The Multilateral Investment Court System as a Credible Alternative to Investor-State Dispute Settlement

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Table of Abbreviations

AISCC	Arbitration Institute of the Stockholm Chamber of Commerce
BIT	Bilateral Investment Treaty
CEPA	Comprehensive Economic Partnership Agreements
CETA	EU-Canada Comprehensive Economic and Trade Agreement
CIEL	Centre for International Environmental Law
CJEU	Court of Justice of the European Union
COMESA	Investment Agreement for the Common Investment Area of the Common Market for Eastern and Southern Africa
CPR	Centre for Public Resources
DGHRCU	Directorate General of Human Rights of the Council of Europe
DPSNR	Declaration on Permanent Sovereignty over Natural Resources
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
FDI	Foreign Direct Investment
FIMTDS	Foreign Investment Multi-Track Dispute Settlement System
FTA	Free Trade Agreement
FTC	Free Trade Commission
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IACHR	Inter-American Court of Human Rights
IBRD	International Bank for Reconstruction and Development

ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICJ	International Court of Justice
ICS	Investment Court System
ICSID	International Centre for the Settlement of Investment Disputes
IEO	International Economic Order
IIL	International Investment Law
ILC	International Law Commission
IMF	International Monetary Fund
IMST	International Minimum Standards of Treatment
ISDS	Investor-State Dispute Settlement
ITLOS	International Tribunal for the Law of the Sea
ITO	International Trade Organisation
MAI	Multilateral Agreement on Investment
MIA	Multilateral Investment Agreement
MIC	Multilateral Investment Court
MIDSI	Multilateral Institution for Dispute Settlement on Investment
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
TRIMS	Agreement on Trade Related Measures

TRIPS	Agreement on Trade Related Aspects of Intellectual Property
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
US/ USA	United States/ United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

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Abstract

International investment arbitration (also known as investor-state dispute settlement or ISDS) is the primary means of resolving investment disputes. ISDS was initially hailed as a success. However, it is currently experiencing a significant backlash. In recent years, the effectiveness of ISDS has increasingly been questioned. In light of this, many scholars have suggested that reform is necessary. Various proposals have been put forward, however, no consensus about the exact nature of reform has emerged.

The thesis will analyse the defects of ISDS in order to examine whether its retention is desirable, or whether complete replacement is necessary. The author will suggest that the time for making minor changes to ISDS has passed, therefore, alternative mechanisms should be considered. This thesis focuses on analysing the EU's proposal to establish a Multilateral Investment Court (MIC), assessing whether it can address the fundamental deficiencies of ISDS. It will strive to determine whether the MIC is the most appropriate mechanism for resolving foreign investment disputes. Ultimately, the work will demonstrate that the conclusion of a multilateral investment agreement (MIA) is the bedrock for establishing a MIC. Short of reforming the substantive foreign investment rules, any iteration of the MIC would fail to enhance legitimacy, efficiency, and transparency in investment dispute resolution. That said, the thesis acknowledges that the conclusion of a MIA (and the establishment of a MIC based on the MIA) may not be politically feasible at present. Further, given the decentralised framework of international investment law, it is not reasonable to introduce a single mechanism for the resolution of all foreign investment disputes. It is within the context that this thesis contends that the establishment of a foreign investment multi-track dispute settlement system, under which the disputing parties can freely select their most preferred means among all the available mechanisms is desirable (at least in the short term).

Declaration

No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

Copyright Statement

Dedication

I didn't win light in a windfall,

nor by deed of a father's will.

I hewed my light from granite.

I quarried my heart.

In the mine of my heart a spark hides –

not large, but wholly my own.

Neither hired, nor borrowed, nor stolen –

my very own.

(H. Nahman Bialik)

I would dedicate this thesis to my mother, who has always believed in me. I was not able to complete this thesis without her support, sacrifice, and inspiration.

I also wish to dedicate this thesis to my sister and her family, who unconditionally supported me during my life as well as my time as a PhD student. Without their love and support, none of these could have happened.

Finally, I am willing to dedicate this thesis to my brother. He has always been my number one role model and encouraged me in any way possible.

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Chapter I: Introduction

1.1 Research Background

The arising of disputes in the course of foreign investment is not a rare phenomenon, but the precise mechanism utilised for their resolution has been an important matter of concern for the foreign investor and the investment host state.[1] Indeed, dispute resolution has arguably been one of the main drivers for the development of the law of foreign investment. The law of foreign investment regulates the activities of foreign investors in investment host countries and establishes the applicable dispute settlement system.[2] International investment law (IIL) is one of the oldest divisions of public international law. Nevertheless, it remained one of its underdeveloped areas for decades. However, we have witnessed a rapid expansion in this field most recently, making it one of the fastest-growing areas of international law today.[3]

There has been a significant rise in foreign direct investment (FDI) worldwide in the past few decades. The relevant statistics confirm this rapid growth. The global FDI in the early 1980s amounted to around $50 billion per year, but in 2022,[4] the figure had risen to a staggering $1286 billion.[5] FDI is one of the vital aspects of the international political economy,[6] and it has created intense competition between states (particularly the developing states) to attract more FDI. As a result, the core focus has been on attracting more FDI in various ways. The well-

[1] P. D. Ehrenhaft, "Effective International Commercial Arbitration" (1977), *Law and Policy International Business*, Vol.9, 1191.
[2] S. Subedi, *International Investment Law: Reconciling Policy and Principle* (4th edition, Bloomsbury, 2020) 6-7.
[3] *Ibid*.
[4] Organisation for Economic Co-operation and Development [hereinafter OECD], "FDI in Figures" (2023), available at: < https://www.oecd.org/investment/investmentnews.htm,> accessed 23 May 2023.
[5] *Ibid*.
[6] J. Paul and M. Feliciano-Cesterob, "Five Decades of Research on Foreign Direct Investment by MNEs: An Overview and Research Agenda" (2021), *Elsevier Journal of Business Research*, Vol. 123; R. Paprzycki and K. Fukao, "The Extent and History of Foreign Direct Investment in Japan" (2005), *Hitotsubashi University Research Unit,* available at: < https://www.researchgate.net/publication/228319160_The_Extent_and_History_of_Foreign_Direct_Investment_in_Japan, > accessed 23 May 2023.

known methods of facilitating foreign investment are: liberalizing an economic sector, offering tax incentives,[7] improving the regulatory environment, and entering into foreign international agreements that provide a mechanism for resolving disputes.[8] Amongst all the methods, establishing a dispute settlement mechanism is arguably the most important.[9] With the expansion of the global economy and corresponding increase in FDI, we have seen a significant rise in the number of foreign investment-related disputes. In the early 1980s, fewer than 5 cases were recorded per year. However, in 2022, more than 40 cases were logged.[10] As a result, foreign investors became more concerned about the means that resolve disputes accurately, fairly and without excessive delay. This highlights the necessity of protecting the interest of foreign investors and providing assurance that there is an effective dispute settlement mechanism for the resolution of disputes which might arise in the course of their investment.

