIII will continue its work regarding further related issues and report back in due course.[204]

It remains unclear whether permanent body awards could get enforcement and recognition under Article 1(2) NYC.[205] WGIII has suggested that State courts could decide this but possibly inconsistently.[206] WGIII has recommended a provision,[207] or recommendation,[208] that might have to be inserted in the NYC for it to have jurisdiction over permanent body awards. The EU submits that

[199] Anna De Luca, Crina Baltag, and Others (2020) op cit., 24.
[200] Colin Brown (2017) op cit., 689.
[201] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [68].
[202] Gabriel Bottini, Julien Chaisse, and Others (2019) op cit., 9, 12. About costs; Anna De Luca, Crina Baltag, and Others (2020) op cit., 22-23. About time.
[203] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [30].
[204] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [76] [79]-[81].
[205] ibid, [70].
[206] ibid, [71].
[207] ibid, [72].
[208] ibid, [73].

awards from a standing two-tier mechanism should get enforcement under the NYC Article 1(2) as '[t]here is no reason to consider that awards of a standing mechanism could not be regarded as such of a "permanent arbitral body"' (see Chapter 3.3.5). The rationale for this approach is to create a mechanism that prevents parties from initiating procedures capable of setting aside awards.[209]

Some of the ICSID issues considered by WGIII were that Article 53 may not allow an appeal, meaning awards made by appellate review may be incompatible with ICSID, and that using Article 66 to amend Article 53 would be difficult and thus an inter se modification of the ICSID Convention could be formed through Article 41 VCLT.[210] In my view, none of these proposals are flawless. Article 53 could prevent appeals particularly those outside the authority of ICSID, amending ICSID Article 53 would be troublesome, and an inter se modification of ICSID Convention to allow appeals could work but its effectiveness depends on the parties to the modification (see Chapters 3.4.2-3.4.3). Furthermore, it seems unlikely that a state which is not party to an appellate review mechanism will agree to be party to an inter se modification of ICSID that allows appeals.

Cost and Time of a two-tier Dispute Settlement Mechanism

The cost and time of an appellate review body or a two-tier body was another important issue raised before WGIII. Emerging economies and developing countries have been especially vocal about the likely increase in costs and time if a two-tier dispute mechanism were to be introduced in ISDS. Bahrain and Ecuador expressed concerns about the cost and time of appellate review in their submissions,[211] while Russia argued that costs and time would remain high under an MIC.[212] China and Morocco have stressed that ISDS is already too costly and time-consuming and for Morocco this had adverse effects on State public policy and the pursuit of sustainable development.[213] In current ISDS, the average compensation for an investor is around $500 million and litigations costs for States is around $5 million.[214] On average it takes nearly 4 years for merits to be decided and a further 2 years for a

[209] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [32].
[210] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [78].
[211] Possible reform of investor-State dispute settlement (ISDS): Appellate and multilateral court mechanisms, (January 2020) op. cit., [9].
[212] Possible reform of Investor-State dispute settlement (ISDS), Submission from the Government of the Russian Federation, (January 2020) op cit., [10]. Russia argued legal advice is the most expensive part of ISDS, and there could be additional costs for translation and interpretation, as parties would be limited in their ability to choose the language of proceedings.
[213] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China, (October 2019) op. cit., p 3; Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Morocco, (April 2019) op. cit., [14].
[214] Tim Samples, 'Winning and Losing in Investor–State Dispute Settlement' (2019) 56 Am Bus LJ 115, 150-152.

decision on annulment.[215] This is why some States favour proposals to improve the mechanisms for conciliation and consultation instead of ISDS,[216] similar to the model set out in the EU agreements of CETA and EU-Vietnam (See Chapter 4.4).

The EU agrees that disputes should be decided amicably through mechanisms like conciliation and mediation.[217] However, the EU argues that concerns of cost and time are related to predictability concerns like when the interpretation of the law is unstable. It argues since 'different ad hoc tribunals may always potentially come up with divergent interpretations', disputing parties may put forward arguments 'which would not be entertained if the interpretation of the relevant norm was stable'.[218] Similarly, academics argue a lack of systemic consistency means counsel will use multiple arguments and conduct a deep evaluation on arbitrator selection in the current party autonomy environment which increase costs, but '[h]ad that argument been dismissed by an appeal mechanism then the wisdom of running the same argument again would be diminished', thus saving time and money.[219]

The EU favours the creation of a standing two-tier MIC system.[220] Academics believe '[t]he MIC model would likely speed up at least some of the stages of arbitration proceedings',[221] and can reduce costs.[222] Pre-selected arbitrators could speed up and reduce the costs of the proceedings since the average time to constitute ISDS tribunals in the current system is around 6-8 months, but in CETA and EU-Vietnam (theoretically, at least) it should be within 45 days.[223] Similarly, party challenges to appointed arbitrators are not typically regulated by IIAs and can last 4 months, while in CETA and EU-Vietnam it should be within 45 days, and since MIC members would already be approved, they would be subject to fewer grounds for challenges.[224] This should mean that significantly less money would be spent on challenges.[225] Furthermore, it has been argued that salaried members would have a lower

[215] Holger Hestermeyer and Anna De Luca, 'Duration of ISDS Proceedings' (EJIL, 3 April 2019) <https://www.ejiltalk.org/duration-of-isds-proceedings/#:~:text=According%20to%20it%20the%20constitution,an%20average%20of%20407%20days> accessed 3 May 2021.
[216] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China, (October 2019) op. cit., p 5; Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Morocco, (April 2019) op. cit., [14]; Possible reform of Investor-State dispute settlement (ISDS), Submission from the Government of the Russian Federation, (January 2020) op cit., [22].
[217] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [12].
[218] ibid, [10].
[219] Colin Brown (2017) op cit., 676.
[220] ibid, [13]-[15].
[221] Anna De Luca, Crina Baltag, and Others (2020) op cit., 26.
[222] Gabriel Bottini, Julien Chaisse, and Others (2019) op cit.
[223] Anna De Luca, Crina Baltag, and Others (2020) op cit., 26; Gabriel Bottini, Julien Chaisse, and Others (2019) op cit., 10.
[224] Anna De Luca, Crina Baltag, and Others (2020) op cit., 26.
[225] Gabriel Bottini, Julien Chaisse, and Others (2019) op cit., 10.

wage per hour than in the current system where arbitrators are paid on an hourly basis,[226] and that salaried members will have better case management as payment is not linked to time spent on a case.[227]

Some academics argue a MIC could set cost limits through setting court fees, security costs, and legal aid to avoid problems of access to justice for parties experiencing financial difficulties.[228] The EU argue these mechanisms could be used to prevent abuse of the appellate system.[229] However, while there is a link between ISDS duration and costs so too is there a link between ISDS and access to justice.[230] Since IIAs leave the procedure of ISDS to arbitration rules (i.e ICSID and UNCITRAL), which commonly do not set time limits causing delays in practice, the 'MIC could address duration of proceedings across the board and set time limits for the various stages of the proceedings'.[231] However, and as seen in the WTO, setting time limits in writing does not mean they will be realised in practice (see Chapter 4.3.2). Complex cases, increased caseload, and substantive inequalities such as the ability of under-resourced States to participate within the time limit effectively, will constrain the ability of a tribunal to adhere to the time limits.[232] If one party cannot equally present their case as effectively as the other party it could restrict the ability of the tribunal to reinforce an IRoL.

However, while working within defined time limits provides a degree of certainty for the parties, the primary focus must be on reinforcing an IRoL to ensure justice and due process is achieved. It may, therefore, be inevitable that in some disputes the anticipated timescales are delayed. Similarly, although increased consistency and correctness from appellate review could mean 'certain witnesses or experts would no longer be necessary, further reducing counsel's work',[233] reducing costs should not be sought in preference to making an award that reinforces an IRoL. A process that organises cost and time needs to take into consideration both formal and substantive equalities, and ensure access to justice is realised.[234] It is a very delicate balance that needs to be struck.

[226] ibid, 12.
[227] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [54].
[228] Gabriel Bottini, Julien Chaisse, and Others (2019) op cit., 34, 39-40.
[229] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [15].
[230] Anna De Luca, Crina Baltag, and Others (2020) op cit., 9-10.
[231] ibid, 26.
[232] ibid, 27.
[233] Gabriel Bottini, Julien Chaisse, and Others (2019) op cit., 10.
[234] Anna De Luca, Crina Baltag, and Others (2020) op cit., 9-10. For time; Gabriel Bottini, Julien Chaisse, and Others (2019) op cit., 34. For Cost.

On cost and time in ISDS there were conflicting suggestions in WGIII that: State parties to the mechanism pay for operational costs and disputing parties pay for administration costs;[235] both States party to the mechanism and disputing parties pay;[236] the respondent State and the claimant investor finances the case while other costs such as the general running costs of the mechanism are shared equally among State parties to the mechanism; and State party finance takes into consideration economic development, contribution and frequency as respondent.[237] There were concerns that States which contribute more would have more say over the body's operations (as seen in other international arrangements in Chapter 2.5), such as arbitrator selection, and voluntary contribution, could impede impartiality and independence of the body.[238] There were also considerations of both formal equality (disputing party pays and user pay system to allow flexibility in finance and encourage accountability and deter systematic appeals as well as frivolous claims),[239] and substantive equality (consideration given to small and medium-sized investors as well as developing and LDCs, and that a new body should not be more burdensome than current ISDS).[240] A deep consideration of the RoL element of equality is important; a concern that is perhaps most powerfully articulated by Morocco in its statement that 'reform should be comprehensive and should take into account the concerns raised by various States with a view to achieving a fair and equitable ISDS system that all countries, in particular, developing countries, can rely upon'.[241]

The EU's submission also addressed equality in the context of contributions to the financing of a standing mechanism which should be, in principle, by contracting States (formal equality) and which will be 'weighted in accordance with their respective level of development, so that developing or least developed countries would bear a lesser burden than developed countries' (substantive equality).[242] Also, the EU asserted that users of the standing mechanism pay certain fees (formal equality), but these fees 'should not be so high as to become a hurdle for small and medium sized enterprises to bring a case' (substantive equality),[243] provided such an approach does not attract frivolous claims.[244] Organisations such as the EFILA also favour equality for small and medium sized investors who may

[235] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [84].
[236] ibid, [91].
[237] ibid, [86].
[238] ibid, [86] [88].
[239] ibid, [89].
[240] ibid, [90] [92].
[241] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Morocco, (April 2019) op. cit., [7].
[242] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [33].
[243] ibid, [33].
[244] Possible reform of Investor-State dispute settlement (ISDS), Submission from the Government of the Russian Federation, (January 2020) op cit., [21].

not have the funds to initiate the same access to justice in ISDS as larger investors. The EFILA argue this access is important because it will reinforce SDG 16 and as small and medium sized investors are 'vital for the international economy', so cost-efficient rules and procedures should be established.[245]

Appointment and Selection of Adjudicators in the two-tier Body or standalone Appellate Review

In respect of the appointment and selection of arbitrators, it is widely recognised that the adjudicators of an appellate review body or two-tier body should have 'certain competences, knowledge of the subject matter, independence and impartiality, accountability and integrity'. [246] Regarding competences and subject matter WGIII has suggested that adjudicators should have expertise in public international law and international trade and investment law.[247] Some scholars have argued that adjudicators with public international law expertise is important as they could enhance the correctness of ISDS awards,[248] and that countless international tribunals require similar qualifications as the International Court of Justice (ICJ).[249] WGIII also explained that adjudicators should have expertise in private international law, alongside the different policies underlying investment, sustainable development, ISDS, how governments operated, and specific knowledge regarding disputes (industry-specific, relevant domestic legal system and calculation of damages).[250] The EU has preferred to 'use comparable qualification requirements as for other international courts' such as qualifications required to be appointed in their State's highest judicial offices or are jurisconsults of recognised competence in international law, required expertise in certain areas of law, and judicial experience and case-management skills.[251] The organisation Transport and Environment further suggests that arbitrators 'demonstrate experience in national law in areas such as: environmental/climate change/consumer law/labour and human rights/competition law'.[252]

However, there have been concerns (see Chapter 4.4) that if qualifications are too strict it will reduce inclusivity and diversity.[253] To ensure an inclusive pool, there should be representation of individuals

[245] These cost efficient rules and procedures include 'simplified procedures for small claims', educational support, or financial support, see, Submission by the EFILA to the UNCITRAL Working Group No III on ISDS Reforms, (July 2019), op. cit., p 21-26.
[246] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [96].
[247] ibid, [97].
[248] Anna De Luca, Mark Feldman, and Others (2020) op cit., 27-28.
[249] Colin Brown (2017) op cit., 682.
[250] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [97]
[251] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [20]. This is all similar to the EU agreements, see Chapter 4.4.
[252] Final intervention from Transport & Environment, May 2018, p 2, <https://uncitral.un.org/sites/uncitral.un.org/files/te_final_intervention.pdf> accessed 24 November 2020.
[253] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [96]; Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [21].

from different geographic and cultural backgrounds and with different attributes (gender, age, languages, expertise). This is important as 'different cultures and different levels of economic development could ensure a more balanced decision-making', although it was correctly noted that the ultimate goal of ISDS is fair and efficient dispute resolution rather than maximising diversity.[254] Increasing the amount of adjudicators on the panel could increase inclusiveness and attain a better balance of different experts and diversities in the dispute resolution mechanism without impacting the fairness and correctness of awards. But that would increase costs which is another delicate issue discussed above.

While for many, the current system of appointment of arbitrators is one of the main reasons for the 'lack of independence and impartiality of decision makers in ISDS'.[255] For others it is the right of investors and States to select their own arbitrators that brings confidence and accountability to ISDS.[256] China, for example, has favoured party appointed arbitrators, especially in the first-instance stage, declaring it as the 'core and most attractive feature of international arbitration'. Russia is also supportive of the right to party autonomy as it 'ensure[s] confidence in the current ISDS system' and allows consideration for 'the specificities of each dispute'.[257] Similarly, China argued that investment disputes often involve complex factual and legal issues, that the disputing parties have to seriously consider arbitrator expertise, that other dispute settlement mechanisms in the fields of international public law or international economics and trade allow the disputing parties to choose trusted experts to hear cases, and that this 'should be retained in any reform process'.[258] EFILA also favour party autonomy to allow the disputing parties to 'select the most appropriate arbitrators' and better diversify 'the pool of arbitrators by selecting more young, female and non-Western arbitrators'.[259] However, China and the EFILA argue adjudicator reform in ISDS is required.[260]

Arbitrator selection through party autonomy is costly and time-consuming and permanent adjudicators would reduce disqualification claims further reducing cost and time.[261] It is imperative that counsel selects arbitrators that can robustly represent the interests of the party while maintaining

[254] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [101].
[255] ibid, [104].
[256] ibid, [103].
[257] Possible reform of Investor-State dispute settlement (ISDS), Submission from the Government of the Russian Federation, (January 2020) op cit., [5]-[11].
[258] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China, (October 2019) op. cit., p 4.
[259] EFILA's written comments made at the UNCITRAL Working Group on ISDS reform, (June 2018), op. cit., [9].
[260] Ibid, [11]; Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China, (October 2019) op. cit., p 5.
[261] Colin Brown (2017) op cit., 683.

a reputation for impartiality. Consequently, in the selection and appointment of adjudicators, WGIII considered the establishment of a roster,[262] and the instalment of full-time adjudicators.[263] The EU has favoured the proposal for full-time, committed, and employed adjudicators who are paid pre-determined salaries, have long but non-renewable terms, have random case assignment, and whose working practices are transparent, in order to adequately address ethical considerations such as stopping them from pursuing other activities that compromise their impartiality and independence or develop arbitrator conflict of interests.[264] This has some differences from the EU agreements as in this proposal by the EU, adjudicators cannot have employment outside the mechanism apart from teaching.[265] This could limit adjudicator conflict of interests and help improve their independence and impartiality (see Chapter 3.5). The establishment of a roster was supposedly for those that favoured party autonomy. However, there was uncertainty regarding who would establish the roster[266] and the specific nature of the adjudicators' terms. While reference was made to other rosters in ISDS, there were complaints that a list of individuals would hardly improve the current appointment mechanism where repeat appointments, conflict of interest, lack of diversity,[267] and 'double-hatting' could occur without a code of conduct.[268] A Draft Code of Conduct was, therefore, presented at the WGIII sessions of February 2021. This is discussed in Section 5.5 below.[269]

Full-time adjudicators would depart from party autonomy and be more suited for a permanent body like appellate review and MIC.[270] Discussions at WGIII included questions on the nomination,[271]

[262] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [105]-[113].
[263] ibid, [114]-[130].
[264] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [16]-[19], [24].
[265] ibid, [16]
[266] For example, are States and investors involved in the establishment of a roster, or only States. Transport and Environment in their submission wanted a 'Transparent arbitrator roster', see, Final intervention from Transport & Environment, (2018), op. cit., p 1.
[267] For example, 'a list of diverse candidates would not necessarily result in greater diversity in the tribunal members' since it depends on who the parties pick for the constitution of the tribunal.
[268] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [105]-[113].
[269] Possible reform of investor-State dispute settlement (ISDS), Draft code of conduct, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Fortieth session, Vienna, Online, 8–12 February 2021, <http://undocs.org/en/A/CN.9/WG.III/WP.201> accessed 5 March 2021.
[270] Colin Brown (2017) op cit., 683.
[271] For example, it was discussed that nomination could be done 'by participating States, by an independent entity established within the permanent body and by interested individuals themselves'. If the nomination is just through States would the dispute be considered unequal since investors would have no say in the arbitrators that hear the case.

selection,[272] terms,[273] and case assignment[274] of adjudicators.[275] These issues were more thoroughly considered at WGIII's fortieth session of February 2021 discussed further below.[276] Some academics argue 'the appointment process of the judges of a MIC is likely to be highly politicised and could potentially lead to political conflict or even vetoes with a negative impact on the settlement of disputes'.[277] However, some comments made within those topics at WGIII address these concerns such as if participating States were to pick candidates 'votes were favoured over election by consensus, which could be used to block the selection process'.[278] This shows WGIII recognised the events at the WTO where the US is blocking the selection process (see Chapter 4.3.2).

Other comments were that stakeholders such as investors and even professionals should be able to express their views in the selection process, which could enhance inclusivity, transparency, and legitimacy of the dispute resolution process. This could pre-empt concerns relating to a politicised MIC and also those stated by EFILA that a body where States dictate the selection process could have pro-State bias, leading to a lack of independence and impartiality and thus not be accepted by investors.[279] Another comment concerned balancing geographical and economic development representation with the number of adjudicators on the body. This could support inclusiveness and represent the views of international society rather than that of a few powerful States. Addressing concerns related to adjudicators like independence, diversity, and expertise will assist ISDS to reinforce the RoL.

Overall, the EU firmly believes that 'establishing a standing two-tier mechanism is the only available option that [both] effectively responds to all the concerns identified in the Working Group', and

[272] For example, it was discussed States should be able to select more than one candidate to help ensure a balance and diversity and that the selection process could be screened by neutral independent bodies to help transparency. Screening the selection process was also supported by the EU in their submission at paragraphs 22-23. The EFILA submission (Submission by the EFILA to the UNCITRAL Working Group No III on ISDS Reforms, (July 2019), op. cit.) show they believe that investors as a user of the system should participate in choosing candidates.

[273] For example, it was discussed longer non-renewable terms could help ensure members are not impacted by undue influence.

[274] For example, the authority, method, and criteria were discussed. On authority it was discussed that the president of the permanent body could be the authority to determine case assignment or done on a random basis. Mention of participating State or disputing party involvement, but fear of independence, impartiality and political interference.

[275] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [114]-[130].

[276] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Fortieth session, Vienna, Online, 8–12 February 2021, <http://undocs.org/en/A/CN.9/WG.III/WP.203> accessed 5 March 2021.

[277] Anna De Luca, Crina Baltag, and Others (2020) op cit., 27.

[278] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [119].

[279] EFILA's written comments made at the UNCITRAL Working Group on ISDS reform, (June 2018), op. cit., [13]. This also relates to States not enforcing awards they make (see above on paragraph on enforcement).

'captures the intertwined nature of those concerns'.[280] It strongly advocates that a two-tier system can resolve the concerns of: consistency, predictability, and correctness of ISDS wards; ethical concerns, eliminating double-hatting, removing incentives flowing from the current system, qualifications, and diversity of the ISDS adjudicators; and cost and time of ISDS proceedings.[281] The EU believes the Mauritius Convention can be used as a basis for an opt-in mechanism which means that, once both States to an agreement enter the two-tier body through the opt-in mechanism, disputes under that agreement will be heard by the two-tier body.[282]

However, the EU stressed that even though a two-tier system is the superior option, the mechanism should have an open architecture which gives flexibility to States for example to choose appellate review but not the first tier.[283] This is because although the EU has a major influence in IIL,[284] there are many other actors besides the EU that participate in and influence the discussions. Although Van Harten favours the EU proposal compared to the current system, he is apprehensive that there remain vague investor protections, no responsibilities on investors (like CSR), lack of third-party involvement (local communities), no exhaustion of domestic remedies, no need to honour contractual obligations, retrospective compensation, and regulatory chill.[285]

5.4 Attendance and Participation of States, Organisations and Academics at UNCITRAL WGIII

This thesis asserts that one of the strengths of the WGIII processes is its inclusive and participative organisation of stakeholder engagement and consultation. In the thirty-eighth session it was decided that discussions between the diverse States and organisations should occur between WGIII sessions,[286] as attendance was so vast and such discussion could develop understanding, co-operation,

[280] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [40] EU Council and EU Commission both support an MIC, see, Official Journal of the European Union, Declaration no 36, 'Statement by the Commission and the Council on Investment Protection and the Investment Court System' OJ L 11, vol 60, 14 January 2017, 9, 20. The European Court of Justice also seems to support an ICS or MIC, see, Opinion 1/17 of the Court (Full Court) (30 April 2019) (European Court of Justice).

[281] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [41]-[57].

[282] ibid, [35]-[36]. There was EU acceptance for an opt-in mechanism back in 2015, see, European Commission, 'Investment in TTIP and Beyond—The Path for Reform, Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration Towards an Investment Court' (May 2015), 11, <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 31 April 2021.

[283] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [39].

[284] The EU is the world's largest exporter and importer of foreign direct investment, and 1384 of 3300 treaties have been concluded by the EU Member States', see, Colin Brown (2017) op cit., 674, 685.

[285] Gus Van Harten (2020) op. cit., 139.

[286] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019), (July 2020) op. cit., [18]. This proposal made at the end of 2019 was limited by Covid-19 at the start of 2020 which restricted in-person international cooperation.

and motives between the attendees, which would boost the efficiency of WGIII. This is important because IIL is significant as FDI should encourage sustainable development and can help achieve the SDGs, which means the concerns in ISDS need to be resolved and this requires the attention of all stakeholders.[287]

Over the years, WGIII has kept its commitment that stakeholders can attend sessions on ISDS reform. The thirty-fourth up to the resumed thirty-eight sessions were attended by many developing, emerging, and developed States, and non-state actors, like civil society organisations.[288] Many LDCs were also in attendance in at least one of these sessions.[289] There was clear continental representation. For example, among the NGOs there was representation from Africa (African Center of International Law Practice (ACILP)), Asia (Asian Academy of International Law (AAIL)), Europe (European Society of International Law (ESIL)), North America (American Bar Association (ABA)), Oceania (Arbitrators' and Mediators' Institute of New Zealand (AMINZ)), South America (Centro de Estudios de Derecho, Economía y Política (CEDEP)), and even international (Friends of the Earth International (FOEI)). These organisations specialise in a variety of areas and therefore diverse organisations are attending ISDS developments unlike in the MAI (see Chapter 4.2.3).[290] Most organisations attending do seem to specialise in arbitration, but there are those with more social concerns that have made submissions to WGIII as seen below. WGIII has provided an inclusive forum for attendance. The inclusive and participative decision-making processes embedded in WGIII demonstrates a commitment to the RoL as inclusive attendance increases the chances of a transparent, accountable, and democratic process for enacting reform of ISDS in WGIII.

[287] Statement of the Group of G77 and China delivered by Ms Veronica Gomez, Charge D´Affaires A.I. of the Permanent Mission of Ecuador at the UNCITRAL WG III (October–November 2018) op. cit.; Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [4]-[5].

[288] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017) Part I, (June–July 2018) op. cit., [7]-[9]; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018) (June–July 2018) op. cit., [4]-[6]; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), (July 2019) op. cit., [6]-[8]; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019), (July 2019) op cit., [6]-[8]; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019), (July 2020) op. cit., [5]-[7].

[289] Looking at the documents these LDCs attended at least once: Uganda, Niger, Sudan, Angola, Burkina Faso, Benin, Myanmar, Nepal, Senegal, Togo, Burundi, Mauritania, Central African Republic, Democratic Republic of the Congo, Guinea, Lesotho, Sierra Leone, Ethiopia, Gambia, Mali, Madagascar, Tanzania, Cambodia.

[290] Expertise of the organisations include commercial, social, and environmental.

Moreover, there has been clear participation in terms of submissions from States from across the world including LDCs,[291] developing States,[292] emergent economies,[293] developed States,[294] and continental participation.[295] Moreover, more wealthy participants of WGIII are taking into consideration substantive inequalities since contributions by the European Union, France, the German Federal Ministry for Economic Cooperation and Development (BMZ), and the Swiss Agency for Development and Cooperation (SDC) have been made to the UNCITRAL trust fund to allow the participation of representatives of developing States in the deliberations of the WGIII as well as in regional intersessional meetings.[296] There has also been participation from organisations where remarks and submissions have been made.[297] It does seem that WGIII will 'strengthen the participation in global governance' under SDG 16.[298]

However, there remains room for improvement. James Gathii has argued that WGIII has been inclusive in holding stakeholder sessions (civil society organisations, academics, practitioners) but these

[291] Possible reform of investor-State dispute settlement (ISDS), Submission from the Government of Mali, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session Vienna, 14–18 October 2019, <https://undocs.org/en/A/CN.9/WG.III/WP.181> accessed 2 March 2021; Summary of the intersessional regional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Republic of Guinea, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session, Vienna, 14–18 October 2019, <https://undocs.org/en/A/CN.9/WG.III/WP.183> accessed 2 March 2021.
[292] Possible reform of investor-State dispute settlement (ISDS), Submission from the Government of Costa Rica, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session Vienna, 14–18 October 2019, <https://undocs.org/en/A/CN.9/WG.III/WP.178> accessed 2 March 2021; Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Colombia, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session, Vienna, 14–18 October 2019, <http://undocs.org/A/CN.9/WG.III/WP.173> accessed 2 March 2021.
[293] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China, (October 2019) op. cit.; Possible reform of investor-State dispute settlement (ISDS), Submission from the Government of Brazil, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session Vienna, 14–18 October 2019, <https://undocs.org/en/A/CN.9/WG.III/WP.171> accessed 2 March 2021.
[294] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit. Possible reform of investor-State dispute settlement (ISDS), Submission from the Government of the Republic of Korea, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session Vienna, 14–18 October 2019, <https://uncitral.un.org/sites/uncitral.un.org/files/wp179_new.pdf> accessed 2 March 2021.
[295] Possible reform of investor-State dispute settlement (ISDS), Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session, Vienna, 14–18 October 2019, <http://undocs.org/A/CN.9/WG.III/WP.182> accessed 2 March 2020.
[296] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019), (July 2020) op. cit., [4]; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, (January 2020) op. cit., [5].
[297] 'Investor-State Dispute Settlement Reform: On-line Resources' (UNCITRAL) <https://uncitral.un.org/en/library/online_resources/investor-state_dispute> accessed 13 November 2020.
[298] SDG, op. cit., Goal 16.8.

sessions are a few steps away from the State-led processes held in Vienna and New York.[299] Moreover, he argued there has not been much criticism of ISDS below main State-led sessions.[300] As such, the extent to which this stakeholder participation is meaningful and legitimate remains uncertain. While the Academic Forum gives stakeholders a voice, some scholars have expressed concern about the interests and priorities of some of these individuals involved in WGIII.[301] In particular, Gus Van Harten, who is no longer participating in the Academic Forum, has expressed concerns about the level of representation of the ISDS industry in WGIII (see Chapter 3.5.3).[302] Gathii reinforces this view and has argued that given the small amount of individuals with relevant ISDS expertise and experience it will be these people involved at WGIII that helped create these problems in the first place, which suggests reforms will only tinker the system rather than lead to real change.[303]

Consequently, there has been debate that public issues such as local communities and CSR remain firmly in the background of reforms while the profitable continuation of ISDS is at the forefront.[304] Furthermore, Van Harten argues that there are 'ISDS hawks' in high positions within the Academic Forum while the same cannot be said for non-'ISDS hawks'.[305] In other words, sustaining the existing system of ISDS will benefit many in the ISDS industry and there is no real impetus to move away from the status quo. However, there are many members of the Academic Forum that are not in the ISDS industry camp and whom remain critical of the existing system of ISDS. Moreover, State governments who are responsible for their citizens should be talking about impacted communities in the State-led discussion even though there may be some that do have interests in MNCs.

Nevertheless, some scholars are worried that reform will only entrench existing structural inequalities and that the most vulnerable will continue to be negatively impacted by ISDS for the benefits of a very small privileged class.[306] These academics are concerned that reforms could be restricted by WGIII's procedural stance, but, in my view, reforming the procedural functioning of ISDS can nonetheless reinforce the RoL and it is possible for procedural reform to cause substantive change. Procedural implementation of appellate review and a multilateral instrument could create 'a consistent interpretation and understanding of the substantive standards of investment production'.[307]

[299] James Thuo Gathii (2021) op cit., 7-8.
[300] ibid, 8.
[301] ibid; Gus Van Harten (2020) op cit.
[302] Gus Van Harten (2020) op cit., 140-142.
[303] Thuo Gathii (2021) op cit., 20-21.
[304] ibid, 6-7; Gus Van Harten (2020) op cit., 139.
[305] Gus Van Harten (2020) op cit., 140.
[306] ibid; James Thuo Gathii (2021) op cit.
[307] Colin Brown (2017) op cit., 686.

There has been some criticism that the potential users (i.e investors and their legal counsel) of the potentially reformed ISDS (i.e the EU's MIC proposal) require further involvement in the process.[308] This is evident from Russia's proposal for the UNCITRAL Secretariat to request comments from the major arbitration centres in London, Stockholm, Singapore, and Hong Kong; again, possibly due to its preference for commercial arbitration in ISDS discussed above, but the Secretariat has so far declined favouring discussion to only be with those heavily involved in ISDS (i.e ICSID and the PCA).[309] It is of course favourable to have investors in WGIII discussions to make the reformed system more legitimate, and increase the chances of acceptance from investors, which is crucial. Without acceptance, the system will not be used and will thus render any implemented reforms pointless. There have been organisations at WGIII like Public Citizens that still completely reject ISDS, comparable to the NGO rejection of the MAI, even though such organisations have been invited to WGIII discussions.[310]

One criticism put forward by Public Citizens is that multinational investors/corporations are 'granted extraordinary commercial rights not available in domestic legal systems' and are 'elevated to equal status with sovereign nations to privately enforce public treaties in extrajudicial venues'.[311] Similarly, Van Harten argues investor protections contained in IIAs give rich foreign investors more rights and better mechanisms to enforce rights through ISDS than domestic investors and average citizens creating inequality justified by wealth.[312] However, ISDS was created to stop potential domestic court bias against foreign individuals compared to nationals (see Chapter 2.8). Also, although these investors are rich and represent a very small class which suggests they should not require protection,[313] their business might be employing thousands of people that rely on their job to support themselves and their families, and when companies take cuts or scale back it is normally the workers that are impacted not necessarily the rich investor who might be more inclined to put themselves first.

Public Citizens want most investor protections removed,[314] even though they have capabilities to reinforce the DRoL and an IRoL (see Chapter 3.2.2). They are opposed to the 'broad obligations' under

[308] Submission by the EFILA to the UNCITRAL Working Group No III on ISDS Reforms, (July 2019), op. cit., [1].
[309] Dmitry Labin and Alena Soloveva (2020) op cit., 250. Although other arbitration centres have attended sessions and the Hong Kong arbitration centre attended the resumed thirty-eighth session, see, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019), (July 2020) op. cit., [3].
[310] Recommendations for UNCITRAL ISDS Discussions, Public Citizen, 15 July 2019, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_publiccitizen.pdf> accessed 24 November 2020.
[311] Ibid.
[312] Gus Van Harten (2020) op cit., 133-136.
[313] ibid, 2-4.
[314] Recommendations for UNCITRAL ISDS Discussions, Public Citizen, (July 2019), op. cit., 2.

fair and equitable treatment (FET),[315] even though the prevention of arbitrariness is one of the most important founding formal RoL elements developed by Dicey (see Chapter 2.2). National treatment is an investor protection that Public Citizens want removed as it restricts domestic systems,[316] even though this investor protection reinforces equality in supposedly giving investors the same treatment as nationals of host States.[317] Moreover, Public Citizens say '[t]he ISDS regime undermines the rule of law by empowering extrajudicial panels of private-sector attorneys to contradict domestic court rulings'.

In a similar vein, the radical critical scholar Muthucumaraswamy Sornarajah completely rejects the system ISDS and considers reform of ISDS secondary.[318] Sornarajah argues that an investment court is unlikely to resolve the current issues facing ISDS, like favouritism towards developed States in the composition of the panel,[319] even though there has been much discussion in WGIII of equality between geographic representation, diversity, and qualifications. Furthermore, he asserts that a permanent court would purposely invoke favourable investor protection for developed States,[320] even though just in the last two years the developed States of Italy, Spain, Switzerland, Germany, Denmark, Norway, and Canada, and emerging States of China and India have been respondents in ISDS claims.[321]

This thesis takes a different view and argues that ISDS can reflect the DRoL and IRoL, subject to certain improvements, so the grounds for this opposition do deserve serious consideration. In other words, we should not abandon the existing system altogether; rather, we should look to overcome the existing problems within the system by focusing on the introduction of interventions that strengthen the RoL.

To better understand how the RoL can be strengthened in ISDS, we can look to existing international systems that have exhibited a commitment to RoL. The international systems of the ICJ, European Court of Justice (ECJ), European Court of Human Rights (ECHR), and International Criminal Court (ICC) are all designed to nourish an IRoL. They engage with and correct domestic systems to nourish the DRoL. In some instances, they will overrule domestic systems. The concern cannot be with international supervisory bodies acting as a corrective but their character, and the reform

[315] ibid, 8.
[316] ibid, 2.
[317] Although maybe in the context of western domestic society/courts.
[318] Muthucumaraswamy Sornarajah, 'An International Investment Court: panacea or purgatory?' (Colombia Centre for Sustainable Investment: Columbia FDI Perspectives, Perspectives on topical foreign direct investment issues No. 180 August 15, 2016).
[319] Ibid.
[320] Ibid.
[321] 'Case name and number' (Investment Policy Hub) <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 16 March 2021.

contemplated by WGIII could make ISDS more transparent and fairer, ensuring for example that it is not conducted by 'private-sector attorneys' but adjudicators with international public law expertise. A valid argument Public Citizens make is the importance of the State's right to regulate for the benefit of its citizens, especially with matters concerning human rights and the environment,[322] but ISDS does not need to be eliminated for this to occur as appropriate reform can address these issues. One example is to make ISDS more responsive to sustainable development and to employ adjudicators in ISDS that respect international public law concerns (see Chapters 3.2.2 and 3.5.3).

Public Citizens and some academics express concerns of for-profit arbitration where arbitrators drag cases on to receive sustained income and where arbitrators favour broad interpretation of investor protection to encourage more ISDS cases to have a better chance of gaining future employment.[323] However, other academics writing in the context of the MIC have argued paying tribunal members a set salary rather than an hourly fee incentivises faster resolution of cases,[324] and a shorter procedure could reduce costs.[325] Public Citizens acknowledged the EU's ICS and while some academics believe it could replace for-profit arbitrators and reduce conflict of interests,[326] Public Citizens believe it will not address investor rights overruling State's right to regulate,[327] since investor protections remain.[328] Furthermore, Public Citizens argue that the EU proposal of courts could further undermine the State's right to regulate compared to the current system,[329] even though adjudicators in an investment court are envisioned to have international public law expertise that can better address State regulatory concerns than those with only international commercial law expertise commonly seen in the current system (see Chapter 3.5.3).

Moreover, although some organisations like Public Citizens and FOEI make claims that studies show ISDS does not boost FDI and is therefore not needed,[330] some studies show contrary results,[331] and in my view, the focus should be on generating sustainable investment rather than simply encouraging investment. It would be concerning if States gained any investment through conceding RoL principles

[322] Recommendations for UNCITRAL ISDS Discussions, Public Citizen, (July 2019), op. cit., 2-3.
[323] ibid, 5-6; Gus Van Harten (2020) op. cit., 11-13.
[324] Anna De Luca, Crina Baltag, and Others (2020) op cit., 27.
[325] Gabriel Bottini, Julien Chaisse, and Others (2019) op cit., 26.
[326] Gus Van Harten (2020) op. cit., 138.
[327] Recommendations for UNCITRAL ISDS Discussions, Public Citizen, (July 2019), op. cit., 7.
[328] Gus Van Harten (2020) op. cit., 139.
[329] Recommendations for UNCITRAL ISDS Discussions, Public Citizen, (July 2019), op. cit., 7.
[330] Recommendations for UNCITRAL ISDS Discussions, Public Citizen, (July 2019), op. cit.; Friends of the Earth International Remarks made during the 35th session of UNCITRAL Working Group III with regards to A/CN.9/WG.III/WP.142, Section D, Paragraphs 45-57, <https://uncitral.un.org/sites/uncitral.un.org/files/friends_of_the_earth_international_remarks.pdf> accessed 13 November 2020.
[331] Eric Neumayer and Laura Spess, 'Do bilateral investment treaties increase foreign direct investment to developing countries' (2005) 33(10) World Development 1567.

like equality, State sovereignty, and judicial independence, for the benefit of a small class of powerful individuals.[332] In any case the priority of the ISDS mechanism should not be to attract investment but to resolve investment disputes in a way that should reinforce the RoL. ISDS was created as a peaceful method to resolve disputes as opposed to the overly aggressive means of diplomatic protection and treaties of capitulation (see Chapter 2.8). Moreover, investors might not make investments if investments were too unstable and uncertain such as in the enforcement of their property rights.

There are also some academics that favour alternate dispute resolution to ISDS and enforcement of domestic legislation as they believe these will address the ISDS concerns identified by WGIII of consistency, adjudicators, cost and time, and third-party funding.[333] Other organisations like the FOEI whilst almost rejecting ISDS in their submissions similar to the rejection of the MAI, have nonetheless submitted constructive criticism of ISDS,[334] while others like the EFILA argue 'destroying the current ISDS system is not a solution but will have significant negative effects for States, investors and the Rule of Law generally'.[335] These organisations are important as they help draw attention to social values that are important to the RoL that might get lost in focus upon the economic nature of IIL and ISDS, such as sustainable development, State's right to regulate, CSR, and participation of third parties (all discussed in Chapter 2).

The FOEI remarked concerns that the threat of ISDS could create regulatory chill as States were scared to regulate in the public interest, such as addressing environmental issues, and that ISDS is imbalanced as it only gives investor rights access to justice and not victims of human rights abuses such as the right to hold investors accountable for their abuses.[336] Similarly, other organisations seemed to almost reject ISDS,[337] but also argued that ISDS should allow counter claims,[338] State's right to regulate in the

[332] Gus Van Harten (2020) op cit., 8.
[333] Jane Kelsey, 'UNCITRAL Working Group III: Promoting alternatives to investor–state arbitration as ISDS reform' (Investment Treaty News, 2 October 2019) <https://www.iisd.org/itn/en/2019/10/02/uncitral-working-group-iii-promoting-alternatives-to-investor-state-arbitration-as-isds-reform-jane-kelsey/> accessed 16 December 2020; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017).
[334] Friends of the Earth International Remarks made during the 35th session of UNCITRAL Working Group III with regards to A/CN.9/WG.III/WP.142, Section D, Paragraphs 45-57, op. cit.
[335] EFILA's written comments made at the UNCITRAL Working Group on ISDS reform, (June 2018), op. cit., [11].
[336] Friends of the Earth International Remarks made during the 35th session of UNCITRAL Working Group III with regards to A/CN.9/WG.III/WP.142, Section D, Paragraphs 45-57, op. cit.
[337] Transport & Environment, Centre for International Environmental Law, Client Earth, SOMO, Reform Options for ISDS, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_recs_and_justification_final.pdf> accessed 24 November 2020.
[338] Also proposed in Spain-Argentina BIT (signed 3 October 1991, entered into force 28 September 1992), art X(3); *Urbaser S.A v Argentina*, ICSID Case No. ARB/07/26, Final Award of 8 December 2016.

public interest,[339] investors to only claim with clean hands,[340] and third party access.[341] The International Law Development Organisation submitted that substantive inequalities of LDCs must be taken into consideration to reinforce the RoL and supported the submission with reference to the SDGs.[342] These are concerns discussed throughout the thesis and one of the reasons why the MAI failed (see Chapter 4.2), but in my view, ISDS should not need be abandoned to resolve these concerns. ISDS just requires certain amendments which is now the purpose of WGIII as it has reached stage 3 of its mandate which requires it to try to produce and recommend proposals for ISDS reform to the Commission.

There is also the proposal for exhaustion of local remedies which requires investors to fully seek justice within the procedures of domestic systems before they can initiate ISDS in the international setting.[343] According to some academics, 'the investment treaty regime is at present the only international regime in which non-state actors have direct standing against governments based on treaty commitments without the need to exhaust local remedies'.[344] Sornarajah adopts a radical position and argues that domestic remedies should replace ISDS entirely while Van Harten strongly prefers domestic remedies instead of ISDS.[345] This thesis has questioned whether domestic remedies offered by States in investor-State disputes can reinforce the RoL (see Chapter 2.8). Van Harten implied part of the Ethyl-Canada dispute involved a domestic award going against the State measure which suggests the judiciary can criticise State actions,[346] but this was in the developed State of Canada, the claimant was a regional government, the award was not binding, and there was opposition to the measure by domestic companies and State officials (see Chapter 4.2.5). Furthermore, some academics

[339] Also proposed in the Morocco-Nigeria BIT (signed 3 December 2016), art 23.3; The abandoned Trans-Pacific Partnership (TPP), article 29.5, in response to the Phillip Morris tobacco case against Australia, which reads as an investor cannot claim against a tobacco control measure.
[340] Also proposed in CETA, art 8.18(3); Morocco-Nigeria BIT, op. cit., art 14; Model Text for the Indian Bilateral Investment Treaty, art 11.
[341] Transport & Environment, Centre for International Environmental Law, Client Earth, SOMO, Reform Options for ISDS, op. cit. On third party access there is inspiration from the Federal Rules of Civil Procedure 24(a) (United States), and Netherlands Arbitration Institute Rules, art 41.1.
[342] Submission by the International Development Law Organisation to the UNCITRAL Working Group No III on ISDS Reforms with Respect to Note by the Secretariat A/CN.9/WG.III/WP.168 On Advisory Centre <https://uncitral.un.org/sites/uncitral.un.org/files/idlosubmission.pdf> accessed 13 November 2020.
[343] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Morocco, (April 2019) op. cit., [14]; Transport & Environment, Centre for International Environmental Law, Client Earth, SOMO, Reform Options for ISDS, op. cit.; Columbia Centre on Sustainable Investment, 1 May 2018, op. cit., p 2.
[344] Jonathan Bonnitcha, Lauge Poulsen, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017) 65.
[345] Muthucumaraswamy Sornarajah (2016) op. cit.; Gus Van Harten (2020) op cit.
[346] Gus Van Harten (2020) op cit., 105-107.

found ISDS is on average quicker than litigation in some developed States like Italy and emerging ones like India,[347] which suggests access to justice could be better achieved in ISDS.