Previously, private investors had no right to bring a claim against a state through an independent dispute settlement mechanism governed by a third party. Therefore, in the case of disagreements, foreign investors had two courses of action; referring a dispute to the national courts of the host state and diplomatic protection.[11] Investment host states suppose that referring disputes to their domestic judiciaries is advantageous as a given dispute could be resolved quickly with less cost.[12] On the other hand, foreign investors believe that such a mechanism is ineffective and unreliable.[13] Their typical concern has been these domestic judicial systems are generally less developed and corrupted.[14]

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[7] World Bank, "World Development Report 2005 : A Better Investment Climate for Everyone" (2004), available at: < http://siteresources.worldbank.org/INTWDR2005/Resources/complete_report.p > accessed 12 May 2023.
[8] Express India, "Effective ADR Mechanism Can Fetch More FDI than China" (2005), available at: < http://expressindia.indianexpress.com/news/fullstory.php?newsid=57809 > accessed 12 May 2023.
[9] *Ibid.*
[10] United Nations Conference on Trade and Development, [hereinafter UNCTAD], "Case Name and Number", available at: < https://investmentpolicy.unctad.org/investment-dispute-settlement > accessed 23 May 2023.
[11] Subedi (n 2) 5-14.
[12] *Ibid*.
[13] *Ibid*.
[14] R. Dolzer, U. Kriebaum, and C. Schreuer, *Principles of International Investment Law* (3rd edition, Oxford University Press, 2022) 212- 214; C. Schreuer, L. Malintoppi, A. Reinisch, and A. Sinclair, *The ICSID Convention: A Commentary* (2nd edition, Cambridge University Press, 2009) 8.

The other dispute settlement mechanism that was historically utilised is diplomatic protection. Diplomatic protection is a right which can be exercised by the home state of the foreign investor to intervene and invoke the right of its injured citizen and seek a remedy on their behalf.[15] This mechanism is also regarded as ineffective due to the existence of a number of requirements which must be met before a state can exercise such a right (i.e., the nationality of claims).[16]

These two traditional dispute settlement methods fell out of favour over time as they were thought to be unreliable and ineffective. As a result, they were replaced by the more modern dispute resolution mechanism of ISDS. ISDS was provided for in bilateral investment treaties (BITs). BITs are agreements between two states that establish the terms and conditions for investment by nationals of one state in the other.[17]

It has been claimed that the system of ISDS has contributed to promoting peaceful international relations as it enabled the de-politicisation of disputes and created an opportunity for their settlement without recourse to violence or physical conflict.[18] ISDS enables foreign investors to take a case to an independent arbitral tribunal without the need for the involvement or intervention of their home states. Since its emergence, most disputing parties have been utilising such a system for settling their disputes. Although initially, ISDS was thought to be an effective mechanism for resolving foreign investment disputes, over time many academics,

[15] *Ibid*, 211-212.
[16] A. Fagbemi, "A Critical Analysis of the Mechanisms for Settlement of Investment Disputes in International Arbitration" (2017), *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, Vol. 8, No. 1; Dolzer, Kriebaum, and Schreuer (n 14) 211-215.
[17] J. Salacuse and N. Sullivan, "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain" (2005), *Harvard Journal of International Law*, Vol. 46, No. 67; E. Neumayer and L. Spess, "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?" (2005), *Elsevier World Development,* Vol. 33, No.10.
[18] P. Malanczuk, *Akehurst's Modern Introduction to International Law* (9th edition, Routledge, 2022) 265- 277.

legal practitioners, politicians, legal scholars, and media have criticised the effectiveness of this mechanism.[19]

Subsequently, scholars such as Dimsey, Frank, Kreindler and Sornarajah have admitted that ISDS is in crisis.[20] The crisis can be attributed to many different issues. In ISDS, there is no single tribunal that resolves all foreign investment disputes. Instead, each tribunal, ad hoc or institutional, is constituted for settling a single foreign investment dispute.[21] It has resulted in the delivery of several diametrically opposing decisions[22] by various tribunals in cases where the facts are materially similar.[23] Reaching diametrically opposing decisions[24] hampers the development of a single and coherent body of law that is built up through consistent jurisprudence.[25] It has also led to the increasing unpredictability of the dispute settlement system, which contradicts the fundamental rule of law.[26] One aspect of the rule of law[27] is that decisions should be based on sound legal principles, as opposed to arbitrary solutions.[28] Furthermore, it has been claimed that one of the main reasons behind increasing inconsistency