Global inequality could exist between investor and local communities, as ISDS tribunals do not require States to invite local communities (average citizens) to decisions impacting them but do for investors, and regulations attracting investment in ISDS is not a problem but regulations disadvantaging local communities is outside scope of arbitration.[348] On third party participation, Ecuador has argued that provisions should be created that allow the possibility for groups that have legitimate interests in, or are directly affected by, the arbitral award to be part of the proceedings to voice their concerns which would also help ensure arbitral awards meet the applicable requirements of fact and of law.[349] Although Russia has expressed concerns that third party participation could become politicised against the State,[350] and this could occur in ISDS when the investor is a member of the third party submitting the amicus curiae brief,[351] third party participation can nonetheless 'address broad policy issues concerning sustainable development, environment, human rights and governmental policy'.[352]

There is scholarly support for communities impacted by investment projects to have a bigger voice in ISDS to promote their human rights and indigenous rights, but current reforms on how ISDS functions could be more suited to profits rather than MNC abuses, and WGIII may not have sufficiently considered local communities/third parties.[353] However, enhancing the participation of local communities in ISDS could be a procedural reform. Furthermore, the composition of the tribunal could use adjudicators with public law expertise (discussed in this chapter) and knowledge of how investment can affect indigenous and human rights and the environment. Other academics have submitted that *amicus* could be insufficient for affected parties to be adequately heard, as 'bias in ISDS cannot be repaired', and no responsibilities for investors undermines protecting the vulnerable from abuses.[354] ISDS should promote equality to uphold access to justice and promote the RoL.

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[347] Anna De Luca, Crina Baltag, and Others (2020) op cit., 31-32.
[348] Nicolás Perrone (2019) op. cit., 174-175; Gus Van Harten (2020) op cit.; James Thuo Gathii (2021) op cit.
[349] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Ecuador, (October 2019) op. cit., [23]-[26].
[350] Dmitry Labin and Alena Soloveva (2020) op cit., 247.
[351] *Eli Lilly and Company v Canada*, ICSID Case No. UNCT/14/2, Procedural Order No. 4 of 23 February 2016, [e]; *Eli Lilly and Company v Canada*, ICSID Case No. UNCT/14/2, Respondent's Observations on Non-Disputing Party Applications of 19 February 2016. Both IMC and BIOTECanada had close ties and worked with the investor.
[352] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008, [366]. The petitioners were: the Lawyers' Environmental Action Team (LEAT); the Legal and Human Rights Centre (LHRC); the Tanzania Gender Networking Programme (TGNP); the Center for International Environmental Law (CIEL); and the International Institute for Sustainable Development (IISD).
[353] James Thuo Gathii (2021) op cit., 24-25. Individuals protecting human rights and the environment get killed where MNCs want to operate and IIL currently ignores the dangers of MNCs like displacement of local communities, and environmental pollution and destruction.
[354] Gus Van Harten (2020) op cit., 136.

To properly recognise the needs and interests of local communities, they should be included before, during, and after investment projects regardless of ISDS claims.[355] This suggests that although inadequate local community participation is an ISDS RoL problem, it is a bigger problem in foreign investment governance. Situations should be avoided where conflicts caused by investment arise between State (investment benefits economy and employment) and local community (investment negatively impacts the community and environment) resulting in the State having to choose between investor and local community when local community mobilises effective resistance,[356] leading to possible ISDS when State chooses local community.[357] If local communities were effectively involved at all stages of investment projects, States' and foreign investors' would need to have the obligation to 'seek free, prior and informed consent' from local communities,[358] which is a solidarity right (see Chapter 2.6.4).[359] In *Bear Creek Mining v Peru*, the majority of arbitrators argued that it was up to the State to establish consultation with the local community, but the dissenting judge argued the investor must also seek consultation and gain trust with the local population regarding the investment project due to the International Labour Organization (ILO) Convention 169 concerning Indigenous and Tribal Peoples (see Chapter 1.2).[360] Some commentators argue human rights are fenced out of IIL and instead focus on investors rather than parties impacted by investment.[361] Other academics believe local community participation in ISDS could come in the form of an opt-in mechanism discussed in the next section.[362]

5.5 The Impact of Covid-19 on WGIII's Mandate

Since March 2020, the international community has experienced unprecedented disruption as a result of the global Covid-19 pandemic. The thirty-ninth session due to be held between 30 March-3 April 2020 in New York was postponed and the discussions on ISDS have progressed at a much slower rate than expected over the past two years. Instead, a variety of State representatives from developed and developing countries (including the EU representing its member States) and academics have met online for informal discussions regarding the benefits of a multilateral ISDS mechanism including an

[355] Nicolás Perrone (2019) op. cit., 172, 179.
[356] ibid, 171-172.
[357] ibid, 173.
[358] ibid, 179.
[359] Declaration on the Rights of Indigenous People, GARes61/295 of 13 September 2007.
[360] *Bear Creek Mining Corporation v Peru*, ICSID Case No. ARB/14/21, Award of 30 November 2017, [226]-[228] [736]; *Bear Creek Mining Corporation v Peru*, ICSID Case No. ARB/14/21, Award of 30 November 2017, Partial Dissenting Opinion Professor Philippe Sands QC, [4]-[6], [7]-[13], [36]-[37], [39]-[40].
[361] James Thuo Gathii (2021) op cit., 23.
[362] Nicolás Perrone (2019) op. cit.,179.

option for appellate review within the multilateral mechanisms.[363] They have considered the importance of legal thinking on the set up, content, structure, and framework of a multilateral mechanism. The discussions also outlined that the multilateral body needs to be unified and include flexible elements such as opt-in and opt-out mechanisms, but also have certain compulsory elements. This has been taken forward into formal reform discussions.

This section will evaluate the more specific procedural reform options of a multilateral instrument, appellate review, and adjudicator overhaul. It will show that these reforms *can* respond to the RoL issues raised in this thesis.

5.5.1 Multilateral Instrument

The postponed thirty-ninth session was later held between 5-9 October 2020 in Vienna. One of the most important discussions at this session was the multilateral instrument on ISDS reform.[364] This shows ambition to establish multilateral appellate review and/or a multilateral two-tier system, and signifies the ethos of WGIII in promoting inclusiveness and flexibility. This discussion follows submissions by States which refer to the implementation of multiple reform options.[365] These include that the reforms contained in the implementation instrument apply to both existing and future IIAs,[366] contain minimum standards,[367] a 'suit' approach to ensure flexibility for each State's needs,[368] and cover procedural matters only, not substantive ones.[369]

[363] UNCITRAL Working Group III, 'Multilateral instrument on ISDS reform - Webinar #2: UNCITRAL Secretariat & ISDS Academic Forum' (23 April 2020) < https://www.youtube.com/watch?v=h2AXze6XRs4> accessed 29 April 2020.
[364] Possible reform of investor-State dispute settlement (ISDS): Multilateral instrument on ISDS reform, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-ninth session, New York, 30 March–3 April 2020, <https://undocs.org/en/A/CN.9/WG.III/WP.194> accessed 1 March 2021.
[365] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [35]; Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Colombia, (October 2019), op. cit., [29], <http://undocs.org/A/CN.9/WG.III/WP.173> accessed 2 March 2021; Possible reform of investor-State dispute settlement (ISDS), Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, (October 2019), op. cit., p 2; Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Ecuador, (October 2019) op. cit., [28]-[33].
[366] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [35].
[367] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Colombia, (October 2019), op. cit., [29].
[368] Possible reform of investor-State dispute settlement (ISDS), Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, (October 2019), op. cit., p 2.
[369] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Ecuador, (October 2019) op. cit., [28]-[33].

It is evident from State submissions that the multilateral instrument must feature both core and opt-in features. Moreover, the thirty-ninth session WGIII report proposed that the multilateral instrument should be 'achieving sustainable development through international investment'.[370] This report also reaffirmed the desire for the multilateral instrument to be flexible and inclusive in terms of framework and participation, but also to 'promote legal certainty in ISDS'.[371]

The possible architecture of the multilateral instrument includes a State opt-in option including both procedural tools as well as different forms of ISDS mechanisms,[372] while including shared common norms to enhance consistency and coherence.[373] Although '[t]he Working Group may wish to decide whether all reform options, regardless of their form, should be covered by the multilateral instrument',[374] it may be worth being cautious. If all proposals are covered by the multilateral instrument, the different reform options may cause conflicts and tensions and the purpose of WGIII discussion is to reach agreed viable solutions.

WGIII acknowledged that, while '[t]he actual architecture of the multilateral instrument should be considered once there is clarity on the reform options to be pursued', given there seems agreement to be an opt-in mechanism, the multilateral instrument could prepare a framework for the implementation of a variety of options.[375] It was discussed that the current fragmented landscape should turn into one central scheme under the multilateral instrument, while preserving State flexibility in dispute settlement to accommodate differences.[376] There could be a variety of different dispute settlement reform choices contained in the multilateral instrument,[377] and the United Nation Convention on the Law Of the Sea (UNCLOS) may offer a good model.[378] Pursuant to Article 287(1) UNCLOS, States can choose different institutional arrangements for the settlement of disputes such as the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), or an arbitral tribunal under UNCLOS Annex VII.[379] Using this model the multilateral instrument could

[370] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5–9 October 2020), United Nations Commission on International Trade Law, Fifty-fourth session, Vienna, 28 June–16 July 2021, [106], <http://undocs.org/en/A/CN.9/1044> accessed 8 March 2021.
[371] ibid, [106].
[372] Possible reform of investor-State dispute settlement (ISDS): Multilateral instrument on ISDS reform, (March–April 2020), op. cit., [11].
[373] ibid, [12].
[374] ibid, [13].
[375] ibid, [14]. This includes provisions and annexes, modes of dispute settlement, and relationship with other arbitration regimes like ICSID.
[376] ibid, [14].
[377] ibid, [16].
[378] ibid, [17].
[379] United Nation Convention on the Law Of the Sea (UNCLOS), art 287(1). Also, an option for a special tribunal under Annex VIII. The preferred option is dispute settlement under UNCLOS, see UNCLOS, arts 287(3), 287(5).

incorporate options of dispute settlement; keeping ad hoc ISDS but providing a safeguard of multilateral appellate review, or moving ad hoc ISDS into a centralised two-tier multilateral body.[380]

Moreover, WGIII noted that State flexibility could also be further achieved through reservations and declarations.[381] Similarly, it was suggested that States to the multilateral instrument should implement their own choice for reform to ensure the 'widest possible participation of States'.[382] However, too many options and flexibility may limit the mechanisms ability to provide precision and legal certainty, and not 'keep the ISDS reformed framework coherent and relatively easy to refer to and understand for users'.[383] Thus, a balance must be sought between core and opt-in features to address the need for both legitimacy and inclusiveness.

It is unsurprising that WGIII proposes that the multilateral instrument contains a flexible opt-in mechanism given the need for State support. This solution might gain support given the plurality and diversity of views among States and thus could be a solution proposed to the Commission for consideration.[384] The cost and difficulty of reaching a mutual agreement to amend IIAs means it is 'not a feasible option' so a multilateral option including multiple States requires attention.[385] State submissions support reference to both the Mauritius Convention and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) which are both inclusive and flexible opt-in mechanisms. Moreover, there are academics that support these mechanisms as models for a multilateral instrument to implement beneficial changes in ISDS.[386]

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[380] It should be noted that Article 287(1) is only a model and should not be copied exactly. These different institutional arrangements for dispute settlement are subject to part XI, section 5 of UNCLOS which is an 'obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea'. Also, the institutional arrangements allow multiple options which would not make sense if applied to the option of standalone appellate review and two-tier system.

[381] Possible reform of investor-State dispute settlement (ISDS): Multilateral instrument on ISDS reform, (March–April 2020), op. cit., [18]-[22]. The Working Group considered that Article 3 of the Mauritius Convention as a good example of reservations, although it did seem to only act as an example to exclude provisions. Declarations could be used when State parties decide whether the multilateral instrument assists their IIAs or replaces it. If there are conflicting declaration between IIA and the multilateral instrument then it is possible that the IIA would apply but if no declarations then the multilateral instrument would apply.

[382] ibid, [15].

[383] ibid, [39].

[384] Russia stressed concern of whether an international investment court would extend to all existing IIAs given State tendencies for disagreement and possible resulting fragmentation and conflict between a new system and the old one, see, Possible reform of Investor-State dispute settlement (ISDS), Submission from the Government of the Russian Federation, (January 2020) op cit., [15]-[17].

[385] Colin Brown (2017) op cit., 681.

[386] Chiara Giorgetti, Steven Ratner, and Others (2020) op cit., [25], [28]-[29]; Julian Arato, Kathleen Claussen, Jaemin Lee, and Giovanni Zarra, 'Reforming Shareholder Claims in ISDS', (Academic Forum on ISDS Concept Paper 2019/9, 17 September 2019), p 9,

As discussed in Chapter 3.3.1.2, the purpose of the Mauritius Convention is to provide for the formal and multilateral application of the substantive UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules) to disputes arising from IIAs made before 1 April 2014, and not just after or on the date of 1 April 2014. Under Article 2(1) provided there are no reservations by both the respondent host contracting State and the home contracting State of the investor, the UNCITRAL Transparency Rules will apply to any ISDS, whether or not initiated under the UNCITRAL Arbitration Rules,[387] and under Article 2(2) provided the responded host State has not made reservations, an investor can accept the UNCITRAL Transparency Rules through unilateral offer of application even if its host State is not party to the Convention.[388] Article 3 is an example of the Mauritius Conventions flexibility as States can reserve IIAs that do not apply.

The MLI works alongside existing tax treaties to modify the application of those treaties between parties rather than acting as an amended protocol capable of directly amending the text of those treaties.[389] Contracting parties can choose which treaties the MLI can modify and there are many different options in how treaties can comply to MLI standards. Article 28 is an example of the MLI's flexibility as it provides 21 instances for reservations. If a provision is deemed not to comply, then parties to the treaty can opt-out that provision from the MLI.[390] This is interesting as WGIII suggested a multilateral instrument automatically covering both existing and future IIAs could further uniformity of the instrument,[391] and States would avoid the complex and difficult burden of amending all their IIAs.[392] However, the MLI model suggests that States are happy to scrutinise which IIAs and what provisions within each IIAs would apply to a multilateral instrument, as the MLI model does not seem to enable automatic amendment of IIAs.

As a consequence, it seems that there are slight differences between the Conventions on the type of opt-in mechanisms, which also highlights slight deviations in the perception of States about the potential application of such mechanisms. Colombia, for example, notes that while there are some similarities in the sense that both Conventions are based on opt-in solutions, '[a] crucial difference is that the MLI does not need to be opted-into integrally, but rather can be done provision by provision,

<https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/arato-reforming-shareholder-claims-isds-af-9-2019.pdf> accessed 29 January 2021.

[387] Mauritius Convention, art 2(1).

[388] ibid, art 2(2).

[389] Possible reform of investor-State dispute settlement (ISDS): Multilateral instrument on ISDS reform, (March–April 2020), op. cit., [29].

[390] ibid, [30].

[391] ibid, [23].

[392] ibid, [24].

and it allows for progressivity as more and more treaties are notified under each relevant provision'.[393] In this way each block of the Convention will only apply if both States involved in the dispute have either both opted-in or both not opted-out of that particular block.[394] Although the MLI could be 'significantly more complicated than the Mauritius Convention',[395] which suggests the Mauritius Convention could be more accessible for a multilateral dispute mechanism, applying the Mauritius model for dispute resolution will be more complicated than that of transparency as it will be broader in scope and effect.[396] Nonetheless, both these Conventions emphasise in international law amendments to existing IIAs can be made through later highly flexible multilateral treaties.[397]

The EU's perception of an opt-in mechanism could be that the multilateral instrument directly influences IIAs but includes some instances of flexibility under the multilateral instrument such as to use only an appellate option or to use a two-tier system.[398] Other States like Colombia in its evaluation of the MLI, and Chile, Israel, Japan, Mexico, and Peru in their submissions, seem to imply opt-in means piece by piece (block by block or provision by provision) and would not necessarily override their existing IIAs.[399] However, the EU does envisage giving contracting parties to the multilateral instrument the choice to decide which IIAs come under the multilateral instrument,[400] and referenced both the Mauritius Convention and the MLI in its submission as possible models for a multilateral instrument.[401] Similarly, Colombia outlined the option to use either appellate review or an investment court,[402] and Colombia, and, Chile, Israel, Japan, Mexico, and Peru also referenced both the Mauritius Convention and the MLI in their submissions as possible models for a multilateral instrument.[403] Thus,

[393] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Colombia, (October 2019), op. cit., [23]. This is supported by academics, see, Chiara Giorgetti, Steven Ratner, and Others (2020) op cit., [28].
[394] Anthea Roberts, 'UNCITRAL and ISDS Reform: Visualising a Flexible Framework' (EJIL:Talk!, 24 October 2019) <https://www.ejiltalk.org/uncitral-and-isds-reform-visualising-a-flexible-framework> accessed 9 March 2021.
[395] Colin Brown (2017) op cit., 685.
[396] Gabrielle Kaufmann-Kohler and Michele Potesta, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap' (CIDS-Geneva Center for International Dispute Settlement, 3 June 2016).
[397] Colin Brown (2017) op cit., 685-686.
[398] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [39].
[399] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Colombia, (October 2019), op. cit., [9]-[26]; Possible reform of investor-State dispute settlement (ISDS), Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, (October 2019), op. cit., 2.
[400] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, (April 2019) op. cit., [35].
[401] ibid, [36].
[402] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Colombia, (October 2019), op. cit., p 8.
[403] ibid, [23]; Possible reform of investor-State dispute settlement (ISDS), Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, (October 2019), op. cit., 4-5.

it seems there is acceptance of the possible models and WGIII discussion going forward could be used as a forum to assist in determining how those methodologies should be incorporated into the multilateral instrument.[404]

This discussion should clarify the scope for jurisdiction of the dispute settlement reform options contained in the multilateral instrument.[405] It is currently suggested that where the respondent host State and the investor's home State are parties to the multilateral instrument, and where there is an existing IIA between them, 'the multilateral instrument will modify the investment treaty between the two States, with the consequence that the investor will be able to resort to the reformed ISDS created as a result of such modification'.[406] Furthermore, when the respondent host State but not the investor's home State is a party to the multilateral instrument it could be possible for the investor to consent to the multilateral instrument.[407] As seen above, according to Article 2(2) of the Mauritius Convention it is possible for the investor to consent to other international instruments provided the host State has not made any reservations, but the WGIII at this stage are unsure whether this mechanism could be transposable to reform options covered by the multilateral instrument.[408] Additionally, '[u]nder the general principle pacta tertiis, a State Party cannot be affected by a modification to which it has not consented' which means an investor could still be entitled to the dispute procedure under an IIA, but WGIII again at this stage were unsure whether an investor in addition to dispute resolution under IIAs could initiate dispute resolution within the reform options under the multilateral instrument.[409]

If the investor's home State but not the respondent host State is a party to the multilateral instrument, then the investor would have to seek the respondent State's consent.[410] Such consent would not impact that respondent State's other IIAs or its relationship with the multilateral instrument, as such consent would be considered a one-off agreement with an investor.[411] If neither the host State or home State are party to the multilateral instrument, WGIII suggest that it could just come down to party consent.[412] In other words, the multilateral instrument could be used through party autonomy if the disputing parties consent.

[404] The submission by Chile, Israel, Japan, Mexico, and Peru showed they were open to consider and adopt proposals of other States, See, ibid, 5.
[405] Possible reform of investor-State dispute settlement (ISDS): Multilateral instrument on ISDS reform, (March–April 2020), op. cit., [31].
[406] ibid, [33].
[407] ibid, [34]-[35].
[408] ibid, [34].
[409] ibid, [35].
[410] ibid, [36].
[411] ibid, [36].
[412] ibid, [37].

The Secretariat outlined to WGIII that 'it is feasible to develop a multilateral instrument that would apply the reforms in a coherent and flexible manner'.[413] However, there were still questions about the multilateral instrument that would require clarification in future WGIII sessions.[414] Yet it was promising that there was interest in a multilateral institutional framework for dispute settlement on investment, 'which would allow States to choose among different modes of dispute settlement administered by the institution'.[415] It is likely that such dispute settlement option would include appellate review which could help ensure an IRoL is reinforced in ISDS awards as long as such appellate review was embedded in a standing institutional structure to address the concerns identified by this thesis.

5.5.2 Appellate Mechanism and Enforcement

The last WGIII session on ISDS within the time constraints of the thesis is the fortieth session held between 8-12 February 2021 in Vienna. The WGIII Report on the fortieth session showed that WGIII suggested 'that adjudicators should be attentive to the sustainable development policies of the respondent State'.[416] Moreover, WGIII argued 'that cases relating to critical issues, such as public health and environmental law, should be subject to de novo review'.[417] It is imperative that public policy issues are considered as part of future reforms, as the failure to do so would mean that ISDS could still be used primarily for profit accumulation.[418]

On the issue of procedural reforms, one WGIII paper did directly concern 'appellate mechanism and enforcement issues'.[419] This document outlined material already discussed and repeated in the earlier WGIII sessions which has been presented in the thesis above (see Section 5.3), therefore only a contextual evaluation of the discussion will take place below. The documents nonetheless act as a further indication of ambition to create an appellate review mechanism in ISDS. On the scope and standard of review in the document, it was again proposed that the appellate body should consider both the fact and law subject to exceptions,[420] and that there are both differences and similarities

[413] ibid, [38].
[414] ibid, [39].
[415] ibid, [40].
[416] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 8–12 February 2021), United Nations Commission on International Trade Law Fifty-fourth session Vienna, 28 June–16 July 2021, [51], <https://undocs.org/en/A/CN.9/1050> accessed 10 November 2021.
[417] ibid, [75].
[418] James Thuo Gathii (2021) op cit., 25-26.
[419] Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism and enforcement issues, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Fortieth session, Vienna, Online, 8–12 February 2021, <http://undocs.org/en/A/CN.9/WG.III/WP.202> accessed 19 February 2021.
[420] ibid, [4].

between fact and law.[421] Furthermore, appeal with current annulment and set aside proceedings will cause too much conflict,[422] manifest review more likely than de novo review,[423] and appeal should be heard by higher body not the same body.[424]

On appealable decisions, the appellate review should include both merits and procedural matters,[425] but there remained questions on whether arbitrator challenges, interim measures and jurisdiction could be appealed and where such challenges would come during the dispute (i.e during dispute or after merits).[426] On effect of the appeal, appeal should suspend first-tier award subject to any frivolous appeals,[427] but further discussion was needed on whether appellate body could affirm, reverse, modify, or annul the decisions,[428] remand,[429] and rectify its errors,[430] which could be assisted by inspecting existing appeal systems which have clear rules on appeal.[431] To sustain a manageable case load maybe only clear grounds for appeal are permissible (i.e error that impacts justice),[432] and that timelines could reflect the appeal issues (small appeal issues means small timeline) while taking the model of other appeal systems into consideration.[433]

On enforcement of appellate review awards, this would be done either under the NYC, the ICSID Convention, (see Chapters 3.3-3.4), or under a separate new multilateral appellate body mechanism. On the NYC, WGIII reaffirmed that many arbitral regimes allow internal review of awards, so a second-tier mechanism should not change its status of giving arbitral awards either.[434] However, if it did, the appellate mechanism needs its own enforcement mechanism which raises questions of whether non-parties to the enforcement mechanism would be required to follow appellate awards through the NYC Article I(2) that enforces awards from permanent arbitral bodies to which the disputing parties had submitted.[435] The NYC may need to be slightly amended to highlight it will enforce awards from the appellate mechanism, or that the appellate mechanism allows non-party States to opt-in

[421] ibid, [5]-[6].
[422] ibid, [7]-[10].
[423] ibid, [11]-[13].
[424] ibid, [14]-[17].
[425] ibid, [18].
[426] ibid, [19]-[22].
[427] ibid, [23]-[25].
[428] ibid, [27].
[429] ibid, [28]-[30].
[430] ibid, [31].
[431] ibid, [32]-[34].
[432] ibid, [35]-[37].
[433] ibid, [38]-[40].
[434] ibid, [42].
[435] ibid, [43].

enforcement, or to encourage States to enforce awards.[436] In my view, Article V would need to be waived to avoid domestic systems undermining the appellate mechanism.

On ICSID, WGIII reiterated that it might be necessary to use Article 66 to amend Article 53 to allow appeals and even Article 52 to include more substantive review mechanisms like error of law and manifest error of fact, as Article 53 allows review of awards remedies laid out in the ICSID Convention.[437] Possibly, following on from the discussion concerning the multilateral instrument which considered opt-in conventions, WGIII added that States could individually choose whether to apply more substantive grounds of review or just formal ones if Article 52 is amended.[438] WGIII argued that 'an amendment proposal could be drafted to accommodate different approaches',[439] even though WGIII earlier noted that '[t]o date, no amendment of the ICSID Convention has been proposed by a member State'.[440] The other ICSID option remains an *inter se* Modification using Article 41 VCLT.[441] In my view, amendments to ICSID or an *inter se* modification are difficult but not impossible (see Chapter 3.4).

5.5.3 Secretariat Draft Provision on Appellate Mechanism and Enforcement

In response to the discussions on the appellate mechanism and enforcement issues, the Secretariat constructed a '[c]onsolidated draft provision on appellate mechanism and enforcement' that put the discussions into a draft provision which could be presented in a multilateral instrument.[442] The possible scope of review in the draft for law was error of law either material and prejudicial, or errors in the application or interpretation of applicable law or a designated list.[443] The scopes of these reviews could pave the way for a substantive appellate review award that could reinforce the substantive RoL, since it would have to be based on either clearly erroneous determination of facts, or manifest error of fact (including concerning relevant domestic law and the assessment of damages).[444] A higher threshold of review means it is more likely to reinforce substantive RoL in the ISDS procedure. A substantive review could lead to changes in attitudes of investor protection standards which could pave the way for substantive reform in the future. Especially if accompanied

[436] ibid, [43]-[44].
[437] ibid, [45]-[52].
[438] ibid, [51].
[439] ibid, [52].
[440] ibid, [50].
[441] ibid, [53]-[56].
[442] ibid, [59]-[61].
[443] ibid, [59]. This scope of review is identical to CETA and EU-Vietnam (see Chapter 4.4).
[444] This is similar to CETA and EU-Vietnam, but they did not have damages as an example for manifest error of facts

by a multilateral instrument.[445] The draft also highlighted the relationship between law and fact by allowing the scope of review to cover error in the application of the law to the facts of a case.[446] Such scope for review could meet some academic expectations[447] that 'any "rogue" or "outlier" decisions could be appealed' which could improve consistency.[448]

The draft interestingly included a review of fact and law in exceptional circumstances not covered by the scope of review outlined above.[449] Provided this provision is used reasonably and without abuse or arbitrariness, it could act as a *de facto* safeguard to help ensure all potentially wronged appellants have access to justice and ISDS awards reinforcing the formal and substantive RoL. Similarly, some scholars have argued that an appellate body could have an en banc or grand chamber review for exceptional cases which requires all adjudicators to hear disputes.[450] There was an option to explore whether appellate review should refer to Article 52 ICSID Convention and Article V(1) NYC or express the provisions within the appellate mechanism.[451] In my view, provisions should be expressed within the appellate mechanism to avoid any doubt and enhance the RoL outcomes of precision, certainty, and accessibility.

Standard of review provisions were absent in this draft, and arguably this needs to be revisited in the future.[452] It is also important to note that while appealable decisions are first-tier awards,[453] the draft fails to specify whether this includes procedural matters. The draft does outline that the jurisdiction of first-tier award can be appealed and 'while such a request is pending, the first-tier tribunal may continue the proceedings and make [an award]'.[454] This process could act as a safeguard to ensure the merits and substance of the dispute is not unnecessarily delayed by potential Italian Torpedo tactics,[455] and provided the appellate mechanism acts quickly in situations where it decides the first-tier did not

[445] Colin Brown (2017) op cit., 686.
[446] Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism and enforcement issues, (February 2021), op. cit., [59].
[447] Colin Brown suggested similar wording for review of law and fact as in the draft that appeal should include 'error in the application of the law' and 'manifest error in the appreciation of facts', similar to WTO AB, see, Colin Brown (2017) op cit., 683-684.
[448] Julian Arato, Yas Banifatemi, and others (2019) op cit., [64].
[449] Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism and enforcement issues, (February 2021), op. cit., [59].
[450] Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti (2019) op cit., 14.
[451] Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism and enforcement issues, (February 2021), op. cit., [59].
[452] Standard of review has been labelled contextual by the Secretariat, see ibid, [5], but standard of review under Article 11 WTO DSU has been questioned as vague, see Andrew Gutzman, 'Determining the Appropriate Standard of Review in WTO Disputes' (2009) 42 Cornell International Law Journal Article 45 (Article 3).
[453] ibid, [59].
[454]ibid, [59].
[455] 'Italian Supreme Court news: the rise of the Italian Torpedo' (2013) op. cit.

have jurisdiction, it could limit the amount of time, costs, and resources wasted in the first-tier when arguing merits and substance.

Time Frame for Appeal

If a disputing party decides to appeal, the draft indicates appeal will suspend the effect of the first-tier award,[456] but the time limit on when appeal must be made was not provided for yet.[457] There must eventually be precision and certainty on when an appeal must be made to ensure the winners of the dispute do not have the constraints of an endless further litigation claim hanging over their heads. Moreover, the wording of the text answers some academic questions as it seems the review of first instance ISDS cases by the appellate body will not be automatic, but up for the parties to request as part of the review of the first-tier award.[458] Furthermore, the appellate body can confirm, modify, or reverse findings of the first-tier award,[459] and it can also annul in whole or in part the first-tier award, and it can correct any administrative errors within 30 days.[460] In my opinion, this approach is to be welcomed, since such wide options could give the appellate body the power to enforce both the formal and substantive RoL in its award.

The draft states that, if the appellate body confirms that the first-tier award stands and if it modifies or reverses that award, then the appellate body shall precisely explain its conclusions.[461] It is highly important for the substantive RoL element of transparency that an appellate body precisely explains its conclusion even if it just confirms the first-tier award. The draft indicates that '[w]here the facts established by the first-tier tribunal so permit, the appellate [body][court][tribunal] shall apply its own legal findings and conclusions to such facts and render a final decision. If that is not possible, it shall refer the matter back to the first-tier tribunal'.[462] The wording of this text might illustrate that the appellate mechanism will not take a *de novo* review which some academics argue would take much longer.[463] Although restriction of review could limit the ability of the appellate mechanism to reinforce the RoL, it has been shown in empirical research that diversity (discussed below) and cost of proceedings (discussed above) are problematic in ISDS.[464]

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[456] Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism and enforcement issues, (February 2021), op. cit., [59].
[457] In CETA and EU-Vietnam it has to be within 90 days after its issuance, see Chapter 4.4.
[458] Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti (2019) op cit., 14.
[459] This is similar to CETA and EU-Vietnam.
[460] Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism and enforcement issues, (February 2021), op. cit., [59].
[461] ibid, [59]. This is like EU-Vietnam and CETA.
[462] ibid, [59]. This is similar to EU-Vietnam and CETA.
[463] Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti (2019) op cit., 14; Colin Brown (2017) op cit., 683-684.
[464] Daniel Behn, Malcolm Langford, and Laura Létourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What do we know? Does it matter?', (Academic Forum on ISDS Concept Paper 2020/1, 21 January

The timeline in the draft outlines requirements for the maximum length an appellate review award should take from the date an appeal is made, and when the appellate body fails to reach this requirement it should underline reasons why and suggest a new date, but such new date must be within a certain time period.[465] A timeline is necessary since long and slow dispute resolution can impede access to justice (discussed above), but the timeline at some point would need to specify exact days for precision and certainty. The draft contains a security for costs provision where the appellate tribunal may request the appellant to provide security for the costs of appeal and any amount awarded against it in the suspended first-tier tribunal award.[466] This approach could be supported by some academics as it is like the EU agreements (see Chapter 4.4).[467] These requirements could ensure appellants use the appeal process responsibly and for the purposes of investors that they do not use the appeal process to wash their money down the drain to avoid paying the winning party if they lose again. On a side note, in WGIII discussion on issues outside the scope of this thesis it was suggested that '[i]t was widely felt that third parties (including non-disputing treaty parties) should not be ordered to provide security for costs, as that could undermine their ability to participate in ISDS proceedings'.[468] This shows a general desire in WGIII to provide access to justice and then for the ISDS to deliver awards that reinforce the RoL.

Enforcement of Awards

For enforcement, the draft emphasised that Article 54 ICSID could be used as a good model for enforcing appellate body awards.[469] This suggests that the appellate mechanism would have its own enforcement mechanism. Some academics argue that, 'if the appellate mechanism is designed as a limited and final second instance within the ISDS system, enforcement ought to be automatic'.[470] Article 54 clearly stresses the finality, binding and enforceable nature of awards. The draft also outlined that recent IIAs could be used as enforcement models.[471]

2020), 49-50, <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/7-empirical.pdf> accessed 30 January 2021.

[465] Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism and enforcement issues, (February 2021), op. cit., [59]; In EU-Vietnam and CETA it is no more than 180 days and then no more than 270 days. In the WTO it is 60 days and in the MPIA it is 90 days.

[466] ibid, [59].

[467] Colin Brown (2017) op cit., 684.

[468] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5–9 October 2020), (June–July 2021), op. cit., [71], [74].

[469] Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism and enforcement issues, (February 2021), op. cit., [60].

[470] Anna De Luca, Crina Baltag, and Others (2020) op cit., 24, <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/2-duration.pdf> accessed 9 December 2020.

[471] Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism and enforcement issues, (February 2021), op. cit., [61].

The contents of these IIAs analysed in the draft included that an appellate award is final, binding, and enforceable between the disputing parties, and is not subject to appeal, review, set aside, annulment or any other remedy. This suggests contracting States should treat enforceable awards within its territory as if it were a final judgment of its national courts. The draft also referred to the awards being recognised under both the NYC and ICSID which could be an attempt to have enforcement of awards in States that are not contracting parties to the appellate mechanism.[472] This suggests 'the role of international law is to reinforce, and on occasions to institute, the rule of law internally'.[473]

Inclusive Treaty Interpretation

In relation to options for establishing an appellate mechanism, it was suggested that such process should encourage inclusiveness.[474] State parties to an investment treaty/mechanism should be able to express views on treaty interpretation during the appellate procedure and such views should be considered by the appellant tribunal especially if backed by numerous States.[475] This would reduce the 'interpretative autonomy of ISDS tribunals', and 'would also assist ISDS tribunal members to clarify the law independently from the interests of disputing parties'.[476] Although this could lead to the evolution of a more binding system of precedent, there is a danger that State views on treaty interpretation could enable the most powerful States to intervene when issues arise affecting their interests in ways that dominate proceedings leaving the respondent States view neglected.

It seems sensible for States to have some sort of relationship with the appellate tribunal to gain trust and confidence in the system. However, too much of a relationship could politicise the court which might tilt the balance in favour of the most powerful States. Furthermore, limiting the interpretative autonomy of ISDS tribunals could restrict their ability to issue awards that reinforce the RoL. Diverging views were expressed on whether appellate tribunal awards be subject to confirmation or review by States parties.[477] I am cautious of awards being subject to State authorisation since this could damage the application of awards made to reinforce an IRoL and could limit the legitimacy of the mechanism.[478] The DRoL is designed to achieve justice within State borders but an IRoL is designed to achieve justice beyond borders so it is possible that domestic governmental review of international awards could cause tensions.

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[472] Ibid, [61].
[473] James Crawford (2003), op, cit., 8.
[474] ibid, [62].
[475] ibid, [62].
[476] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [9]; Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti (2019) op cit., [25].
[477] Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism and enforcement issues, (February 2021), op. cit., [62].
[478] Under GATT, disputes were commonly rejected by the State that lost, see Chapter 4.3.

An appellate review mechanism in a flexible opt-in multilateral instrument requires careful consideration. If parties could opt-in to the appellate review mechanism but for example could opt-out of its enforcement provision, it would delegitimise the appellate mechanism. Moreover, if parties could opt-out of appeals being heard from first-tier tribunal awards, it would neutralise the purpose of appellate review. Thus, there should be certain 'core' provisions. Adjudicators also require careful consideration as the secretariat appellate review draft did not address the appellate review structure and its relationship with a first-tier structure.[479]

WGIII discussion in February 2021 showed uncertainty around the nomination and selection process of adjudicators between first and second tier.[480] Certain academics think the first-tier and appellate review could share the same adjudicator roster,[481] while others think separate full-time adjudicators should serve on the first-tier and second-tier,[482] and others are not sure.[483] Some academics argue for the importance of adjudicators being permanent and full time in an MIC, which could resolve problems like double-hatting as their adjudicators would be unable to take up other positions.[484] Furthermore, it would prevent the secretariat staff having too much influence, while time pressure could be alleviated if adjudicators are full-time.[485] Additionally, it could resolve implicit pro-investor bias since adjudicators would not be dependent on investors for future employment, although if MIC exists alongside normal ISDS then there would be competition for cases between both systems and even without competition a pro-investor stance could develop to encourage litigation in the MIC rather than commercial arbitration.[486]

5.5.4 Draft Code of Conduct and Selection and Appointment of ISDS Tribunal Members

In addition to the multilateral instrument and the appellate review mechanisms and/or the two-tier system, it is thus important that the arbitrators who will be sitting in the appellate review mechanism and/or two-tier system are capable of reinforcing both the formal and substantive RoL. This thesis will now evaluate the WGIII sessions on draft code of conduct (arbitrator ethics),[487] and selection and

[479] Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism and enforcement issues, (February 2021), op. cit., [57]-[58].
[480] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [60].
[481] Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti (2019) op cit., 15-16.
[482] Chiara Giorgetti, Steven Ratner, and Others (2020) op cit., 30-31.
[483] Andrea Bjorklund, Marc Bungenberg, and Others (2019) op cit., 19-20.
[484] Chiara Giorgetti, Steven Ratner, and Others (2020) op cit., 30-31.
[485] ibid, 30-31.
[486] ibid, 30-31.
[487] Possible reform of investor-State dispute settlement (ISDS), Draft code of conduct, (February 2021), op. cit.

appointment of ISDS tribunal members.[488] The latter references many international human rights sources such as Charters, Conventions, and Courts, although only in the footnotes, which suggests WGIII intends the procedure for appointing ISDS tribunal members to operate in accordance with human rights. These documents included discussion in both the context of a two-tier/appellate review mechanism, as well as just improving ISDS with no new dispute settlement body. This section will mainly focus on the discussion in the context of an MIC and standalone appellate review, although both discussions relate to each.

Independence and Impartiality

Some commentators at the Academic Forum argued that, although arbitrator ethics already exists in the IBA Guidelines, it is only soft law and written from an international commercial arbitration aspect.[489] They argue a model like the Mauritius Convention (discussed above as a model for developing an multilateral instrument) could be implemented that aims for targeted changes, and also institutions could create codes of conduct and administer arbitral proceedings accordingly.[490] One of these proposed ISDS reforms is a code of conduct. Ethics can include independence, impartiality, separation of powers, no connection with disputing parties, fairness and integrity, timely and efficient adjudication of the dispute, experience, duties of disclosure, duties of confidentiality, rules related to communication, and integrity.[491] This suggests ethics covers personal characteristics of arbitrators as well as procedural rules and checks. Some academics argue '[t]he duty of independence and impartiality is an essential principle found in all kinds of codification of duties of arbitrators',[492] and 'is also a foundational principle in the statutes of several international courts and tribunals'.[493]

Independence and impartiality is both a key element of the RoL and key norm in the draft code.[494] Article 4 of the draft code covers independence and impartiality with Article 4(1) demanding that '[a]djudicators shall at all times be independent and impartial', and Article 4(2) listing many instances where independence and impartiality could be compromised (see footnote for the listed instances).[495]

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[488] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit.
[489] Chiara Giorgetti, Steven Ratner, and Others (2020) op cit., p 25.
[490] ibid, p 25.
[491] Chiara Giorgetti and Mohammed Wahab (2019) op cit., [1]-[15].
[492] ibid, [8].
[493] ibid, [13]; Independence and impartiality are also vital to the 2002 Bangalore Principles of Judicial Conduct, see, 'The Banglore Principles of Judicial Conduct 2002', p 3-4, [1]-[2], <https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf > accessed 31 April 2021. Some academics believe the Bangalore principles are 'regarded as a highly influential global statement of the manner in which judges should operate', see, Colin Brown (2017) op cit., 677.
[494] Possible reform of investor-State dispute settlement (ISDS), Draft code of conduct, (February 2021), op. cit., 3-4.
[495] ibid, 3.

Article 3 on Duties and Responsibilities further reiterates that adjudicators shall always be independent and impartial,[496] and Article 5 on Conflicts of Interest: Disclosure Obligations indicates adjudicators 'shall disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality'.[497] This could be expected and it has been argued that '[t]he duty of independence and impartiality is continuous',[498] and '[i]n practice, the duty of independence and impartiality is embodied in the duty by adjudicators to avoid conflicts of interest'.[499] There are other provisions like Article 6 which aim to help reinforce independence and impartiality through the prevention of holding multiple roles (double hatting).[500]

The Draft Code of Conduct also reinforces other elements of the RoL such as Article 7 which emphasises high standards of Integrity, Fairness and Competence and outlines that adjudicators: 'shall ensure that parties are treated with equality and that each party is given a reasonable opportunity of presenting its case'.[501] This could reinforce the RoL elements of fairness, equality, justice, and due process. Article 8 on Availability, Diligence, Civility and Efficiency emphasises: '[b]efore accepting any appointment, adjudicators shall ensure their availability to hear the case and render all decisions in a timely manner'.[502] This could reinforce access to justice since long disputes resolution may impede justice. WGIII recognised that '[t]he draft code addresses matters relating to independence, impartiality and accountability'.[503] Some academics have argued that 'appeal itself does not offer an obvious solution to the independence and impartiality problems',[504] but an MIC or two-tier body depending on its design, 'could represent a significant improvement upon, current practices'.[505] Arguably, appellate review depending on its design could also enhance independence and impartiality, but it is more certain that personal and professional standards should be taken into consideration during the election and appointment process of adjudicators at an MIC or standalone appellate review.[506]

[496] ibid, 3.
[497] ibid, 4.
[498] Chiara Giorgetti and Mohammed Wahab (2019) op cit., [10].
[499] ibid, [9].
[500] Possible reform of investor-State dispute settlement (ISDS), Draft code of conduct, (February 2021), op. cit., 4.
[501] ibid, 4.
[502] ibid, 5.
[503] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [80].
[504] Chiara Giorgetti, Steven Ratner, and Others (2020) op cit., p 29.
[505] ibid, p 30-31.
[506] Andrea Bjorklund, Marc Bungenberg, and Others (2019) op cit., 8.