[19] E. Bihari, "International Investment Arbitration in the European Union" (2021), *Legal Studies Journal*, Vol. 101, No.1; C. Moehlecke and R. L. Wellhausen, "Political Risk and International Investment Law" (2022), *Annual Review of Political Science*, Vol. 25; S. Franck, "Development and Outcomes of Investment Treaty Arbitration" (2009), *Harvard International Law Journal*, Vol. 50, No. 2, 435.
[20] M. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration* (Oxford University Press, 2008); R. Kreindler, "Parallel Proceedings: A Practitioner's Perspective" in M. Waibel (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010) 131; M. Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven International Publishing, 2008); M. Potesta, "An Appellate Mechanism for ICSID Awards and Modification of the ICSID Convention Under Article 41 of the VCLT" in E. Shirlow and K. N. Gore (eds.), *The Vienna Convention on the Law of Treaties: in International Arbitration: History, Evolution, and Future* (Kluwer Law International, 2022).
[21] *Ibid*, Sornarajah, 73-90.
[22] *Lauder v. Czech Republic, Final Award, IT 187-91, (2001), UNCITRAL*; *CME Czech Republic B.V. v. The Czech Republic,* (2003), final award, UNCITRAL; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* ICSID Case No. ARB/01/13.
[23] Kreindler (n 20) 131.
[24] *Ibid*, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (n 22).
[25] For discussion of how inconsistent decisions in international investment arbitration have a destabilising effect on the entire framework of the law of foreign investment, see S. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" (2005), *Fordham Law Review,* Vol. 73, No. 4, 1521; B. Liu, "Reform Trend of Investor-State Dispute Settlement in International Investment" (2022), *Asian Journal of Social Science Studies*, Vol. 7, No. 2; C. L. de Second and B. de Montesquieu, *The Spirit of the Law 1748* [translated by T. Nugent 175] (Batoche Books, 2001).
[26] T. Bingham, *The Rule of Law* (Allen Lane Publishing, 2010).
[27] *Ibid*, also see present chapter, 31-33.
[28] *Ibid*.

in case law is the lack of an appeal mechanism.[29] It is crucial to address this issue as the existing inconsistency in the system would lead to uncertainty and damage the legitimate expectations of the states and investors.[30]

On the other end of the spectrum, opposing scholars[31] maintain that the criticisms of inconsistency are not compelling enough. It is because the quest for coherence and consistency is in vain since it is impossible to reach it in this procedure due to the structure and functioning of the foreign investment law.[32] Similarly, it has been asserted that the issue of inconsistency in ISDS has been grossly exaggerated, and it is indeed an inevitable part of every dispute settlement process.[33] Another similar allegation is that the problem of inconsistency would be tackled over time when one judicial solution is labelled as the most favoured over others.[34]

Due to the rising concerns about the effectiveness of ISDS, several proposals have been put forward to improve the dispute settlement system. These proposals can be divided into two main groups. The first group focuses on retaining ISDS, but suggests various changes should be implemented within the system, such as creating an appeal mechanism.[35] On the other hand, the second group insists on replacing ISDS entirely with an alternative method of dispute resolution.[36] One specific suggestion in this regard has been put forward by the EU; the Commission proposes the establishment of a permanent investment court (which it refers to as a multilateral investment court system or MIC). [37]

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[29] Dimsey (n 20) 40-43.
[30] *Ibid*.
[31] J. Paulsson, "Avoiding Unintended Consequences" in K. Sauvant'(eds.), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) 240-253; J. Gill, "Inconsistent Decisions: An Issue to be Addressed or a Fact of Life?" (2005), *Transnational Dispute Management* No.2.
[32] *Ibid*, Paulsson, 240-253.
[33] Gill (n 31).
[34] B. Legum, "Options to Establish an Appellate Mechanism for Investment Disputes" in K Sauvant (eds.), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) 241-265.
[35] See Chapter IV, 121-43.
[36] See Chapter IV, 143-51.
[37] European Council of the European Union, "Multilateral Investment Court: Council Gives Mandate to the Commission to Open Negotiations" (2018), available at: < https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/ > accessed 12 May 2023.

In 2019, the EU initiated talks with its member states to set up a MIC.[38] The EU has set its objective as the proposed MIC would replace ISDS completely. The EU asserts that the new system could address most of the considerable deficiencies associated with ISDS and subsequently increase the efficiency, legitimacy, and transparency of the foreign dispute settlement system. The EU is still in the process of negotiation with its member states. It has not provided any time scale for establishing its proposed MIC.[39]

It is worth mentioning that the EU's MIC proposal is the product of the EU's proposal to establish an Investment Court System (ICS) which was unveiled on 16 September 2015 as a response to the ongoing criticisms of ISDS.[40] Initially, the EU claimed that the ICS would replace all ISDS mechanisms provided in EU agreements, the agreements of the EU Member States with third countries, and trade and investment treaties concluded between non-EU countries with time.[41]

- Contextual Framework: The Rule of Law

In the context of this thesis, the author will refer to the often-used concept of the rule of law and its role in justifying the necessity of reforming the current ISDS system. This section provides a brief explanation of this significant concept in international investment law. That said, it is beyond the scope of this work to analyse it in detail, given that the thesis's focus is on exploring the most efficient mechanism for the settlement of foreign investment disputes.

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[38] European Commission, "Commission Presents Procedural Proposals for the Investment Court System in CETA" (2019), available at: < https://trade.ec.europa.eu/doclib/press/index.cfm?id=2070 > accessed 12 May 2023.
[39] *Ibid*.
[40] The EU, in 2016, successfully concluded several agreements, including the EU-Canada Comprehensive Economic and Trade Agreement (CETA), which contains an ICS, available at, The European Commission, "Commission Proposes New Investment Court System for TTIP and Other EU Trade and investment negotiations" (2015), available at: < http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364 > accessed 12 May 2023.
[41] *Ibid*.

Such a comprehensive analysis of the concept would distract from the focus of this thesis, and there is much extant literature on this rather well-worn topic.[42]

The concept of rule of law can be defined as, "the mechanism, process, institution, practice, or norm that supports the equality of all citizens before the law, secures a nonarbitrary form of government, and more generally prevents the arbitrary use of power."[43] This concept is closely related to constitutionalism and refers to a political situation, rather than any specific legal rule.[44]

The umbrella protection of the rule of law comprises four key areas: equality under the law, transparency of the law, independent judiciary, and accessible legal remedy.[45] The first area clarifies that all individuals, corporates, businesses, and governments are accountable to the law, and the law applies to everyone in the same way.[46] The second area affirms that the law must be precise, clear, affordable, stable, and publicised. It must ensure contract rights, procedural rights, fundamental human rights and property rights.[47] The third focuses on ensuring the equality and fairness of the law between individuals and public officials through the establishment of an independent judiciary. The process by which the law is adopted, administered, adjudicated, and enforced is accessible, fair, and efficient.[48] The fourth area highlights the necessity of having access to just and accurate resolutions in a court of law.