Independence and Accountability

In the selection and appointment of ISDS tribunal members document, it was indicated that 'the Working Group may wish to note the need for a balance between independence and accountability, and the role of appointment procedures in this respect'.[507] Some academics have similarly demanded a balance between independence and accountability arguing that these 'are features that are in conflict with each other: the more independent judges are the less accountable they will be, and vice versa'.[508] This is interesting as both independence and accountability are elements of the DRoL and an IRoL. These academics argue high independence and low accountability could lead 'judges to develop legal doctrines independently of state interests or independently of what states originally intended when concluding the treaty'.[509] There are arguments that this may have occurred at the WTO AB (see Chapter 4.3). Alternatively, they argue 'low independence and high accountability may lead to politicization of courts'.[510] This argument is used against investor-State disputes occurring in domestic courts.

Renewable terms can cause conflicts between accountability and independence. WGIII explained that, although the option for one renewable term is common in international courts, accountability may limit judicial independence especially if the court is transparent and shows how the adjudicators voted.[511] Yet transparency should not be limited as it is a key element of the substantive RoL. However, academics argue 'accountability may come at the expense of judicial independence as judges wishing to be reappointed face incentives to satisfy the actors in control of reappointment decisions',[512] 'particularly near the end of their term'.[513] Some adjudicators may not have sought reappointment in some international courts like the WTO because they did not satisfy their own State's interests.[514]

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[507] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [8].

[508] Olof Larsson, Theresa Squatrito, Øyvind Stiansen, and Taylor St John, 'Selection and Appointment in International Adjudication: Insights from Political Science', (Academic Forum on ISDS Concept Paper 2019/10, 17 September 2019), 4, <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/larsson-selection-and-appointment-isds-af-10-2019.pdf> accessed 1 February 2021.

[509] ibid, 4.

[510] ibid, 4; The ICC has been criticised by some as being politicised, see, Benjamin Duerr, 'Twenty Years On: The ICC and the Politicization of its Mechanisms' (Global Observatory, 7 August 2018) <https://theglobalobservatory.org/2018/08/twenty-years-icc-politicization-mechanisms/> accessed 5 March 2021, and, 'Rebalance the ICC' (Rebalancing the ICC, 22 February 2021) <https://rebalancingtheicc.medium.com/rebalance-the-icc-now-6fb95fa9fb5b> accessed 5 March 2021.

[511] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [65].

[512] Olof Larsson, Theresa Squatrito, and Others (2019) op. cit., 4.

[513] Chiara Giorgetti, Steven Ratner, and Others (2020) op cit., 32.

[514] It is possible that judge Merit Janow and Jennifer Hillman did not seek reappointment to the WTO because the United States Trade Representatives were not fond that judges from their own country were ruling against their interests, see, Giorgio Sacerdoti, 'The Future of the WTO Dispute Settlement System: Confronting

However, WGIII also argued '[r]enewable terms can improve accountability as States can base reappointment decisions on the past performance of the judges'.[515] If terms are non-renewable, adjudicators may have less ambition to make an award that reinforces an IRoL. Moreover, WGIII indicated 'that single terms may increase independence but make the system potentially less accountable. Being unable to reappoint judges means that valuable experience is lost'.[516] On the issue of renewable terms, it may be difficult to find a balance between accountability and independence that can universally reinforce the RoL. It has been suggested that terms in an MIC could be three, six, or nine years, renewable once or twice; or non-renewable and adjudicator turnover intervals could be every three years.[517]

The appointment procedure could also be important to addressing this balance between accountability and independence.[518] Some commentators support the inclusion of nomination, screening and appointment processes as part of the selection of candidates in an MIC.[519] It seems that the mechanics of these procedures and processes has not yet been decided but the current main options are; States voting for a limited number of adjudicators or a committee that is represented by States or an independent Commission appointing them or a mix of the two or all.[520] The pros and cons of State appointment of adjudicators is interesting and it has been argued that, if 'arbitrators are appointed by states, they may be seen as less motivated to advance the cause of investors generally' (talking in the context of State-State dispute resolution) which could enhance impartiality and independence.[521] But this could also 'lead to a bench populated only by "pro-state" judges' (talking in the context of a two tier ISDS) which could decrease impartiality and independence.[522] While it is possible capital exporting States would appoint adjudicators that advance investor interests,[523] and it would seem logical for members of an appellate mechanism to elect adjudicators,[524] States could nonetheless have contact with arbitrators at the nomination stage which might raise conflict of interests and impact their independence, impartiality, and accountability.[525]

Challenges to Consolidate a Success Story' in Carlos Braga and Bernard Hoekman, *Future of the Global Trade Order* (2nd edn, European University Institute 2017).

[515] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [65].

[516] ibid, [64].

[517] ibid, [63]; Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti (2019) op cit., 13-14.

[518] Olof Larsson, Theresa Squatrito, and Others (2019) op. cit., 4.

[519] Andrea Bjorklund, Marc Bungenberg, and Others (2019) op cit., 18.

[520] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [33], [53].

[521] Chiara Giorgetti, Steven Ratner, and Others (2020) op cit., 34.

[522] ibid, 31.

[523] ibid, 31; Conversely capital exporting States could appoint adjudicators that advance State interests.

[524] Andrea Bjorklund, Marc Bungenberg, and Others (2019) op cit.

[525] Chiara Giorgetti, Steven Ratner, and Others (2020) op cit.

The EFILA submits that problems could arise if the selection of arbitrator members for a pool is nominated by States as this could be a limitation of party autonomy for investors. Furthermore, this process could be considered different from traditional arbitration practised under the NYC and ICSID if these Conventions are supplemented for the enforcement of appellate review awards.[526] Some scholars argue that for a two-tier system it could be a State based nomination process but non-State actors could have input,[527] and WGIII also highlighted the possibility of including other interested stakeholders.[528] Nominees would naturally require qualifications and expertise. But consideration could be given to gender, whether States nominate their own nationals or nationals of other States or through their geographical regions, and if ad hoc adjudicators could come in for certain disputes involving particular States.[529] On ad-hoc adjudicators, WGIII have argued that they could be 'provided for, to address the concerns that domestic, local, or regional interests would be duly understood and taken into account'.[530] This could 'entail having an ad-hoc judge of the nationality of the State and of the investor'.[531] This might support the DRoL, but this could also raise problems of independence and impartiality. Adjudicators may feel uncomfortable when trying to ensure they are independent and impartial in disputes involving States or investors that either represent or share their nationality.

Moreover, States could nominate candidates to be selected by an institution created as part of a standing court, or nominated candidates put in pool and institution selects from pool.[532] There is acceptance at WGIII that a committee and a multi-layered transparent screening process could be included in the selection and appointment process.[533] This has also been supported by academics.[534] Furthermore, it has been suggested that a committee with the authority to investigate the candidates' qualifications, expertise, and suitability, could offer a 'preliminary screening [which] would strengthen

[526] Submission by the EFILA to the UNCITRAL Working Group No III on ISDS Reforms, (July 2019), op. cit., [71]. The EFLIA say for example France believe inequality between the parties in the process of appointing an arbitrator is a violation of public policy and could therefore interfere with Article 1(4) NYC if it is deemed the selection of arbitrators by States is unequal for investors.
[527] Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti (2019) op cit., 13-14.
[528] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [33], [59].
[529] Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti (2019) op cit., 13-14; Andrea Bjorklund, Marc Bungenberg, and Others (2019) op cit., 20.
[530] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [61].
[531] ibid, [61].
[532] Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti (2019) op cit., 13-14.
[533] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [55]-[59].
[534] Olof Larsson, Theresa Squatrito, and Others (2019) op. cit., 3-4.

the legitimacy and acceptance of a MIC and would contribute to greater transparency and objectivity in the appointment procedure'.[535]

However, the diversity of arbitrators remains of real concern to ISDS[536] and, arguably, 'the lack of diversity has considerably undermined the legitimacy of the system'.[537] At the February 2021 sessions, 'the Working Group indicated that appropriate diversity, such as geographical, gender and linguistic diversity as well as equitable representation of the different legal systems and cultures would be of essence in the ISDS system',[538] and thus the selection and appointment process should consider diversity and inclusiveness.[539] Some academics argue that although appellate review or MIC representation would be limited given the few members needed for appointed,[540] there could be a mechanism in the selection process that considers gender equality and reflects the global north and south similar to the WTO AB.[541] If States were to select members, they must work together to achieve diversity by selecting different backgrounds of people that represent different genders similar to the Rome Statute of the International Criminal Court (ICC) and geographical and development level of States similar to the International Court of Justice (ICJ).[542] However, implicit in this practice is transparency; something that is currently lacking in ISDS.[543]

Similarly, other academics in the context of an MIC with appellate review argue there must be representation (legal systems and regions, gender, cultural backgrounds) with no same nationality adjudicators.[544] They also favour regional groupings in selection similar to ICJ and International Law Commission with selections through nomination by members or direct application by candidates, and argued that there must be transparency in calls for nominations and the specific number of candidates nominated for each regional grouping.[545] However, some academics argue that the MIC is an EU concept built off the EU agreements, and as such question its ability to 'spawn diversity'.[546] In the EU agreements, 2/3 of the arbitrators are from parties to the agreement which would significantly limit

[535] Andrea Bjorklund, Marc Bungenberg, and Others (2019) op cit., 19.
[536] Daniel Behn, Malcolm Langford, and Laura Létourneau-Tremblay (2020) op. cit., 49-50.
[537] Andrea Bjorklund, Daniel Behn, and Others (2020) op cit., [7].
[538] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [10]-[11].
[539] ibid, [11].
[540] Russia indicated that fixed-term adjudicators would limit the pool of different adjudicators in ISDS. Thus, it is important to get diversity right in selection and appointment. See, Possible reform of Investor-State dispute settlement (ISDS), Submission from the Government of the Russian Federation, (January 2020) op cit., [18]-[19].
[541] Andrea Bjorklund, Daniel Behn, and Others (2020) op cit., [6.2]-[6.3].
[542] ibid, [6.2]-[6.3].
[543] ibid, [6.2]-[6.3].
[544] Andrea Bjorklund, Marc Bungenberg, and Others (2019) op cit., 18.
[545] ibid, 18-19; Statute of the International Law Commission, art 3.
[546] Andrea Bjorklund, Daniel Behn, and Others (2020) op cit., [6.3].

its ability to spawn diversity (see Chapter 4.4).[547] In contrast, the MIC intends to have more than just two States and the adjudicators would be of different State nationalities. Furthermore, a concept must be started somewhere for it to develop, and UNCITRAL offers an inclusive environment for discussion.

Some academics also argue that even if the appointment stage and the adjudicators themselves reinforce accountability and independence, political actors can still influence the court through 'reducing funding, making interpretive statements, overriding the court, or threatening non-compliance'.[548] However, such an unfortunate situation could occur in courts that have a State-State Dispute System (SSDS) or ISDS. Some academics argue a benefit of SSDS is that it would decrease claims since '[b]ecause all cases are brought by states, which have the sole discretion whether to espouse a claim or bring their own, the amount of cases would likely shrink dramatically'.[549] However, the investor would not have access to justice if the State did not take the claim and even if the State did it might lack required motivation or act against the interest of the investor (see Chapter 2.8).[550] Furthermore, the purpose of a judicial setting should be to uphold the RoL and not limit claims. If domestic legislation replaced ISDS, it would mean in States with the RoL adjudicators would follow ethical code and have longer terms compared to most international courts, but these adjudicators could still be biased towards their host State and in some systems the government has influence over adjudicators.[551]

To minimise costs of funding a court, it has been suggested that the number of adjudicators (which should be diverse through factors like geographical representation) should be based on the number of cases.[552] Commentators have argued there could be multiples of 3 adjudicators,[553] and others even committing to 15 for first tier and 9 for appellate body.[554] Although this is similar to the EU agreements (see Chapter 4.4) an MIC is envisioned to have many State parties so not all State parties are expected to have adjudicators on the court,[555] and the respondent State would not have an adjudicator representing their nationality on the division. When more members join, the more reach the MIC may

[547] The EU proposal still lacks third party access guarantees so it could reinforce or 'reentrenche' (James Thuo Gathii (2021) op cit.) the private nature of ISDS by preserving standing for private actors (investors). See Chapter 4.4 for evaluation of EU agreements.
[548] Olof Larsson, Theresa Squatrito, and Others (2019) op. cit., 4-5.
[549] Chiara Giorgetti, Steven Ratner, and Others (2020) op cit., 34.
[550] Moreover, cases from the SSDS of the WTO take very long to settle, are very costly, only allow very limited access to third parties (i.e amicus is limited), and are now being appealed into the void given the shutdown of the WTO AB (see Chapter 4.3).
[551] Chiara Giorgetti, Steven Ratner, and Others (2020) op cit., 32-33; Colin Brown (2017) op cit., 682-683.
[552] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [46].
[553] Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti (2019) op cit., 13.
[554] Andrea Bjorklund, Marc Bungenberg, and Others (2019) op cit., 20.
[555] ibid, 20.

have to attract investor claims, which means more adjudicators may be required if caseloads increase so that disputes are resolved in a timely manner to ensure the disputing parties have access to justice.[556]

Some argue a roster of court members could be selected by the institution which would select three members to hear disputes,[557] while others argue that larger panels of five instead of three could ensure no State influence,[558] or arguably investor influence. Selecting judges for specific cases could be random, by the secretary general of the institution, or by the full-time president of the court.[559] WGIII remained unsure whether the selection of adjudicators should be suited to the parties (such as being at the developmental level of the respondent State) and the merits of the case (on the basis of expertise, such as environmental or social considerations) or whether it should be random (avoiding conflicts of interest and enhancing independence and impartiality). They were also unclear on how this process would be overseen.[560]

The selection and appointment of ISDS members document on adjudicator qualifications is similar to the discussion in WGIII before 2020 which referred to the importance of adjudicators acquiring the relevant expertise and experience.[561] Since then some academics have questioned whether both tiers should have the same qualification requirements for adjudicators, or whether the appellate body should seek superior qualifications.[562] WGIII discussions related to this issue indicated that appellate tier 'members could be required to meet certain specific qualifications'.[563] Moreover, it was suggested that an ICJ judge could 'be involved into each formation of judges to ensure that the public international law aspect of the case is clearly understood and managed'.[564] In my view, it is better to ensure that adjudicators in either the MIC or standalone appellate review have international public law expertise rather than relying on another system which could question IIL's legitimacy. The draft code of conduct also touches upon relevant expertise and experience outlining at Article 7 that: 'Adjudicators shall act with competence and shall take reasonable steps to maintain and enhance the

[556] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [49]-[50]. Brown thinks an example of increasing adjudicators while respecting adjudicator diversity and distribution of costs is Article 36(2) Rome Statute, see, Colin Brown (2017) op cit., 687-688.
[557] Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti (2019) op cit., 13.
[558] Andrea Bjorklund, Marc Bungenberg, and Others (2019) op cit., 20.
[559] Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti (2019) op cit., 13-14.
[560] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal. members, (February 2021), op. cit., [68]-[70].
[561] ibid, [34], [37], [58], [62], [64], [68].
[562] Andrea Bjorklund, Marc Bungenberg, and Others (2019) op cit., 19.
[563] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [60]; Such proposal in my opinion would need to avoid creating a potential disconnect between the first and second tier.
[564] ibid, [61].

knowledge, skills and qualities necessary to fulfil their duties. Candidates should only accept appointments for which they are competent.'[565]

Article 5 of the Draft Code of Conduct indicates that '[c]andidates and adjudicators shall avoid any direct or indirect conflict of interest', and that '[a]djudicators shall have a continuing duty to promptly make disclosures'. [566] Disclosures include relevant 'professional, business and other significant relationships', 'direct or indirect financial interest', involvement in other cases, and publications. Article 6 limits double hatting.[567] The draft seems currently uncertain on whether adjudicators should refrain from acting or merely disclose when acting as counsel, expert witness, judge, agent, or any other relevant role acting on matters that involve the same parties, or same facts/treaty. Some academics have questioned what amounts to double-hatting and the scope of limitations on double-hatting,[568] and the scope for disclosure of information.[569] However, limiting conflict of interests and double hatting could reinforce aspects of the RoL like independence and impartiality (see above).

Methodology of Draft Code of Conduct and Selection and Appointment of ISDS Tribunal Members

On enforcement of the Code of Conduct, the draft indicates that '[e]very adjudicator and candidate has an obligation to comply with the applicable provisions of this code'.[570] It is both uncertain whether this obligation will be considered legally binding and what occurs if an adjudicator fails to comply with these obligations, but some academics have proposed temporary bans.[571] WGIII indicated that the implementation and enforcement of the selection, nomination and functioning of tribunal 'would require the preparation of an opt-in convention for their application to existing investment treaties'.[572] This concept of opt-in was also considered in the multilateral instrument discussed above.

Some academics may expect more ambition and creativity from the current draft code of conduct to reflect ISDS such as to 'structure a code of conduct following the arbitral procedure'.[573] This could represent pre-appointment, to adjudication of the case, to end of appointment. Furthermore, instead of an arbitrator code of conduct, there could be an arbitrator code of obligations,[574] setting out obligations towards disputing parties, tribunal members, the institution, and the secretariat. Unique

[565] Possible reform of investor-State dispute settlement (ISDS), Draft code of conduct, (February 2021), op. cit., 5.
[566] ibid, 4.
[567] ibid, 4.
[568] Chiara Giorgetti and Mohammed Wahab (2019) op cit., [19]-[22].
[569] ibid, [26].
[570] Possible reform of investor-State dispute settlement (ISDS), Draft code of conduct, (February 2021), op. cit., 6.
[571] Chiara Giorgetti, Steven Ratner, and Others (2020) op cit., 26-27.
[572] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [72].
[573] Chiara Giorgetti and Mohammed Wahab (2019) op cit., [28].
[574] ibid, [29].

codes of conduct for each actor could be 'preferable to highlight differences among obligations of different actors',[575] such as counsel, disputing parties, members, secretaries, and adjudicators. Other academics argue that while international courts share many traits, their selection and appointment procedures often relate to their purposes and memberships so their designs can be different.

Surveying this offers 'possible innovations that could be adapted to the context of investment law, even to address challenges often seen as unique to investment law'.[576] Moreover, 'the Working Group considered that the selection and appointment methods of ISDS tribunal members should be such that they contribute to the quality and fairness of the justice rendered as well as the appearance thereof, and that they guarantee transparency, openness, neutrality, accountability and reflect high ethical standards, while also ensuring appropriate diversity'.[577] Arguably, reform should 'create a more accountable, legitimate, and fair system of global economic governance that breaks from tradition without breaking traditional notions of fair play, equal treatment, and substantial justice'.[578] These RoL aspirations could be achieved at WGIII.

5.6 Conclusion

This chapter has followed the procedure of WGIII's mandate of identifying concerns in ISDS, considering whether reform was desirable, and developing and proposing relevant solutions to the Commission. WGIII has highlighted concerns relating to ISDS that would impact the ability of the ISDS to reinforce the RoL in its awards. These can be linked to the concerns in relation to the application of the RoL, which were identified in the preceding chapters of this thesis. Furthermore, the fact that WGIII is still considering appellate review as a reform option emphasises that appellate review could enhance ISDS to further the RoL as argued by the thesis. Moreover, and notwithstanding the unprecedented impact of the global pandemic, the inclusiveness of WGIII's discussions lends legitimacy to any future outcomes on appellate review mechanisms.

This chapter has focused on proposals for a two-tier system or standalone appellate review currently under discussion at WGIII. Moreover, it has investigated the proposal for a multilateral instrument, and it has explored reforms to the nomination, selection, and appointment of adjudicators. Together, and if these proposals are eventually adopted, it is envisaged that such reforms should reinforce the RoL in ISDS. WGIII discussions are truly underway in the quest for reform. A draft provision of an appellate mechanism has been presented and although the draft requires further detail and

[575] ibid, [33].
[576] Olof Larsson, Theresa Squatrito, and Others (2019) op. cit., 32.
[577] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, (February 2021), op. cit., [5].
[578] Andrea Bjorklund, Daniel Behn, and Others (2020) op cit., [7].

substance, the current text could enable an appellate mechanism to be capable of reinforcing the formal and substantive RoL when issuing awards. It is promising that a draft code of conduct for arbitrators has been presented alongside general interest in reforming the system of appointing and deploying adjudicators, so as to ensure they are capable of reinforcing the RoL. Furthermore, discussion on a multilateral instrument symbolises that there is a commitment for reform to be multilateral and unified.

Overall, the work of WGIII underscores a commitment to ISDS reform. There now appears to be a path forwards and an idea of how ISDS could be reformed procedurally, as concrete reform proposals in ISDS have been submitted, but the fine details of those proposals require further discussion and clarification. It seems at this stage that a multilateral instrument that focuses on opt-in and flexibility could enter ISDS with reform options for members to choose from such as the adjudicators (nomination, selection, and appointment, and code of conduct, etc) and the dispute setting (two-tier, standalone appellate review, one-tier, etc). There are still however many unresolved questions that must be answered before such a proposal can be implemented. It remains to be seen whether such proposed flexible reform will impact upon identified concerns. The future developments at WGIII will be very interesting indeed and will require further analysis in due course. It does seem though that a multilateral appellate review mechanism, preferably in a two-tier system which contains appropriate adjudicator reforms, will help address RoL concerns in ISDS.

Chapter 6 Conclusion

6.1 Introduction

This thesis contributes to an ever-growing body of scholarship on the nature of international investment law (IIL) and investor-State dispute settlement (ISDS) in the global economy. The thesis has made a significant intervention in the scholarship by applying a rule of law (RoL) analysis of ISDS to explore the possibility of reforming ISDS to include an appellate review mechanism. It is recognised that there is already existing scholarship and some of the most significant existing contributions concerning the RoL and ISDS come from Velimir Zivkovic and Mavluda Sattorova.[1]

The RoL analysis on which the thesis is based was set out in Chapters 1 and 2. The author shares the view expressed by Zivkovic and Sattorova that 'the role of international law is to reinforce, and on occasions to institute, the rule of law internally'.[2] This argument was adopted in Chapters 1 and 2 and applied for example in Chapter 3 when criticising the function of Article V of the New York Convention (NYC) which obstructs the adoption of international awards in domestic systems. Furthermore, this thesis has considered both the role of an international RoL (IRoL) in promoting justice beyond State boundaries and a domestic RoL (DRoL) seeking justice within State borders. These two facets of the RoL offer a different perspective to Sattorova who investigates the extent to which ISDS achieves good governance in domestic systems and does not distinguish between the DRoL and an IRoL, although she does recognise that international governance frameworks can influence and improve governance in domestic systems.[3]

This thesis recognised two types of RoL, the formal RoL and the substantive RoL. Formal theories emerged in the literature with a focus on the prevention of arbitrariness while substantive theories built upon this foundation by considering whether those laws and judicial awards had consistency and correctness and whether human rights were respected. This thesis focused on the RoL elements of the prevention of arbitrariness, transparency, and equality. As shown in previous chapters (particularly Chapters 1 and 2) these elements of the RoL interlink between one another and with other elements of the RoL. This RoL analysis through formal and substantive theories offers a further

[1] Velimir Zivkovic, 'Pursuing and Reimagining the International Rule of Law Through International Investment Law' (2020) 12 Hague Journal of the Rule of Law 1; Velimir Zivkovic, 'Fair and equitable treatment between the international and national rule of law' (2019) 20(4) Journal of World Investment & Trade 513; Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance* (Hart Publishing 2018).

[2] Velimir Zivkovic (2019) op. cit., 552; Mavluda Sattorova (2018) op. cit., 8.

[3] Mavluda Sattorova (2018) op. cit.

original contribution to the current literature. While Sattorova does consider substantive RoL concerns, she does so more as an element of 'governance'.[4]

Zivkovic's investigation of an IRoL on IIL focuses on a formal RoL definition. In his work of the RoL, he states that 'the concept is here understood as primarily setting out formal requirements or meta-values that should characterize the whole legal framework of public international law, as well as the behaviour of those subject to it'.[5] Furthermore, most investigations justifying ISDS or which highlight the impact of ISDS on the RoL and governance in host States seems to be from the spectrum of the formal RoL.[6] Yet considering the substantive RoL is important, since ISDS tribunals using IIAs have held host States accountable to guarantee more substantive aspects like consistency and transparency.[7] My analysis goes beyond the boundaries of investigating the formal RoL in ISDS by investigating the substantive RoL, and the interlinkages between the two in the context of proposals to reform investment arbitration. In incorporating this substantive RoL perspective, this thesis has proposed appellate review as helpful to the realisation of formal and substantive elements of the RoL, although international adjudication has traditionally only rarely provided for appellate review.[8]

Other academic literature by Thomas Schultz and Cédric Dupont offers a more nuanced account and distinguishes between the DRoL and an IRoL when assessing the purpose and effect of the RoL in ISDS.[9] This thesis builds on the foundation offered by some of their arguments, especially in relation to analysis of equality and State sovereignty in ISDS. Firstly, this thesis recognises that the past use of ISDS in IIL could have been used as a neo-colonial instrument,[10] but acknowledges that ISDS could still promote the RoL in some domestic systems,[11] albeit ISDS procedural reform is needed for the RoL to be reinforced sufficiently. Secondly, it is evident that current use of ISDS in IIL engages more with developed States, while systematically disadvantaging poorer and more vulnerable States, since ISDS favours States holding more resources enhancing their ability to prevent and fend off claims.[12] However, the findings of Schultz and Dupont were limited insofar as they referred only to a more

[4] Mavluda Sattorova (2018) op. cit., 7-8, 14-15, 24-25.
[5] Velimir Zivkovic (2020) op. cit., 3.
[6] Mavluda Sattorova (2018) op. cit., 21-22.
[7] ibid, 22-23.
[8] Noemi Gal-Or, 'The Concept of Appeal in International Dispute Settlement' (2008) 19(1) European Journal of International Law 43; Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Grotius Publications 1991) ch VI; Giorgio Sacerdoti, 'Appeal and judicial review in international arbitration and adjudication: the case of the WTO appellate review' in Ernst Petersmann, *International trade law and the GATT/WTO dispute settlement system* (Kluwer, 1997) 245-280.
[9] Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' (2014) 25(4) EJIL 1147, 1162-1163, 1168.
[10] Ibid, 1157-1159, 1168
[11] Ibid, 1162-1163, 1168
[12] Ibid, 1166-1168.

formal conception of the RoL, focusing on its legality aspect.[13] This thesis makes an original contribution to the scholarship as it considers both formal and substantive elements of the RoL with a focus on the prevention of arbitrariness, transparency, and equality. A substantive perspective of the RoL brought attention to human rights, environmental considerations, and sustainability.

The RoL indicators and proxies used to assist evaluation by Schultz and Dupont of whether ISDS serves to make up for deficient RoL in host States seems to only reflect some RoL elements.[14] These RoL indicators and proxies operate in the context of political stability and the separation of powers between executive, legislative, and judiciary, and assume the supremacy of law, including the strength and impartiality of the legal system and popular observance of the law.[15] Schultz and Dupont focused on obedience to clear applicable law in impartial and independent adjudication to prevent arbitrariness.[16] The prevention of arbitrariness is an essential aspect of any formal RoL definition.

My unique RoL analysis set out in Chapters 1 and 2 considers the relationship between the DRoL and an IRoL, and its formal and substantive interpretations in ISDS regulations (Chapter 3), multilateral mechanisms and appellate bodies (Chapter 4), and Working Group III (WGIII) at the United Nations Commission on International Trade Law (UNCITRAL) (Chapter 5). In the analysis of ISDS regulations in Chapter 3, this thesis differed from other contributions to the literature by evaluating the DRoL and an IRoL in the domestic review of Article V NYC and the international review of Article 52 of the International Centre for Settlement of Investment Disputes (ICSID) for ISDS awards. The purpose of this relates to the proposal of appellate review in ISDS and reviewing awards in domestic and international systems. Furthermore, in evaluating review of ISDS awards under ICSID and NYC, this thesis investigated the ability of those review provisions to reinforce the formal and substantive RoL.

Moreover, this thesis explores proposals for multilateral mechanisms and appellate bodies, and discussions at WGIII, through a RoL analysis which prior literature did not address in detail. Certainly, this thesis develops the work of Zivkovic by examining multilateral agreements including investment aspects like CETA, arbitrators, appellate review, enforcement, investor protections other than FET, EU ICS proposal, World Trade Organisation, and WGIII.[17] For example, Zivkovic does list RoL concerns identified by WGIII in ISDS, but he does not investigate these by analysing how other multilateral

[13] ibid, 1163-1164.
[14] These RoL indicators and proxies were the Polity IV and the ICRG Law and Order Scores
[15] 'Polity IV Project: Political Regime Characteristics and Transitions, 1800-2013' (Polity, 6 June 2014) <https://www.systemicpeace.org/polity/polity4.htm> accessed 4 May 2022; 'ICRG Methodology' <https://www.prsgroup.com/wp-content/uploads/2014/08/icrgmethodology.pdf> accessed 4 May 2022.
[16] Thomas Schultz and Cédric Dupont (2014), op. cit., 1160-1163.
[17] Velimir Zivkovic (2020) op. cit., 15.

systems deal with RoL concerns.[18] Similarly, Sattorova noted a lack of participation from developing States and other interested stakeholders like regional, local, and civil society in IIL and ISDS, but this thesis builds upon this claim by investigating whether WGIII can help achieve a participatory and inclusive process in the discussions of reforming ISDS and IIL.[19] Sattorova focuses more on providing a critical review of the literature on the RoL related good governance narratives of IIL,[20] and Zivkovic focuses on the impact of IIAs formed in the international setting taking priority over domestic protections.

This thesis offers a contemporary focus on the recent work of WGIII in UNCITRAL, analysing the merits of the proposals for ISDS reform and multilateral appellate review being considered at the present time, and their relevance to formal and more substantive understandings of the RoL. In Schultz and Dupont the data they used is more outdated as it is from 1972 to 2010.[21]

This thesis has considered procedural reform in the form of an appellate mechanism, preferably within a two-tier system containing adjudicators capable of reinforcing the RoL. In this sense, the thesis considers procedural proposals and the formal and substantive interpretations of the DRoL and an IRoL. Even though the thesis has a procedural focus on ISDS reform, there is a link with more substantive reform aspects, in that the thesis' proposal is to change who hears investor-State disputes in the expectation that this could lead to a better acknowledgement of policy space issues, and the existence of a single appellate mechanism may improve the consistency/certainty of IIL. In this regard, akin to the arguments of Sattorova and the International Law Association, investor protections like FET can reinforce the RoL like preventing arbitrariness, and promoting consistency and due process, but also that the open-ended nature and textual variety of some treaty provisions create inconsistency in awards which hinders the RoL.[22] Furthermore, in the selection and appointment of adjudicators, requiring adjudicators to have knowledge of international public law could better highlight issues of human rights and environmental considerations which are necessary for victims of investor abuses like indigenous communities to claim to have any chance of accessing justice. However, for this to be effective the procedure to appoint and select these adjudicators that will consider more substantive aspects must be transparent. Zivkovic only recognises FET as reinforcing the formal RoL,[23] even though transparency which Zivkovic agrees is an FET requirement can also be regarded as a substantive RoL

[18] ibid, 15.
[19] Mavluda Sattorova (2018) op. cit., 193-194.
[20] ibid, 14, 55.
[21] Thomas Schultz and Cédric Dupont (2014) op. cit., 1149-1150.
[22] Ibid, 15; ILA, International Law Association Interim Report (2020) Rule of Law and International Investment Law, 6.
[23] Velimir Zivkovic (2020) op. cit., 2-3.

element, as I have explained in Chapter 1.2. Indeed, formal and substantive RoL elements traverse and are intwined since transparency is necessary to discover both the source and content of the law.

As the primary focus of this thesis is on procedural reforms, the extent to which substantive reforms and the relationship between procedural and substantive reforms can be explored has limitations. Other scholarship may address in more detail the issues involved in reform of substantive standards of treatment in investment treaties or investor obligations,[24] although these issues are touched upon in this thesis. The key proposal of procedural reform in the form of an appellate mechanism is one contribution to the much wider challenge of ISDS reform that this thesis offers. This thesis did not pursue a case study of comparing substantive standards in IIAs constructed by States of differing development levels and similar development levels to investigate whether any power asymmetries existed based on different provisions that are or are not investor friendly depending on the economic strength of States. Another limitation of my study in comparison to others that examined the RoL and IIL is that I have not conducted empirical work such as conversations with government officials.[25]

This thesis provides a snapshot of some of the RoL issues of procedural ISDS reform and it will act as a springboard for future research. Many developments are currently taking place at the time of writing which offers fascinating insights into the challenges facing IIL which requires investigation. Due to covid-19 the submission of this thesis was delayed and much has happened since the cut-off date of February 2021. This thesis set out corporate social responsibility (CSR) at Chapter 2.7 to show the problematic relationship between multinational corporations (MNCs) and international standards. Future work could investigate the current work of CSR amendments taking place at the Human Rights Council, which established intergovernmental working groups with the purpose of creating a binding instrument that can hold MNCs legally accountable for human rights abuses.[26] Seven sessions have

[24] ibid; Mavluda Sattorova (2018) op. cit; Kenneth Vandevelde, 'A Unified Theory of Fair and Equitable Treatment' (2010) 43 NYU Journal of International Law & Policy 43; Stephan Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in Stephan Schill (ed*), International Investment Law and Comparative Public Law* (Oxford University Press 2010); Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2014) ch 4, esp. 164; Vicki Been and Joel Beauvais, 'The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine' (2002) 78 NYU Law Review 30; Gregory Starner, 'Taking a Constitutional Look: NAFTA Chapter 11 as an Extension of Member States' Constitutional Protection of Property' (2002) 33 Law & Policy in International Business 405; Jarrod Hepburn, 'Remedying Misaligned Norms in International and Constitutional Law: Investment Treaties, Property Rights and Proportionality' (2020) 43 UNSW Law Journal 1167.

[25] Mavluda Sattorova (2018) op. cit., 197.

[26] 'Seventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (United Nations Human Rights Council) <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session7> accessed 27 April 2022; Report on the sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Human Rights Council, Forty-sixth session, 22 February–19 March 2021, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and

been held since and a third draft of a binding instrument published. Further work could investigate some of the current questions of the CSR amendments such as who are the victims (does it include groups/local communities), whether MNCs could impede human rights through omissions (maybe positive rights), and the jurisdiction of courts to hear claims (maybe limit *forum non conveniens*). Future work could also investigate the opinions of capital exporting and capital importing States when participating in the discussion as there does seem to be a divide of opinions in the discussion.

I chose to focus on UNCITRAL due to the current work being undertaken by WGIII on ISDS procedural reforms. However, there is other discussion. One is the International Law Association (ILA) Committee on the Rule of Law and International Investment Law, which had regular attendance at WGIII both before and during Covid-19,[27] and identified procedural RoL concerns in ISDS like WGIII.[28] The ILA had a more substantive reform focus to examine both the substantive content of the treaty standards, and the impact of those standards on the rule of law in the host states.[29] The Committee argued there needed to be improvements to treaty language, the clarity of obligations, and interaction with domestic system after this investigation. This thesis focused more on procedural reform of ISDS which is more suited to the discussion at WGIII. UNCITRAL WGIII could be more accessible than the ILA, as much WGIII material is freely publicly available online, while the ILA work is published in books.

This thesis did not focus on the ICSID amendments, since the discussion lacked intention to create an appellate review mechanism and/or a two-tier multilateral system and/or multilateral instrument.[30] This thesis considered appellate review an important procedural reform as this thesis considered appellate review as part of the RoL. The ICSID amendments to expand and update mediation and fact-finding procedures and rules, and provide enhanced transparency, third-party funding disclosure, and shorter disputes could nonetheless offer intriguing future analysis on ISDS, especially as the amendments have been regarded as the most wide-ranging in ICSID's 55-year history and the most modern.[31]

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cultural rights, including the right to development, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/004/07/PDF/V1900407.pdf?OpenElement> accessed 27 April 2022.

[27] i.e see, Report of Working Group III (ISDS Reform) on the work of its fortieth session (Vienna, 8–12 February 2021), United Nations Commission on International Trade Law Fifty-fourth session Vienna, 28 June–16 July 2021, [9], 4, <https://undocs.org/en/A/CN.9/1050> accessed 20 April 2022; Report of Working Group III (ISDS) on the work of its resumed thirty-eighth session, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Resumed, thirty-eighth session, Vienna, 20–24 January 2020, [9], 4, <https://undocs.org/en/A/CN.9/1004/Add.1> accessed 20 April 2022.

[28] ILA, ILA Committee on the Rule of Law and International Investment Law Committee Description, 1-2.

[29] ibid

[30] 'ICSID Rules and Regulations Amendment- Working Papers' (ICSID) <https://icsid.worldbank.org/resources/rules-amendments> accessed 27 April 2022.

[31] 'ICSID Submits Amended Rules to the Administrative Council for a Vote' (ICSID, 20 January 2022) <https://icsid.worldbank.org/news-and-events/news-releases/icsid-submits-amended-rules-administrative-

Transparency was a topic that was investigated by the thesis as it is a vital element of the RoL. This thesis investigated reform that aimed to enhance transparency through the UNCITRAL Transparency Rules and the Mauritius Convention. On possible further reform at WGIII, this thesis focused on issues that were most relevant to appellate review like correctness and consistency of awards, impartiality and independence of adjudicators, and cost and enforcement of ISDS procedure. There were other topics discussed at WGIII such as third-party funding,[32] which future work could investigate.

The post-February 2021 WGIII reform sessions offer intriguing insights into the development of the draft code of conduct and selection and appointment of adjudicators. Unfortunately, the cut-off date for this thesis was February 2021 with the intended submission taking place 6 months later so this could not be included with appropriate conclusion drawn. However, it does seem that the post-February 2021 discussion is moving in the right direction and my aim would be to consider developments in my future research.

The recent selection and appointment of tribunal members document issued by UNCITRAL later in February 2022 was envisaged as having application solely in the context of a multilateral mechanism.[33] It builds upon the February 2021 discussion by potentially including a committee made up of party members and an adjudicator selection (screening) process panel envisioned to be independent of States (and presumable investors). The selection and appointment document refers to the draft code of conduct currently being prepared jointly with ICSID.

The recent Draft Code of Conduct document could also build upon the February 2021 WGIII discussion by making better links between Articles (disclosure requirements), and expanding detail and understanding of the Articles (assistants of adjudicators have been considered more).[34] The questions for consideration in the document show an understanding of what is required to further enhance the

council-vote> accessed 30 January 2022; 'ICSID Releases 2022 Versions of its Rules and Regulations' (ICSID, 22 June 2022) <https://icsid.worldbank.org/news-and-events/communiques/icsid-releases-2022-versions-its-rules-and-regulations> accessed 15 June 2022; There is also an amendment to expand jurisdiction under its additionally facility.

[32] Possible reform of investor-State dispute settlement (ISDS): Third-party funding, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-seventh session, New York, 1–5 April 2019, <https://undocs.org/en/A/CN.9/WG.III/WP.157> accessed 16 March 2020.

[33] Possible reform of investor-State dispute settlement (ISDS): Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Forty-second session, New York, 14–18 February 2022, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/092/76/PDF/V2109276.pdf?OpenElement> accessed 27 April 2022.

[34] Possible reform of investor-State dispute settlement (ISDS): Draft Code of Conduct, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Forty-first session, Vienna, online, 15–19 November 2021, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/068/11/PDF/V2106811.pdf?OpenElement> accessed 27 April 2022.

codes. The draft highlights the relationship between the conduct codes, but it could be investigated whether the draft could consider additional categories of individuals involved in ISDS and differences in codes between individuals operating in a standing multilateral mechanism and in current ad hoc ISDS. There is also the revised draft code of conduct which requires future evaluation.[35] The work at WGIII is an ongoing topic that requires further research. This thesis has investigated in detail the discussion taken place up until February 2021, as that was the cut-off date of the thesis with the expected submission in September 2021, which was later pushed back to December 2021 due to Covid-19. This discussion includes appellate review, multilateral instrument, and selection and appointment of adjudicators. The discussion is relevant to one of the main focuses of the thesis as to whether a multilateral appellate body, preferably in a two-tier system, with appropriate adjudicators can help ISDS better reinforce the RoL. By considering formal and substantive elements of the RoL in both the international and domestic contexts, this thesis has focused on ISDS regulations, appellate review mechanisms, and the potential reforms proposed at UNCITRAL WGIII.

The main argument of this thesis is that ISDS does not adequately reinforce the RoL. The analysis in the preceding chapters has demonstrated that ISDS fails to adhere to the substantive RoL, paying limited regard to such issues as human rights and sustainable development. ISDS does not have a mechanism capable of appellate review, even though appellate review can help reinforce the substantive RoL. By examining appellate review mechanisms operating in other international law settings, the potential benefits and drawbacks of an appellate mechanism in IIL have been critically evaluated. Applying this guidance would give an appellate review mechanism in ISDS the best possibility to reinforce the RoL. The work of UNCITRAL WGIII has played an important role in providing further insights into the strengths of appellate review, both in terms of ambition to construct such a process and the appreciation of its ability to help address the ISDS RoL related concerns. One of the core aims of this thesis has been to show that an appellate review mechanism, operating within a unified and multilateral two-tier system with adjudicators that are capable of reinforcing the RoL, could facilitate a system of ISDS that is more compliant with the RoL.