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[42] A. Golanski, "A Structuralist Concept of the Rule of Law" (2021), *British Journal of American Legal Studies*, Vol. 10, No.1.
[43] N. Choi, "Rule of Law, Political Philosophy" (2023), Encyclopaedia Britannica, available at: < https://www.britannica.com/topic/rule-of-law > accessed 12 May 2023.
[44] *Ibid*.
[45] Golanski (n 42).
[46] The Statute of the Council of Europe 1949, paragraph 3 of the preamble. available at: < https://rm.coe.int/1680306052 > accessed 12 May 2023; C. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (University Press of Kansas, 1996) 50-57.
[47] European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions" (2020), Rule of Law Report, The Rule of Law Situation in the European Union, available at: < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0580&from=EN > accessed 10 May 2023; Council of Europe, Statute of the Council of Europe 1949; United Nations General Assembly Resolutions A/RES/61/39, A/RES/62/70, A/RES/63/128.
[47] Resolution of the Council of the International Bar Association (2009); Commentary on the IBA Council Rule of Law Resolution (2005).
[48] *Ibid*.

Justice is delivered appropriately by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the value of the communities they serve.[49]

The rule of law is necessary for developing peaceful, equitable and prosperous societies.[50] Within the context of foreign investment, international investment law has emerged as a mechanism to promote the rule of law that acknowledges the importance of protecting property rights.[51] It is believed that providing adequate protection for foreign investors against measures of a host state is directly related to such a concept.[52] The economist Hayek recommended that under the rule of law, individuals can make sensible investments with some confidence in a successful return on investment. He justified his suggestion by stating that, "Under the Rule of Law, the government is prevented from stultifying individual efforts by ad hoc action. Within the known rules of the game, the individual is free to pursue his personal ends and desires, certain that the powers of evidence show that foreign investment could be discouraged by the weak rule of law (i.e., discretionary regulatory enforcement)."[53] This has been seen in the US case where a rise in discretionary regulatory enforcement caused US firms to abandon international investments.[54]

As illustrated above, the benchmarks of legitimacy, efficiency and transparency represent the rule of law. Within the context of foreign investment law, the available foreign investment dispute settlement mechanisms must correspond with these benchmarks. It means that it must be ensured that they are efficient (i.e., in terms of cost and time), contain

[49] *Ibid*.
[50] T. Drinóczi and A. Bień-Kacała, *Rule of Law, Common Values, and Illiberal Constitutionalism* (Routledge, 2020) Chapter Illiberal Constitutionalism and the European Rule of Law.
[51] A. N. Licht, C. Goldschmidt, and S. H. Schwart, "Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance" (2003), *William Davidson Institute Working Paper No.* 605.
[52] P. Tobias Stoll, "International Investment Law and the Rule of Law" (2018), *Goettingen Journal of International law*, Vol. 9, No 1.
[53] B. Graham and C. Stroup, "Does Anti-bribery Enforcement Deter Foreign Investment?" (2015), *Applied Economics Letters*, Vol. 23, No. 1.
[54] *Ibid*.

accountable, independent, and impartial dispute resolvers who are capable of making just, fair, and accurate decisions, and provide an opportunity for the publication of awards/orders and third-party participation. It creates a basis for this thesis to assess the current system of ISDS and all the proposed reform options, which will be considered later in this thesis, against these benchmarks. In addition, this thesis will take a further step and assess the reform options against the benchmark of feasibility.

1.2 Central Research Question

The thesis seeks to respond to the central research question of whether the EU's proposed MIC system is a credible and desirable option for the settlement of international investment disputes. In order to fully answer this question, a number of secondary questions will undoubtedly arise. The first of these ancillary questions is whether the current system of ISDS provides an adequate and effective means of settling international investment disputes. If the answer to this is negative, then attention must turn to consideration of alternatives. Accordingly, this thesis will examine the most prominent ISDS reform options, such as creating an appeal mechanism. If it is found that reforms to ISDS would not remedy the central problems of the system, this thesis will move on to consider alternative methods of investment dispute resolution (i.e., replacement of ISDS). In addition, this thesis aims to provide an answer to the question of whether the ISDS system and the proposed alternative dispute settlement methods correspond with the benchmarks discussed in the proceeding section.

Various academics have examined the EU's proposal to establish a MIC.[55] Much of the literature has focused on whether it has addressed the defective aspects which are associated

[55] M. Bungenberg and A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (2nd edition, Springer, 2020); W. Weiß, "The Role of Treaty Committees in CETA and Other recent EU Free Trade Agreements" (2019), available at: < https://www.bilaterals.org/IMG/pdf/questions-and-answers_ceta-treaty-commitees.pdf > accessed 12 May 2023; A. Jan van den Berg, "Appeal Mechanism for

with the ISDS system. In other words, their main focus has been on clarifying whether the EU proposal has met its objectives of addressing the issue of inefficiency (i.e., the chilling effect created by ISDS), the crisis of legitimacy (i.e., conforming to the rule of law), and the lack of transparency (i.e., protecting the right of third parties).[56]

A number of academics argue that, by establishing a MIC system, it is possible to achieve a more consistent and predictable case law which would consequently lead to enhancing the legitimacy of the foreign investment regime.[57] It has been claimed that the EU's proposed MIC attempts to address the issue of the crisis of legitimacy associated with ISDS by firstly, preventing the parties from participating in the process of appointment of the dispute resolvers to hear their case, and secondly, by the selection of long and non-renewable terms for appointment of the judiciary as the selection of these terms is claimed to be the best way to ensure impartiality and independence.[58]

Others counter-argue that the EU has not provided sufficient evidence to prove that government-appointed tenured judges in the new system are more competent, independent and impartial comparing the party-appointed arbitrators in ISDS.[59] It has been claimed that the proposed MIC could undermine the ability of independent adjudicative bodies to check arbitrary or abusive governmental behaviour.[60] Since it permits sovereign states to nominate the courts' members with only this limited mandate. This means the court does not have a broad

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ISDS Awards: Interaction with the New York and ICSID Conventions" (2019), *ICSID Review - Foreign Investment Law Journal*, Vol. 34, No 1; J. Zárate, "Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?" (2019), *Boston College Law Review*, Vol. 59, No. 8; Y. Hyoeun, "The EU's Investment Court System and Prospects for a New Multilateral Investment Dispute Settlement System" (2017), *Korea Institute for International Economic Policy*, No.1; J. Lam and G. Ünüvar, "Transparency and Participatory Aspects of Investor-State Dispute Settlement in the EU New Wave Trade Agreements" (2019), *Leiden Journal of International Law*.

[56] W. Koeth, "Can the Investment Court System (ICS) Save TTIP and CETA?" (2016), *European Institute of Public Administration.*

[57] G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007) 181.

[58] C. Brown, "The Path to a Multilateral Investment Court – Keynote to the 4th EFILA Annual Conference 2019" (2020), European Investment Law and Arbitration Review, Vol. 4, No. 1.

[59] *Ibid*.

[60] G. Born, "Court-Packing and Proposals for an EU Multilateral Investment Court" (2021), Kluwer Arbitration Blog, available at: < http://arbitrationblog.kluwerarbitration.com/2021/10/25/court-packing-and-proposals-for-an-eu-multilateral-investment-court/ > accessed 12 May 2023.

jurisdiction over various subject matters, like the U.S. Supreme Court or any other constitutional courts elsewhere.[61] There is a substantial chance for the officials of states to choose the candidates whose views they wish the new court to adopt.[62] This would undermine the efficiency and legitimacy of MIC as a dispute settlement mechanism, and it is contradictory to the rule of law.[63]

Furthermore, opponents of the proposed MIC argue that there is a risk that the system would be re-politicised.[64] They maintain that the new system would introduce a political component which could jeopardise the development achieved in respect of the de-politicisation of the investment disputes process, which has long been considered one of the significant achievements of ISDS.[65]

In addition, they argue that currently, it is unlikely for the EU to be able to establish its proposed MIC due to the political resistance of the majority of member states.[66] They reason that the proposed MIC lacks sufficient global legitimacy since its agenda, objectives, and rules have never been agreed upon globally through formal international means. It must be noted that in order to establish a globally legitimate MIC system which holds the public authority to hear international claims, such a court must be free from all political pressures.[67] It must follow basic democratic principles throughout its establishment. It should include the conduction of comprehensive, transparent, and formal international rounds of discussions to establish an

[61] *Ibid*.
[62] M. Bungenberg, and A. Reinisch, *Draft Statute of the Multilateral Investment Court* (2nd edition, Springer, 2019) 8-14.
[63] Born (n 60).
[64] A. Zwolankiewicz, "Multilateral Investment Court – a Cure for Investor-State Disputes Under Extra-EU International Investment Agreements?" (2021), *Groningen Journal of International Law*, Vol. 9, No.1; R. Permana, "Achieving Multilateral Investment Court through EU-ASEAN Expansion of Bilateral Investment Court: Is It Possible" (2019), *Indonesian Journal of International Law*, Vol. 16, No.4.
[65] Zárate (n 55); J. Benedetti, "The Proposed Investment Court System: Does It Really Solve the Problems" (2019), *Revista Derecho del Estado,* No.42.
[66] *Ibid*, P. Nikolov, "Mass Investment Claims in the ISDS Reform Process: Promoting Procedural Efficiency and Strengthening the Rights of Individuals and Small and Medium-Sized Enterprises" in J. Scheu (eds.), *Creation and Implementation of a Multilateral Investment Court* (Bloomsbury, 2022).
[67] *Ibid*.

agenda.[68] Also, it must provide necessary mechanisms to guarantee that both developing and developed states will have equal rights during the negotiations. It must prevent the developed states from applying pressure to limit the developing states' power to protect their interests. Nonetheless, the EU has previously demonstrated that it utilises specific means to set the world agenda that leaned toward its use of power to obtain a global consensus. It is dubious whether such a trend does exist during the upcoming UNCITRAL negotiation.[69]

Moreover, some suggest that the transparency concerns associated with the ISDS system could be resolved by creating a centralized investment court since its proceedings would be open to the public, and all its decisions would be published.[70] However, it has been argued that despite the significance of enhancing the transparency of the foreign investment dispute settlement system, the EU has failed to provide any clear information about its plan for the enhancement of transparency rules regarding the publication of awards, access to evidence, conduction of public hearing and third-party participation.[71]

Given this extensive debate around the MIC proposal, this study will evaluate the state of ISDS and seek to determine whether ISDS, as it currently stands, provides an adequate and effective means of settling international investment disputes. The work will then examine the EU's proposed MIC system, analysing literature that has been produced on the topic to determine whether the most suitable solution is to replace ISDS with the EU's proposed MIC. Finally, the thesis will put forward the most achievable solution for improving the foreign investment dispute settlement had the outcome of the above examination been negative.

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[68] A. M. Heideman, "Investment Law for Investors: A Case Against Multilateral Investment Courts" (2018), *UC Davis Business Law Journal,* Vol. 19, No.1; A. Von Bogdandy and I. Venzke, *In Whose Name? A Public Theory of International Adjudication* (Oxford University Press, 2014); H. Ning and T. Qi, "Multilateral Investment Court: The Gap Between the EU and China" (2018), *The Chinese Journal of Global Governance*.
[69] Bungenberg and Reinisch (n 62) 8-14.
[70] D. M. Howard, "Creating Consistency through a World Investment Court" (2017), *Fordham International Law journal*, Vol. 41, No. 1.
[71] Bungenberg and Reinisch (n 62) 8-14; Nikolov (n 66).

1.3 Originality and Significance of the Research

- ***Filling the Gap in Literature***

Although it is generally accepted that the current system of ISDS should be reformed or replaced with a new mechanism and several reform proposals have been put forward, none of the existing proposals has gained the necessary credibility among all or majority of foreign investment experts. The lack of consensus among scholars regarding the reform of ISDS has not prevented the author from looking for the most desirable possible solution for two main reasons. First, the total worldwide FDI accounts for trillions of dollars every year.[72] This amount is incomprehensible to most people. Thus, the existence of an efficient dispute settlement system which could resolve disputes arising out of foreign investments is of substantial value. Next, foreign investment disputes usually involve sensitive issues, such as human rights and environmental protection matters.[73] It means that the foreign dispute resolvers, while protecting the interests of disputing parties, should also provide sufficient protection for the interests of third parties, such as human rights activists and NGOs. This work will bring together the main strands of the existing literature in one place, codifying and analysing major reform and replacement proposals in one comprehensive document.