Chapter 1 provided an outline of the substantive themes of the thesis relating to the RoL, ISDS, appellate review, and the ongoing work of UNCITRAL WGIII. The contemporary problems and controversies of IIL, with the focus on ISDS and the opportunities for ISDS reform at WGIII, were presented in this chapter. As the RoL is the conceptual underpinning of the thesis, Chapter 1 put

[35] Possible reform of investor-State dispute settlement (ISDS): Revised version of the draft Code of Conduct, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Forty-second session, New York, online, 14–18 February 2022, <https://uncitral.un.org/sites/uncitral.un.org/files/crp_2_e.pdf> accessed 27 April 2022.

forward the concepts of the DRoL and an IRoL and explained why this thesis highlighted the prevention of arbitrariness and the promotion of transparency and equality as formal and substantive elements of the DRoL and an IRoL. Chapter 1 also pinpointed certain elements of the RoL like State sovereignty, equality, human rights and sustainability, and appellate review where tensions with the current system of ISDS are significant. The purpose of this chapter was to map contemporary problems in IIL and ISDS through a RoL analysis, which served as the foundation for the rest of the thesis.

6.2 Chapter 2

In Chapter 2, the theoretical framework of the thesis was outlined in detail. More explanation was given to the DRoL and an IRoL and their formal and substantive variants.

An IRoL is particularly controversial in IIL. This is due to a variety of factors. For example, it is difficult to apply understandings of the DRoL to the international system, which has no single binding court, no unified executive or legislature, and no clear hierarchy of powers.[36] The founding RoL elements are linked to addressing arbitrariness in both the domestic and international settings.[37] The RoL has evolved to include a mixture of formal and substantive elements.[38] This thesis paid attention to transparency, equality, and the prevention of arbitrariness, which interlink with other formal and substantive elements of the RoL. This includes access to justice, fairness, appellate review, State sovereignty, correctness, consistency, predictability, independence, impartiality, due process, justice, legal order, and human rights, environmental considerations, and sustainable development.[39] These elements are integral to both the DRoL and an IRoL. An argument put forward by this thesis is that, in these ways, domestic and international systems are symbiotic.

The symbiotic nature of this relationship is evident in IIL. For example, in ISDS international adjudication is commonly reliant upon disputes arising within State territories and ISDS awards are commonly reliant upon enforcement within State territories. Awards from international disputes like ISDS should reinforce the RoL within domestic systems. However, differences lie in the application, articulation, and understanding of the RoL in the domestic and international systems. An example of

[36] Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity' (2016) 65 ICLQ 277.
[37] Albert Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan 1885), pt II; *ELSI (United States v Italy),* ICJ Judgment of 20 July 1989, [124]-[128]; *Asylum Case (Colombia v Peru)* ICJ Judgment of 20 November 1950, p 284.
[38] Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004); Lon Fuller, *The Morality of Law* (Yale University Press 1964); Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 EJIL 315.
[39] Tom Bingham, *The Rule of Law* (Penguin 2010); James Crawford, 'International Law and the Rule of Law' (2003) 24 ADL 3; Simon Chesterman, 'An International Rule of Law?' (2008) 56(2) AJCL 331 European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, adopted at its 86th plenary session (Venice, March 2011), [41]; Robert McCorquodale (2016), op. cit. 65; Brian Tamanaha (2004) op. cit.

these differences is that the DRoL should provide justice within State borders while an IRoL should provide justice beyond State borders. This means domestic and international awards can be different to accommodate these objectives. As outlined in Chapters 1 and 2, there may be both benefits and drawbacks to the current approach(es) of ISDS from RoL perspectives.

In the context of the RoL element of sovereign equality there must be a balance between State sovereignty when the State desires to regulate for legitimate public policy objectives for the benefit of its citizens and State compliance to recognised international standards to which States commonly consent. There also needs to be a balance between formal and substantive equality in domestic and international systems. Formal equality alone will only reinforce formal elements of the RoL and justice may only be achieved on paper in the sense that what an entity puts into the system is what they are expected to get out of it. Recognising substantive equality will uncover disparities in power between actors within a system that might make the system unequal in application between those actors. Ensuring substantive equality will also reinforce more substantive RoL elements like human rights.

Human rights is another element of the RoL that gives insights into the relationship between DRoL and an IRoL. Civil and political rights,[40] economic, social, and cultural rights,[41] solidarity rights,[42] and sustainability intersect with investments,[43] but they may not receive the required attention in ISDS. In my view, IIL promoting and protecting *sustainable* investment rather than just encouraging investment could address these concerns.[44] Enhancing third-party access, including access of local communities impacted by investments in ISDS, could further help these rights to be adequately considered alongside the common corporate claims.[45] Furthermore, non-State actors may not be adequately prosecuted for the abuses they commit such as human rights and environmental abuses. The international system and some domestic systems may fail to offer adequate legally binding

[40] See, International Covenant on Civil and Political Rights (ICCPR) Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[41] See, International Covenant on Economic, Social and Cultural Rights (ICESCR), Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[42] See, Declaration on the Rights of Indigenous People, GARes61/295 of 13 September 2007; Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514 (VX) of 14 December 1960, UN Doc A/4684 (1960); Rio Declaration on Environment and Development (1992) UN Doc. A/CONF.151/26 (vol I), 31 ILM 874.
[43] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1 (entered into force 1 January 2016).
[44] *Magyar Farming Company Ltd, v Hungary*, ICSID Case No. ARB/17/27, Award of the Tribunal of 13 November 2019, [235]. This tribunal described the object of IIAs as to encourage investment, rather than to promote sustainable investment or investment capable assisting the SDGs.
[45] Nicolás Perrone, 'Making Local Communities Visible: A Way to Prevent the Potentially Tragic Consequence of Foreign Investment' in A Santos, C Thomas & D Trubek, *World Trade and Investment Law Reimagined* (CUP, 2019); James Gathii, 'Reform and Retrenchment in International Investment Law' (January 13, 2021); Gus Van Harten, *The Trouble with Foreign Investor Protection* (OUP 2020).

standards and enforcement procedures in the form of corporate social responsibility (CSR) that hold non-State actors accountable.[46]

Although the DRoL and an IRoL and formal and substantive RoL theories are contested concepts, the investigation of these concepts explicates the importance of an appellate review mechanism existing in ISDS. One of these factors is the ability for appellate review to reinforce more substantive RoL elements or outcomes of the RoL like certainty, correctness, justice, and fairness. Another is that ISDS is complex so not all adjudicators may make an award that reinforces the RoL and ISDS is important as it involves expensive commercial aspects and contemporary public elements impacting State citizens like human rights and environmental considerations. In this regard appellate review can act as an important safeguard for ISDS to reinforce an IRoL. Any appellate review mechanism must strive to prevent arbitrariness, promote transparency, and be equal to increase the chance of it being able to effectively reinforce the RoL.

Relying on the morals of non-State actors, or contextualising ISDS in a different way to justify its standing, will not resolve RoL problems in ISDS.[47] Reform of the adjudicators and the creation of appellate review preferably in a multilateral court system are procedural amendments which could help address RoL issues, and these issues have already been discussed extensively in scholarly debates. Provided amendments are made, ISDS could be better placed to provide access to justice in investor-State disputes than a State-State dispute resolution procedure or within domestic systems. In State-State disputes, investors are reliant upon States initiating action on their behalf, and in domestic settings investors are reliant upon domestic courts and their adjudicators remaining independent and impartial when they are commonly citizens of the respondent.

[46] The Organisation for Economic Co-operation and Development (OECD) Declaration and Decision on International Investment and Multinational Enterprises (1976) 15 ILM 967; Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO, 279th Sess, November 17 2000, in 41 ILM 187 (2002), available at "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy" <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf> accessed 16 May 2016; United Nations Global Compact (31 January 1999); Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN4/Sub2/2003/12/Rev2 (2003) [1]; United Nations Guiding Principles on Business and Human Rights (2011); *Re Union Carbide Corporation Gas Plant Disaster at Bhopal*, 643 F Supp 842 (SDNY 1986) 849.

[47] Gus Van Harten (2020) op cit.; James Gathii (2021) op cit.; Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing 2009) 5; Stephan Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) EJIL 875; Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17(1) European Journal of International Law 121; *International Thunderbird Gaming Corp v Mexico*, UNCITRAL, Separate Opinion by Thomas Wälde of 1 December 2005, [12]–[13].

After further setting out the RoL analysis in Chapter 2, the next step was to investigate the different IIL governance frameworks in which ISDS operates and apply the RoL analysis to identify strengths and weaknesses in those regimes.

6.3 Chapter 3

Chapter 3 started by comparing the relationship between the DRoL and an IRoL on IIAs with focus on the elements of State sovereignty and equality. It showed that IIAs reproduce formal inequalities as they contain mainly investor rights and lack investor obligations like CSR, human rights, environmental considerations, sustainable investment, and access for local communities impacted by investments. IIAs also produce substantive inequalities between sovereign States in application. Citizens from some States are more likely to have the resources for investing in foreign States than other individuals from other States based on the number of rich individuals in those States capable of investing.[48] Chapter 3 highlighted the importance of sustainable investment and suggested that the most favoured nation (MFN) investor protection (if applied multilaterally) could bring uniformity of provisions to IIAs and balance the inequality of power and income differences between sovereign States.[49] However, such uniformity is commonly in favour of investor protections rather than State rights. MFN clauses tend only to reinforce equality between certain foreign investors and can instead further widen the gap between investor and State rights in IIAs. This is compounded by IIAs mainly containing investor rights and lacking investor obligations like CSR and access for local communities impacted by investments.

It is generally accepted that a convergence approach towards investor protections could negate dubious *ad hoc* arbitrator interpretations and enhance predictability and consistency and modernise IIAs for sustainable investment.[50] Claims for investor protections in ISDS perpetuate inequalities as

[48] UNCTAD, 'World Investment Report 2016- Investor Nationality: Policy Challenges (2016), p36; 'GDP per capita, current prices' (International Monetary Fund) <https://www.imf.org/external/datamapper/NGDPDPC@WEO/ADVEC/OEMDC/LBY/WEOWORLD/EGY/PIQ/CMQ/CBQ/NAQ/CAQ/AS5/SSA/EDE> accessed 18 December 2018; UNCTAD, World Investment Report 2019 – Special Economic Zones (2019), p 103.

[49] *Maffezini v Spain*, Decision of the Tribunal on Objections to Jurisdiction [62]-[63], *Plama Consortium v Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, [219], [223], [227]; *Salini v Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 29 November 2004, [118]-[119]; *Telenor v Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006, [90]-[101], esp [92]; *Gas Natural SDG v Argentina*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions of Jurisdiction of 17 June 2005, [29]; *EDF v Argentina*, ICSID Case No. ARB/03/23, Decision on Annulment of 5 January 2016, [237]-[238]; *Bayindir v Pakistan,* ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005 [230]-[231]; *MTD Equity v Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004 [103]-[104]; *İçkale İnşaat Limited v Turkmenistan*, ICSID Case No. ARB/10/24, Award of 8 March 2016, [328]-[329] [332].

[50] Stephan Schill (2011) op. cit., 893; Ying-Jun Lin, 'Achieving sustainable development objectives in international investment law through the lens of treaty interpretation', in Clair Gammage and Tonia Novitz (eds), *Sustainable Trade, Investment, and Finance: Towards Responsibility And Coherent Regulatory Frameworks* (Edward Elgar 2019).

only certain extremely rich individuals can rely upon them as opposed to general citizens.[51] However, investor protections like non-discrimination and national treatment can reinforce equality between foreign investors and nationals and prevent arbitrariness.[52] Other investor protections can reinforce elements of both the formal and substantive RoL.[53] However, in ISDS they can be applied inconsistently and limit State sovereignty in the domestic setting which significantly limits their ability to reinforce the RoL. Formal and substantive RoL elements have tensions in ISDS which means it is crucial that adjudicators can balance the RoL based claims between investor protections and States regulating in the public interest to protect human rights and environmental considerations. Interpreting the purpose of IIAs and ISDS through the lens of sustainable investment could help reach this balance, but such interpretation would have to be consistent.[54]

This thesis suggests that UNCITRAL, as an institution of the United Nations (UN), is best placed to promote inclusiveness of engagement between State and non-State actors, respect for substantive equalities, and application of the sustainable development goals (SDGs). The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules) contribute to moving ISDS more into the public domain to reflect public issues of ISDS and can enhance accountability.[55] In Chapter 3, it was argued that UNCITRAL's transparency rules could help ISDS achieve the more substantive element of achieving justice rather just the formal element of access to justice. The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) helps to overcome the limitations of the UNCITRAL Transparency Rules by giving it the jurisdiction to apply to all disputes, but currently few States are party to the Convention, and it is subject to reservations capable of limiting the Conventions scope.[56] The UNCITRAL Transparency Rules do not provide for appellate review, but could provide a basis for its development.

Chapter 3 also explored the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (NYC), which provides an interesting example of the interplay between

[51] Gus Van Harten (2020) op cit.; Muthucumaraswamy Sornarajah, 'An International Investment Court: panacea or purgatory?' (Colombia Centre for Sustainable Investment: Columbia FDI Perspectives, Perspectives on topical foreign direct investment issues No. 180 August 15, 2016).
[52] *Azurix Corporation v Argentina*, ICSID Case No. ARB/01/12, Award of 14 July 2006, [393] [442(4)].
[53] *Técnicas Medioambientales Tecmed, SA v Mexico*, ICSID Case No. ARB (AF)/00/2, Award on 29 May 2003, [154]; *Waste Management, Inc v Mexico* (Number 2), ICSID Case No. ARB(AF)/00/3, Final Award of 30 April 2004, [98].
[54] Ying-Jun Lin in Gammage and Novitz (2019) op. cit., 257, 265.
[55] UNCITRAL Arbitration Rules (2013), UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration Official Records of the United Nations General Assembly, Report of the United Nations Commission on International Trade Law, 8-26 July 2013, 68th Session, Supplement No.17 (A/68/17), Ch III (entered into force 1 April 2014).
[56] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention), 69th Session, 7 November 2014 (69/496). Adapted 10th December 2014, enforceable 18th October 2017.

an IRoL and the DRoL in an ISDS setting.[57] Even though the NYC Convention is an international instrument dealing with cross border issues that includes States and non-State actors, meaning it should theoretically follow and contribute to an IRoL, Article V is set up for the function of the DRoL whose purpose could be to achieve justice within State borders.[58] The relationship between the DRoL and an IRoL is interesting in Article V, having the potential to protect State sovereignty and the State's right to regulate in the domestic setting, but could also limit the authority of the international system. In Chapter 3, it was argued that Article V could limit the impact of problematic awards which might otherwise indirectly reinforce an IRoL and advance the diversities between domestic systems which could better inform the international system. However, a State refusing an award that could expose RoL issues within its domestic setting would limit the ability of the international system to achieve justice and fairness for all States and non-State actors. It could also act contrary to principles of State compliance, co-operation, and equality if domestic systems could decide whether the international system accommodating other States and non-State actors was correct.

While Article V(1) is capable of reinforcing formal elements of the RoL, it falls short of offering appellate review as it fails to review the substantive content of the award and does not reinforce substantive elements of the RoL. Article V(2) delves deeper into the contents of the award, but only reinforces the element of State sovereignty in the domestic context and thus cannot be considered an appropriate appellate review mechanism. A successful claim under Article V only invalidates the award in that State rather than developing substantive arguments which affect whether the award can be enforced in other jurisdictions. Also, the dispute can be restarted in ISDS creating circular proceedings which would add to costs and time.[59]

Appellate review awards including those made in permanent bodies could be classed as arbitral awards for recognition and enforcement under the NYC. However, a limitation is Article V, which gives the decision to domestic courts. The EU free trade agreements attempt to avoid Article V by implementing waivers between the parties.[60] Article V(1) could be waived by a party to the EU agreement, whereas, Article V(2) can be invoked by a court where enforcement and recognition is sought even where the State is not party to the agreement. Whether there is a waiver or not, it is unlikely that Article V would be applied consistently in domestic courts dealing with appellate review

[57] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed on 10th June 1958, entered into force on 7th June 1959) 330 UNTS 38.
[58] Ibid, art v.
[59] International Centre for Settlement of Investment Disputes (ICSID) (signed on 18th March 1965, entry into force 14 October 1966) 575 UNTS 159, art 52(6).
[60] Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) 18 Journal of World Investment & Trade 585, 619-623.

awards which would create inequalities. The EU agreements could respond to domestic considerations, but this could occur during the ISDS process rather than afterwards.

Chapter 3 then considered ISDS in the context of the International Centre for Settlement of Investment Disputes (ICSID), which is part of the World Bank and also an institution of the UN.[61] Although the ICSID amendments in 2006 showed a lack of inclusiveness in the reform process, some of the amendments strengthen the formal and substantive RoL like the prevention of arbitrariness and transparency. Moreover, Article 54 of the ICSID Convention prevents domestic review of ICSID awards which means that, provided adjudicators in ISDS can reinforce the RoL, Article 54 is suited to the current understanding between the DRoL and an IRoL, enabling the international system to reinforce the RoL internally.[62] Article 54 does not make the domestic system or DRoL redundant. As the international system does not have a single binding court, there could be instances where an ICSID award conflicts with another international award like with *Achmea*.[63] Thus, the domestic system would decide which one to follow.[64]

Articles 49-51 of the ICSID Convention do not offer appellate review but can reinforce formal and substantive elements of the RoL.[65] Article 52 reviews the award but does not reinforce enough substantive elements of the RoL so cannot be considered appellate review.[66] It seems accepted that Article 53 denies appeal,[67] but appellate review could be tacitly allowed provided it operates within the ICSID system. This could involve amending Article 52 to conduct a substantive review and ICSID providing assurance regarding how appellate review is conducted (perhaps under ICSID's arbitration rules). Moreover, it seems that Article 53 cannot be amended or limited, but a controversial view is that this could be achieved through *inter se* modification under Article 41 of the Vienna Convention on Law of Treaties.[68] ICSID has a Chapter dedicated to amendments, and an *inter se* modification to allow appellate review should not interfere with other State's obligations under ICSID or the purpose of ICSID.

The chapter then moved its attention to the selection and appointment of adjudicators. Independence and impartiality can be closely aligned with further RoL elements of transparency, equality, and the

[61] ICSID (1965), op. cit.
[62] Ibid, art 54; James Crawford (2003) op. cit., 8.
[63] *Slovakia v Achmea BV* (Case C-284/16), 6 March 2018; *Magyar Farming v Hungary* (2019) op. cit., [225]-[238]
[64] *United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v Estonia*, ICSID Case No. ARB/14/24, Award of 21 June 2019, [541].
[65] ICSID (1965) op. cit., arts 48-50.
[66] Ibid, art 52.
[67] Ibid, art 53; Jansen Calamita (2017) op. cit.; Christian Tams, An Appealing Option? The Debate about an ICSID Appellate Structure (2006) Essays in Transnational Economic Law No. 57, 10.
[68] Vienna Convention on the Law of Treaties (VCLT), (signed on 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

prevention of arbitrariness.[69] Qualifications and procedures in the selection and appointment of adjudicators that can reinforce the prevention of arbitrariness, enhance transparency, and promote equality would strengthen perceptions of ISDS as a more impartial and independent system of arbitration. The current system of ISDS has limited regulations on who can sit as adjudicators and their selection and appointment, albeit a commitment for adjudicators to be independent and impartial.[70] However, the regulations are not clear on issues that can impact an adjudicators impartiality and independence; for example, conflict of interests that may arise as a result of double-hatting.[71] Although the individuals that took up the position of arbitrator most frequently did not double hat, there are many notable individuals that double hat.[72] This draws into question the independence and impartiality of decision-making in arbitral awards and may undermine efforts to strengthen RoL elements like transparency, equality, and preventing arbitrariness in ISDS.

There are concerns that certain individuals look to benefit from disputes coming to ISDS rather than striving to reinforce the RoL in decision making.[73] The selection and appointment of adjudicators could be influenced by relationships between a number of connected and central individuals that have formed private social clusters due to their repeated appearance in ISDS procedures.[74] Furthermore, and as this chapter has shown, there is a lack of inclusiveness in terms of other individuals effectively entering employment in ISDS such as in the position of arbitrator.[75] This also relates to diversity issues in ISDS as an individual appointed as arbitrator is likely to be an older male from a developed State,[76] and this also applies to individuals taking up counsel and expert witness in ISDS procedures.[77] Furthermore, these individuals commonly have a commercial law background which may restrict their ability to consider public aspects relevant in investor-State disputes.[78] If only a small number of

[69] Tom Bingham (2010), op. cit., ch 3-6; UN SDGs (2015), op. cit., Goal 16; Robert McCorquodale (2016), op. cit., 292; Clair Gammage and Tonia Novitz (eds), Sustainable Trade, Investment, and Finance: Towards Responsibility And Coherent Regulatory Frameworks (Edward Elgar 2019) 8.
[70] ICSID Convention (1965), op. cit., arts 13-14, 57; UNCITRAL Arbitration Rules (2013), art 12; IBA Guidelines on Conflicts of Interest in International Arbitration, Adopted by resolution of the IBA Council on Thursday 23 October 2014.
[71] Ibid; Malcolm Langford, Daniel Behn, and Runar Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 Journal of International Economic Law 301, 322-324; *Ghana v Telekom Malaysia Berhad*, Hague District Court, Challenge No. 13/2004, Petition No. HA/RK 2004.667, 18 October 2004; Challenge 17/2004, Petition No. HA/RK/2004/778, 5 November 2004; 31-32.
[72] Malcolm Langford, Daniel Behn, and Runar Lie (2017), op. cit., 320, 325, 328.
[73] Gus Van Harten (2020), op. cit., 11-13, 133-136, 140-142; James Gathii (2021), op. cit. 8-15.
[74] Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 European Journal of International Law 387, 411, 422-423.
[75] Malcolm Langford, Daniel Behn, and Runar Lie (2017), op. cit., 310.
[76] Sergio Puig (2014), op. cit., 403-405.
[77] Malcolm Langford, Daniel Behn, and Runar Lie (2017), op. cit., 314-319.
[78] Stephan Schill (2011) op, cit., 883; Michael Waibely and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' (January 2017), p8, <http://www.yanhuiwu.com/documents/arbitrator.pdf> accessed 20 August 2022.

individuals with certain expertise and diversity are represented in ISDS, the system may struggle to reinforce an IRoL. Justice and fairness are central principles underpinning an international appellate mechanism, and the selection and appointment of adjudicators is a factor to achieving those objectives.[79] This means an international appellate review should insist that adjudicators have relevant qualifications, require diversity and inclusiveness in the selection and appointment of arbitrators, and impose a ban on double hatting in ISDS.

After applying the RoL analysis to the forms of regulation on ISDS in Chapter 3, the next step was to apply the RoL analysis to investigate appellate review mechanisms in international economic law (IEL) and multilateral instruments.

6.4 Chapter 4

Chapter 4 started by considering the proposed Multilateral Agreement on Investment (MAI).[80] The background of the Organisation for Economic Co-operation and Development (OECD) showed that there were great disparities between developed and developing States in developing IIL and diverging views on the merits for a multilateral agreement on investment. In this chapter, it was shown that the OECD seriously lacked inclusiveness for non-European and non-north American and developing States, which limited the capacity of the MAI to create a multilateral and unified system of IIL. The international exposure of closed negotiations that lacked transparency created a public backlash. This meant opportunities to revise the MAI draft could not be addressed, although there were signs of RoL elements like environmental considerations, sustainability, State sovereignty, and human rights, starting to come through within the MAI albeit outside of the agreed text.

Investor protection definitions were similar to those which this thesis briefly identified in Chapter 3.2.2, but the MAI placed considerable emphasis on investor rights and lacked CSR provisions and the State's right to regulate for legitimate public policy objectives. The leaked MAI draft came when ISDS was seen to be strongly favouring investor rights and attuned to a very formal IRoL over more substantive State public policy considerations arising within the DRoL. Tensions between OECD States arising due to other international developments, the lack of inclusivity for non-OECD States especially capital importing States, and NGO pressure, meant the MAI negotiations could not continue. If IIL was to be reformed in the future, it was clear that said reforms must be inclusive, transparent, and consider aspects like CSR, human rights, environmental considerations, local communities, and sustainable development.

[79] Noemi Gal-Or, 'The Concept of Appeal in International Dispute Settlement' (2008) 19(1) The European Journal of International Law 43,, 60, 62-63.
[80] The Multilateral Agreement on Investment, (Draft Consolidated Text, 22 April 1998).

Chapter 4 then considered models of appellate review operating outside IIL but within IEL. With a focus on the World Trade Organisation (WTO), this chapter illustrated the difficulty of balancing conflicts between State compliance and State sovereignty.[81] WTO rules and reports are binding on States so the system can achieve justice across State borders reflecting an IRoL, but they may be interpreted slightly differently to accommodate justice within State borders to reflect the DRoL. Furthermore, the ongoing crisis facing the WTO's dispute settlement mechanism has meant that the ability of the WTO's two-tier dispute system to reinforce an IRoL remains limited.

In response to the AB absence and as a temporary measure, some WTO States created an interim appeal measure known as the multi-party interim appeal arbitration arrangement (MPIA) to prevent disputes getting 'stuck' in the system. The MPIA operates *mutatis mutandis* to the WTO and DSU, and it is hoped that this arrangement could resolve some of the problems associated with reports being appealed into the legal void.[82] The MPIA is not a universal remedy, but this should not be much of a concern if the AB becomes operational again soon. The MPIA provides an example of a temporary mechanism that could work around problems in unified appellate review mechanisms and a solution in response to any uncooperative States.

Moving beyond multilateral frameworks, Chapter 4 then examined three dispute settlement mechanisms in IEL operating at the regional levels. Three free trade agreements (FTAs) were chosen to provide insights into the different models for appellate review that have been implemented to date, or that may be envisioned in the future, in contemporary trade agreements. The first regional agreement to be examined was the Comprehensive Economic and Trade Agreement (CETA), negotiated between the EU and Canada. In Chapter 4, it was argued that the preamble of CETA could reinforce the RoL.[83] CETA recognises investor protections akin to those that were found in the MAI but also acknowledges a contemporary approach that considers more substantive RoL aspects for investors and States that can be linked to more sustainable investment. CETA's dispute settlement procedures and rules seem to have built upon provisions in the MAI, ICSID 2006 amendments, and UNCITRAL Transparency Rules. CETA recognises potential substantive inequalities on costs in dispute settlement, and that adjudicators holding both public law and commercial law expertise can help balance investor and State interests.

[81] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization (1994) 1867 UNTS 154, 33 ILM 1144.
[82] 'Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (27 March 2020), 1 <https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158685.pdf> accessed 24 June 2020.
[83] Comprehensive Economic and Trade Agreement Between Canada and the European Union, (CETA) (Signed on 30 October 2016, Provisionally Effective 21 September 2017).

The tribunal is constituted from each treaty party picking an arbitrator and agreeing upon another, which is like the current criticised party ad hoc treaty arbitration with the exception that the investor's host State picks a selection of arbitrators to be members of the tribunal that hear disputes rather than its investor. However, the adjudicators have fixed-terms and have arbitrator ethics and codes of conduct to follow which may improve independence and impartiality. However, CETA only applies to the two parties, which limits both the adjudicators that will be selected members and its international reach to achieve justice across borders. Furthermore, CETA's dispute settlement for investment disputes might only be envisioned to be temporary until the creation of a multilateral two-tier system which could occur at WGIII. The appellate body established by CETA appears to reinforce the substantive RoL, since it includes the power to correct errors of law and manifest errors of fact, and can reinforce the formal RoL, since it includes the provisions under ICSID Article 52. It seems an appellate body award is final and binding, but a first-tier award could be challenged by the appellate body, under ICSID Article 52 and the NYC Article V.

Another interesting regional dispute settlement framework is found in the EU-Vietnam FTA, which was discussed in Chapter 4. In this case, the preamble of the EU-Vietnam Investment Protection Agreement (EU-Vietnam) does not seem to reinforce the RoL as much as in CETA, since reference to State sovereignty, public policy objectives, and CSR are absent.[84] However, State sovereignty and public policy objectives like environmental considerations and human rights are included in the main text which could in practice limit investor protections to a greater extent than CETA. EU-Vietnam provisions could therefore be used to reinforce the substantive RoL. EU-Vietnam has similar dispute resolution rules and procedures to CETA but recognises disparities in wealth between the two parties by giving Vietnam more protection against investors than the EU and limiting the cost of ISDS, i.e employing less adjudicator members. Its award cannot be set aside or annulled under ICSID or NYC as would be possible under CETA, which means the EU-Vietnam dispute settlement process could be less likely to be undermined. The appellate body otherwise has similar rules and procedures to that of CETA.

The third FTA to be examined was the mega-regional agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The preamble to CPTPP does not reinforce the RoL as much as CETA.[85] However, the CPTPP, unlike CETA and EU-Vietnam, includes a CSR provision in its investment chapter, but may not go as far as enforcing State public policy objectives over investor

[84] Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam (EU-Vietnam), Investment Protection Agreement (published 24 September 2018) (EU-Vietnam) (Signed 30 June 2019).
[85] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (Signed on 8 March 2018, Effective on 30 December 2018).

protections. The enforcement of awards like CETA can be subject to ICSID and NYC. CPTPP does not have an appellate body, even though Canada and Vietnam agreed to such a body with the EU, but there is an opportunity to create one. Other interesting differences, when compared with the EU agreements, are that Canada in United States–Mexico–Canada Agreement (USMCA) has tried to exclude ISDS entirely, and Vietnam in the CPTPP is less focused on consultation before ISDS.[86] There are no fixed-termed adjudicator members in the CPTPP which could raise problems of independence and impartiality. However, asking States like Vietnam to fund numerous courts is not sustainable and instead the focus should be on one multilateral two-tier ISDS that can resolve fragmentation and complexity. This could be achieved at UNCITRAL WGIII.

After applying the RoL analysis to different IIL governance regimes in Chapter 3 and appellate review mechanisms in international economic law and multilateral instruments in Chapter 4, the next step was to apply the RoL analysis to investigate reform possibilities that are currently being considered and developed at UNCITRAL WGIII.

6.5 Chapter 5

The concerns identified by WGIII relate to the arguments made within the thesis regarding RoL aspects of ISDS that should be remedied.[87] Some of these concerns relate to the cost and time of ISDS,[88] the selection and appointment and independence and impartiality of adjudicators,[89] and the consistency and correctness of ISDS awards.[90] These concerns are interconnected.[91] In Chapter 5, it was argued

[86] United States–Mexico–Canada Agreement (USMCA) (Signed 30 November 2018, Revised Version Signed 10 December 2019, Effective 1 July 2020).

[87] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), United Nations Commission on International Trade Law, Fifty-second session, Vienna, 8–26 July 2019, [135] [138], <https://undocs.org/en/A/CN.9/964> accessed 11 November 2020.

[88] Possible reform of investor-State dispute settlement (ISDS): Cost and duration, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session Vienna, 29 October–2 November 2018, <https://undocs.org/en/A/CN.9/WG.III/WP.153> accessed 16 March 2020.

[89] Possible reform of investor-State dispute settlement (ISDS): Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session Vienna, 29 October–2 November 2018, <https://undocs.org/en/A/CN.9/WG.III/WP.151> accessed 16 March 2020; Possible reform of investor-State dispute settlement (ISDS): Arbitrators and decision makers: appointment mechanisms and related issues: Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-sixth session Vienna, 29 October–2 November 2018, <https://undocs.org/en/A/CN.9/WG.III/WP.152> accessed 16 March 2020.

[90] Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session, Vienna, 29 October–2 November 2018, <https://undocs.org/en/A/CN.9/WG.III/WP.150> accessed 16 March 2020.

[91] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, United Nations Commission on International Trade Law Working Group III (Investor-State

that there needs to be an appropriate balance between legal correctness and consistency to reinforce the RoL.[92] For ISDS awards to find this balance and to reinforce the RoL, attention should be drawn to the dispute procedure so it can provide access to justice and achieve justice, and also to the adjudicators. In other words, both procedural and substantive aspects of ISDS require reform. As outlined by leading scholars in the field, adjudicators should have credentials like: relevant qualifications, no conflict of interests (i.e double hatting, multiple appointments, inappropriate contact between arbitrators and disputing parties etc..), diversity to reflect the international system, transparency, integrity, and should aim to arbitrate in the public interest.[93] This links to independence and impartiality and appropriate selection and appointment mechanisms. Adherence to transparency, a substantive element of the RoL, could help to resolve these concerns and encourage sustainable investment pursuant to the SDGs.

Moreover, WGIII has suggested that appellate review, possibly in a multilateral court, is a viable reform proposal that could remedy those concerns and is one worthy of further interrogation. This proposal could enhance not only the procedural elements of ISDS but also substantive elements like correctness and consistency of awards, which could make ISDS more fair and just and also enhance its legitimacy. There were other issues that had been identified by WGIII which relate to arguments forwarded within the thesis which so far may not have received the same amount of attention such

Dispute Settlement Reform), Thirty-seventh session, New York, 1–5 April 2019, p 10, <https://undocs.org/A/CN.9/WG.III/WP.159/Add.1> accessed 18 November 2020.

[92] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018), United Nations Commission on International Trade Law, Fifty-first session, New York, 25 June–13 July 2018, [7], <https://undocs.org/A/CN.9/935> accessed 11 November 2020.

[93] Chiara Giorgetti, Steven Ratner, Jeffrey Dunoff, Shotaro Hamamoto, Luke Nottage, Stephan Schill, Michael Waibel, 'Independence and Impartiality in Investment Dispute Settlement: Assessing Challenges and Reform Options', (Academic Forum on ISDS Concept Paper 2020/1, 21 January 2020), 2, 12-23, <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/6-independence.pdf> accessed 27 January 2021; Anna De Luca, Mark Feldman, Martins Paparinskis, and Catharine Titi, 'Responding to Incorrect ISDS Decision-Making: Policy Options', Academic Forum on ISDS Concept Paper 2020/1, 21 January 2020, 27-28, <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/4-responding.pdf> accessed 16 December 2020; Andrea Bjorklund, Daniel Behn, Susan Franck, Chiara Giorgetti, Won Kidane, Arnaud de Nanteuil and Emilia Onyema, 'The Diversity Deficit in International Investment Arbitration', (Academic Forum on ISDS Concept Paper 2020/1, 21 January 2020), 21-22, <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/5-diversity.pdf> accessed 24 January 2021; Chiara Giorgetti and Mohammed Wahab, 'A Code of Conduct for Arbitrators and Judges', (Academic Forum on ISDS Concept Paper 2019/12, 13 October 2019), [18], <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/giorgetti-wahab-code-of-conduct-af-isds-paper-8-final--14-oct-2019-1.pdf> accessed 28 January 2021; Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti, 'The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement', Academic Forum on ISDS Concept Paper 2019/12, 13 October 2019, 1, 26 <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/langford-behn-malaguti-models-trade-offs-isds-af-isds-paper-12-draft-14-october-2019.pdf> accessed 3 February 2021.

as CSR, State sovereignty, human rights, environment considerations, sustainability, and local community access.[94]

Furthermore, WGIII has submitted that appellate review should contain wider standards of review than those under NYC Article V and ICSID Article 52 like review of law and fact, but at the same time the process cannot be costly or used as a delay tactic to enforcement. In this regard, appellate review should be able to reinforce the substantive RoL but should not impede access to justice. If the appellate review mechanism ensures legal correctness and consistency then limited issues will be discussed before it, which in turn will reduce cost and time associated with ISDS. In my opinion, the appellate review mechanism should deal with standards under NYC and ICSID to prevent domestic and international systems delegitimising appellate review awards. WGIII argued appellate review should include merits, and procedural and jurisdiction issues, and that the appellate tribunal should be able to affirm, reverse or modify the decision of the first-tier tribunal. This should give the appellate review mechanism the substantive powers to reinforce the substantive RoL.

Although WGIII has been unsure on the cost and time of appeal or a two-tier system, in my view, funding of an appellate mechanism or a two-tier system should take into consideration both formal and substantive equality. This is key to the emergence of a more equitable and just system of IIL and ISDS. Moreover, appellate review in a two-tier system could clarify the current law which means disputes could be avoided and be quicker to resolve. If adjudicators were to be full-time with fixed-term appointments, there would not be money and time spent by the parties picking arbitrators and there would be fewer grounds to challenge their appointment. Adjudicators in the two-tier system need expertise in international public law and international commercial law to appreciate the balance of the competing State and investor interests, while to enforce an IRoL there should be adjudicators that represent international society or possess extensive knowledge of international law. Party autonomy allows adjudicators to be picked best suited for a case, but this selection and appointment method has problems like independence and impartiality. There were options for a roster and full-time adjudicators; arguably, full-time adjudicators is the better option since it is easier to manage towards resolving current ISDS problems such as addressing diversity, qualifications, independence, and impartiality.

While the EU strongly advocates for an MIC to address the current problems in ISDS, it proposes that such mechanism is flexible to attract State membership.[95] WGIII has attracted the participation of

[94] James Gathii (2021) op cit., 1-5.

[95] Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, United Nations Commission on International Trade Law Working Group III (Investor-State

States from differing geographics and development levels, and organisations from all over the world, which means it has established an inclusive forum. But there have been criticisms that stakeholder sessions are far from State-led sessions, the academic forum might represent members of the ISDS industry, and that potential users of the system (investors) need more involvement in discussions.[96] Like the MAI there have been concerns raised by NGOs,[97] but this thesis comprehensively addressed these concerns either countering them or claiming they can be resolved subject to certain amendments in ISDS.

The discussion of a multilateral instrument at WGIII offers promise with the Mauritius Convention and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) acting as templates to achieve multilateral and unified reform in IIL and ISDS.[98] Although these instruments are slightly different, they have both helped respond to challenges in the international system. The templates offer a flexible method that can respond to the diversities between States and could enhance acceptance to multilateral reform. Yet there needs to be caution between opt-in and core provisions. This is because there needs to be a balance between flexibility and inclusiveness, and legitimacy and certainty, which could all link to the accessibility of the multilateral instrument. WGIII is an appropriate forum to deliberate concerns such as the jurisdiction and application of the multilateral instrument.

The reiteration of the claim that there is a need for the creation of an enforceable appellate review mechanism at WGIII in February 2021 is promising.[99] WGIII reiterated that there should be appellate review to include scope for fact and law and that claims could include merits and procedural matters. WGIII again considered the NYC and ICSID as enforcement mechanisms for appellate review awards,

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Dispute Settlement Reform), Thirty-seventh session, New York, 1–5 April 2019, <https://undocs.org/A/CN.9/WG.III/WP.159/Add.1> accessed 18 November 2020.

[96] Submission by the European Federation for Investment Law and Arbitration (EFILA) to the UNCITRAL Working Group No III on ISDS Reforms, Brussels 15 July 2019, Ensuring Equitable Access to all Stakeholders: Critical Suggestion for the MIC, [1], <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_efila.pdf> accessed 24 November 2020; James Thuo Gathii (2021) op cit., 6-8, 20-21; Gus Van Harten (2020) op cit., 139-142.

[97] Recommendations for UNCITRAL ISDS Discussions, Public Citizen, 15 July 2019, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_publiccitizen.pdf> accessed 24 November 2020.

[98] Possible reform of investor-State dispute settlement (ISDS): Multilateral instrument on ISDS reform, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-ninth session, New York, 30 March–3 April 2020, <https://undocs.org/en/A/CN.9/WG.III/WP.194> accessed 1 March 2021.

[99] Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism and enforcement issues, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Fortieth session, Vienna, Online, 8–12 February 2021, <http://undocs.org/en/A/CN.9/WG.III/WP.202> accessed 19 February 2021.

but I remain less optimistic on the efficiency of those options due to the NYC including domestic review of international awards and ICSID excluding appealable awards outside the ICSID system.

As a result of continued discussion, the secretariat has constructed a draft for appellate review and its enforcement.[100] This draft outlined the potential for appeal, which would allow a wider scope for claims of error of law than that of error of fact. But the draft also acknowledged the link between law and fact and was open to the possibility of hearing appeals not covered within that scope. This scope for appellate review should reinforce both the formal and substantive RoL. Furthermore, in my view, the appellate mechanism should operate under its own distinctive norms and provisions, rather than relying on reference to other instruments like ICSID or NYC, so as to further RoL elements of precision, certainty, and accessibility. Moreover, the draft indicated that the appellate body could confirm, modify, or reverse findings of the first-tier award to have the authority to issue awards that reinforces the RoL, and would precisely explain its conclusion. This supports transparency and helps prevent arbitrariness.

On issues relevant to ISDS under a multilateral instrument, in my view, a balance should be sought between the interests of State parties to the instrument and the respondent State of an appellate case, so as to avoid the system becoming politicised and lacking legitimacy. This could be further avoided by preventing States under a multilateral instrument from opting-in to the appellate review whilst not opting-in to the legally binding nature of the award. Moreover, the adjudicators under this instrument must be capable of reinforcing the RoL as reform of ISDS must address RoL concerns.

WGIII has discussed a draft code of conduct,[101] and the selection and appointment of adjudicators.[102] The draft code of conduct envisioned that the adjudicators would uphold RoL elements of independence and impartiality and be accountable if they failed to pursue these aims, like failing to avoid or disclose conflict of interests. There must be a balance between independence and accountability in the selection and appointment of arbitrators as too much accountability may politicise ISDS and too much independence may mean ISDS acts contrary to the interests of the international community. There were other discussions in WGIII which remained uncertain like on the issue of terms of appointment. If there are renewable terms, adjudicators may issue awards that could

[100] Ibid, [59]-[61].
[101] Possible reform of investor-State dispute settlement (ISDS), Draft code of conduct, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Fortieth session, Vienna, Online, 8–12 February 2021, <http://undocs.org/en/A/CN.9/WG.III/WP.201> accessed 5 March 2021.
[102] Possible reform of investor-State dispute settlement (ISDS), Selection and appointment of ISDS tribunal members, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Fortieth session, Vienna, Online, 8–12 February 2021, <http://undocs.org/en/A/CN.9/WG.III/WP.203> accessed 5 March 2021.

get them re-elected rather than reinforcing the RoL, but if terms were non-renewable then valuable experience of reinforcing the RoL in ISDS is lost, and it was undecided whether the adjudicator screening process should include just State participation or also non-State actor involvement to enhance its legitimacy.

Diversity such as through gender and geographic representation in the selection and appointment of adjudicators, while maintaining requirements for relevant experience, is another concern that must be resolved to reinforce the RoL through the procedural decision-making process. Similarly to the appellate review mechanism, the draft code of conduct and the selection and appointment of adjudicators draft could eventually come under the multilateral instrument, and further improvements could be made with the draft detailing conduct and procedure at each stage of the ISDS process and specifying the roles and responsibilities for each type of actor in ISDS.

6.6 Final Statement

The main findings of this thesis are that ISDS currently fails to adequately reinforce the RoL. It is suggested that an appellate review mechanism is preferable within a unified and multilateral two-tier system, containing adjudicators that can assist ISDS to be more compliant with the RoL. These proposals must adhere to transparency, equality, and the prevention of arbitrariness, to increase the likelihood of reinforcing the RoL. However, this also depends upon the ability to balance RoL elements. This issue of balance arises between investor property rights in the international setting and the State's right to regulate for legitimate public policy objectives in the domestic setting; but also between formal and substantive equality; correctness, consistency and access to justice; and independence and accountability of adjudicators.

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