Furthermore, the EU-proposed MIC system is a recent effort of the European Commission (EC) to develop the foreign investment dispute settlement system. The novelty of the proposed system and the fact that the negotiations are still ongoing between the EU and its member states have created an opportunity for the author to analyse it from a different angle that has never

[72] OECD, FDI in Figures (n 4).
[73] K. Gore, K. Duggal, E. Putilin, and C. Baltag, "Emerging Challenges and Opportunities in International Investment Law and Investor-State Disputes: Whither Central Asia?" (2022), *Wolters Kluwer, Forthcoming*; G. Shaw, "The 2022 ICSID Rules: A Leap Toward Greater Transparency in ICSID Arbitration" (2022), *ICSID Review, Foreign Investment Law Journal*.

been observed before by any other investment legal experts. It also enabled the thesis to provide a considerable contribution and advance the existing debates on this subject.

Various scholars[74] have only focused on evaluating the EU's proposed MIC in the abstract. Some literature[75] mainly focused on specific aspects of the MIC proposal, such as the independence of the proposed judges or the effectiveness of the appeal mechanism. Others assessed whether there are any substantial similarities or differences between this system and ISDS.[76] The issue is they have not considered how a MIC could operate in the context of the wider issue of IIL. One of the most significant aspects of the thesis is it does not attempt to draw a distinctive line between the reform of the substantive foreign investment rules and the dispute settlement procedure. In fact, it does not regard them as two separate issues which should be considered separately. Instead, it aims to demonstrate how closely these two are related to the extent that reform of the latter is impossible without reforming the former.

Accordingly, the author attempts to provide a comprehensive and detailed analysis which is distinguishable from other scholarly works. The thesis will begin by discussing the decentralised framework of IIL, then the attention will turn to assessing the alleged fundamental defective aspects of ISDS. The next step for this thesis is to determine whether any of the most prominent reform proposals including the EU's proposed MIC could be labelled as the most appropriate mechanism through which all investment disputes can be

[74] Van Harten (n 57); A. Qureshi, "An Appellate System in International Investment Arbitration?" (2012), *The Oxford Handbook of International Investment law,* No. 1165; Subedi (n 2) 208- 209; H. Mann and K. Moltke, "A Southern Agenda on Investment? Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States" (2005), *International Institute for Sustainable Development*; M. Goldhaber, "Wanted: A World Investment Court" (2004), *Transnational Dispute Management,* No.3; Koeth (n 56).

[75] S. Wilske, G. Sharma, R. Rawal, "The Emperor's New Clothes: Should India Marvel at the EU's New Proposed Investment Court System?" (2017), *Indian Journal Arbitration Law*, Vol. 6; C. Brower and J. Ahmad, "From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court" (2018), *Fordham International Law Journal,* Vol. 41, No. 4, 791.

[76] Koeth (n 56); N. Lavranos, *The ICS and MIC Projects: A Critical Review of the Issues of Arbitrator Selection, Control Mechanisms, and Recognition and Enforcement* (Springer, 2020); L. Caplan, "ISDS Reform and the Proposal for Multilateral Investment Court" (2019), *Berkeley Journal of International Law*, Vol. 37, No. 2.

effectively resolved. The final part of this thesis would bring everything that exists together and goes one step further by suggesting the establishment of a new system: a foreign investment multi-track dispute settlement system.

Another significant aspect of this thesis is it put forward a suggestion that aligns with the current fragmented and decentralised framework of IIL. It does not claim that there is or can be a single effective mechanism for resolving foreign investment disputes. Instead, it suggests that the most acceptable and feasible solution (not the best or ultimate, solution) is establishing a foreign investment multi-track dispute settlement system in the interim until the time has come to create a basis for fundamental reform of IIL. Establishing such a system could address one of the central issues identified in the current literature, namely the lack of consensus between investment experts about the most desirable dispute settlement means.

The present author reasons that it is not feasible to convince all states, investment players, legal experts, and scholars that there should be only one mechanism for dispute resolution. It claims that instead of creating competition between different proposed models, which could potentially increase inconsistency within the dispute settlement system, a bridge must be created between the available mechanisms. This would increase the degree of reliability of the system as the disputing parties can freely choose their preferred method of dispute resolution among all the available mechanisms. Enabling the parties to decide would increase the chance of accepting and following the rendered decision.

- ***Practical Value***

In addition to filling a gap in existing literature by making a significant and original contribution to the ongoing debate, the findings and conclusions of the thesis would have substantial practical value for the EU or any other international organisation whose core concern is reforming the ISDS system. Moreover, this research can serve as a springboard for

future discussions about the practicalities and efficiency of establishing a MIC system. In addition, it assists the EU by determining the defective aspects of its proposal, which should be reviewed and improved. Furthermore, it would shed some light on the obstacles and challenges that the EU could face. Finally, this thesis, for the first time, examines the intricacies of the foreign investment multi-track dispute settlement system which could be regarded as a stepping stone to more foundational reform.

1.4 Methodology

This thesis utilises the doctrinal method. The doctrinal method has been selected, as it is, in the present author's view, the most appropriate method of answering the research question(s) set out above.[77] The term doctrine comes from Latin, which means, "to instruct, read, or understand."[78] The doctrinal method investigates what the rule is on a specific subject. It examines the legal theory and how it has been formed and implemented. The present author believes that it is the most appropriate method for addressing the research questions set out in the thesis. Its utilisation provides an opportunity for researchers to categorise, rectify and clarify the relevant law by referring to authoritative texts which comprise significant sources.[79] Accordingly, the author conducts this research by consulting various sources, including primary sources: treaties, legislation, cases, and secondary sources: books, articles, reports, websites, news, online journals, and discussion papers.

In respect of using the primary sources, the author studies laws, regulations and cases in foreign investment and other fields of international law. The author would not focus merely on

[77] B. A. Garner, *Black's Law Dictionary* (9th edition, Thomson West, 2009).
[78] P. Ishwara Bhat, *Ideas and Methods of Legal Research* (Oxford University Press, 2020) Chapter 5.
[79] W. Hong Chui, *Research Methods for Law* (Edinburgh University Press, 2007) 4.

spelling out the relevant law and cases but, more importantly, providing critical analysis.[80] Regarding the secondary sources, the author conducts extensive legal research to analyse and subsequently address the most recent and essential literature on the state of IIL, the general dispute settlement system, the system of ISDS, the most prominent reform proposals and the EU's proposal for establishing a MIC. The author would deliberate the findings and interpretations of the topic following analysing the literature.

Furthermore, this thesis will study the similarities and differences between the rules and procedures under other divisions of international law such as trade law, law of the sea and competition law. It provides the author with valuable information about the possibility and desirability of adopting similar structures and frameworks in foreign investment regimes. In addition, such a study creates an opportunity for the author to examine broader levels of abstraction through its investigation[81] and expand the discussions outside the foreign investment regime. The thesis considers the effectiveness of other international dispute settlement systems in other international law divisions, such as European law, human rights law, international law of the sea, international trade law, and international competition law. It seeks to find the leading factors behind the successful performances of these dispute settlement systems and subsequently examine whether any of their features are transferable to the thesis's suggested foreign investment multi-track dispute settlement system.

The thesis will specifically conduct case studies to examine the dispute settlement systems available under the international law of the sea and international competition law. The main reason for choosing these specific divisions is they previously established similar multi-track

[80] T. Hutchinson, "Doctrinal Research, Researching the Jury" in D. Watkins and M. Burton (eds), *Research Methods in Law* (Routledge, 2013) 13.
[81] J. C. Reitz, "How to Do Comparative Law" (1998), *The American Journal of Comparative Law*, Vol. 46, No. 4.

systems that have been praised for effectively resolving the relevant disputes. The thesis thoroughly considers their frameworks to assess the possible degree of success of its suggested multi-track system and to determine whether it could follow any of these systems' significant aspects. Such a study would create a ground for this thesis to justify its proposal of establishing a multi-track system. The thesis would not have been able to defend its propositions if it had not demonstrated the successful performance of similar dispute settlement systems previously established in other regimes.

1.5 Structure of the Thesis

In order to answer the central and secondary research questions, the thesis is divided into seven chapters. The present chapter has provided an introduction to the work, providing background information, the literature review, introducing the research questions, setting out the originality and significance of the work, detailing the selected methodology and presenting the structure of the thesis. The second chapter will discuss the origins and current status of IIL. The aim of the second chapter is to assess how the applicable substantive law and the fragmented and decentralized character of IIL affects the foreign investment dispute settlement system. This chapter examines the reasons why the traditional dispute settlement methods (namely, referring a dispute to the national courts of the host state and diplomatic protection) fell out of favour. Finally, it analyses a number of international dispute settlement mechanisms (including consultation, negotiation, mediation, and international commission of inquiry) to determine their suitability for the resolution of foreign investment disputes.

Chapter three examines the effectiveness of the current system of ISDS system. It considers the factors behind the backlash to this system in recent years. It assesses the fundamental deficiencies which are associated with this mechanism. The discussions provided

in this chapter create a basis for the following chapters. It is because chapters four, five and six focus on addressing the ISDS's fundamental deficiencies.

Chapter four examines the most prominent proposals for reform of ISDS. It analyses two groups of reform proposals. The first group consists of suggestions which support the idea of retaining ISDS as the primary method of dispute resolution by making some changes. Among these proposals, this chapter exclusively assesses creating an appeal mechanism within ISDS since it assists the author in utilising the relevant findings while analysing the effectiveness of establishing an appellate body within the EU's proposed MIC in chapter five. The second group focuses on replacing ISDS with an alternative method of dispute settlement, such as state-to-state arbitration. This chapter demonstrates that the proposals from both groups have not been able to promptly address the defective aspects of the current system of ISDS. Indeed, they cannot be the best possible solutions for reforming ISDS due to their significant shortcomings.

Chapter five moves on to critically analyse the EU-proposed MIC system. It aims to consider the feasibility and desirability of the MIC proposal. The chapter examines whether the EU's proposal would address the concerns associated with the current system of ISDS, in particular, the crises of legitimacy, inconsistency and lack of transparency. Accordingly, this chapter assesses the MIC proposal in light of four main concerns, namely, the selection and appointment of the adjudicators, the establishment of an appellate body, the transparency rules, and enforcement of judicial awards. The central aim of the chapter is to provide a comprehensive analysis of the proposed MIC system. This is with the caveat that the EU Commission has yet to release detailed concrete proposals for the MIC. Consequently, the chapter considers other international courts previously established in other fields of international law to examine the extent to which they may serve as a model for the future MIC.

Chapter Six goes on to examine the other prominent proposals for reform of ISDS. This chapter concludes that proper reform of dispute settlement procedure is highly unlikely without reforming the substantive foreign investment rules. In other words, without the existence of a multilateral investment agreement that contains a clear and coherent body of law, it is not possible to establish a dispute settlement mechanism through which foreign investment disputes could be effectively resolved. This chapter discusses that the majority of states are still hesitant to participate in any round of negotiations for the conclusion of a MIA due to a number of reasons. The chapter suggests that the most considerable solution currently is to consider the establishment of a foreign investment multi-track dispute settlement system that contains different types of dispute settlement mechanisms.

Building on the penultimate chapter, chapter seven concludes that the current system of ISDS is suffering from fundamental deficiencies. It also contends that none of the existing reform proposals has the credibility to reform or replace ISDS due to their fundamental shortcomings. It clarifies that the most concerning issue is not to reform the current system of ISDS but to reform the substantive investment rules through the conclusion of a MIA which provides a single coherent body of law instead of the existence of thousands of BITs and other international investment agreements. This chapter suggests that in short term the most considerable solution is to establish a foreign investment multi-track dispute settlement system as it aligns with the decentralised framework of IIL. This chapter explains that the practical value of this suggestion is it encourages the states to utilise this system as it comprises most of the prominent dispute settlement mechanisms.

Chapter II: The Historical Evolution of International Investment Law and Dispute Settlement System

2.1 Introduction

International investment law is the branch of public international law that governs foreign investment and the settlement of disputes between foreign investors and sovereign states.[82] The roots of IIL can be traced back to the customary international law principles by which the international minimum standards of protection for the investment of foreign investors have been provided. Nevertheless, since the Second World War, there have been several attempts to formalise the regulation of this division of international law.[83] A key turning point for IIL was the emergence of BITs in the 1950s, which permanently changed the regulatory framework of IIL, not least by providing ISDS as the default mechanism for the settlement of international investment disputes.

Despite the emergence of BITs and ISDS, the emergence of a significant mass of case law was lacking until the 1970s.[84] The lack of cases was mainly because, until the 1990s, the number of BITs and relative arbitral tribunals sitting under BITs was considerably small. Accordingly, the International Court of Justice (ICJ) branded this field an "underdeveloped area of international law."[85] Nevertheless, by the 1990s, the increase in the utilisation of international investment arbitration, primarily enabled by BIT provisions, dramatically

[82] Dolzer *et al.,* (n 14) 1-3.; C. Lim, J. Ho, and M. Paparinskis, *International Investment Law and Arbitration: Commentary, Awards, and other Materials* (Cambridge University Press, 2018).
[83] Subedi (n 2) 1-9.
[84] *Ibid*.
[85] *Ibid*.

increases the significance of IIL and it became the dynamic, vibrant, and fast-growing field of international law we recognise today.[86]

In order to answer the central research question posed by this thesis, it is necessary to critically analyse the historical evolution of IIL. Although there is a considerable amount of existing literature dealing with this subject and several scholars have previously considered them in greater depth, a concise treatment of that literature is necessary to provide the crucial context in which investment dispute settlement operates today. Indeed, these discussions would contribute to answering the theoretical part of the research question. In addition, without considering the current state of IIL, it is impossible to provide a comprehensive analysis of reforming the ISDS system and determining the most suitable dispute resolution system. The discussions provided within this chapter are directly linked with all the following chapters. Chapter three will use these discussions to elucidate that lack of a MIA, and the existence of thousands of BITs have been one of the main reasons for rendering inconsistent decisions by the arbitral tribunals. Also, all the debates regarding the efficiency of the traditional dispute settlement methods create a basis for chapter four which examines whether any of these methods could be an alternative to ISDS at present. Likewise, chapter five uses the content of this chapter to assess whether the EU's proposed MIC could operate within the current fragmented framework of IIL. Similarly, chapter six, based on the discussions provided in this chapter, would put forward a new reform proposal which is aligned with the current state of IIL.

In order to achieve its aim, this chapter is divided into three substantive parts. The first part provides a general background to the state of IIL. The second part focuses on analysing the traditional dispute settlement mechanisms: diplomatic protection and referral of the dispute

[86] T. Gazzini, "Bilateral Investment Treaties and Sustainable Development" (2014), *Journal of World Investment and Trade,* Vol. 15, No. 6; S. Schwebel, "In Defense of Bilateral Investment Treaties" (2015), *Arbitration International*, Vol. 31, No. 2.

to the national courts of the host state. It will discuss why these methods fell out of favour over time and were replaced by the modern ISDS system. The third and final part examines various dispute settlement mechanisms for settling general international disputes. The discussions in this part assist the author assessing whether any of these mechanisms could appropriately fit within the suggested foreign investment multi-track system.

2.2 Customary International Law Roots of International Investment Law

Formal regulation was not a prominent feature of the law of foreign investment during its earliest days. Instead, customary international law principles were central to the governance of international investment activities.[87] This section will discuss the laws, rules, and principles which govern foreign investment activities.

A) State Responsibility

Aliens and their properties in other states, in the Middle Ages and even after the emergence of the modern nation-state in the seventeenth century, were often subjected to discriminatory and abusive treatments by the local governing authorities.[88] In the same era, seeking reprisal from the alien's home territory was the only remedy for the mistreatment of aliens.[89] However, in the middle of the eighteenth century, attention was paid to the importance of protecting aliens and their properties and the notion of state responsibility for injuries to aliens.[90] The concept of state responsibility was first mentioned by Vattel in 1758, who stated

[87] Subedi (n 2) 5-13.
[88] E. Borchard, *Diplomatic Protection of Citizens Abroad* (Banks Law Publishing, 1915) 33.
[89] E. Colbert, *Retaliation in International law* (King's Crown Press, 1948) Chapter 1.
[90] M. Sornarajah, *International Law on Foreign Investment* (3rd edition, Cambridge University Press, 2010) 19-47.

that, "Whoever uses a citizen ill, indirectly off ends the state, which is bound to protect this citizen."[91]

During the earliest days of IIL, the customary international law principles of state responsibility and protection of aliens abroad were the central tool to govern international investment activities.[92] The concept of state responsibility can be defined as a set of international rules that govern the obligations of a state to other states.[93] A primary obligation of every state is to provide compensation or make reparation for injuries suffered by nationals of other states as a result of their wrongful act. The principle of state responsibility was created to introduce a way to deal with violations of customary international law. Likewise, it was constituted to grant power to states to protect their citizens outside their national boundaries whose rights have been violated due to another state's action.[94] It caused the creation of the notion of diplomatic protection of citizens abroad, which became one of the central aspects of customary international law as it pertains to investment.[95]

B) International Standards of Treatment of Aliens

One of the highly contentious issues during the early days of IIL was determining which nation's law (home or host state rules) should govern foreign investment and regulate investment activities. Vattel [96] and Grotius[97] held that foreign investors are already subject to

[91] E. Vattel, The Law of Nations (1758), reprinted by Natural Law and Enlightenment Classics, (2008) as cited in I. Brownlie, *Principles of Public International Law* (7th edition, Oxford University Press, 2008) 519.
[92] Subedi (n 2) 8-13; B. Sepulveda, "State Responsibility and the Enforcement of Arbitral Awards" (2017), *Arbitration International*, Vol. 33, No. 1; I. Ryk-Lakhman, *Protection of Foreign Investments Against the Effects of Hostilities: A Framework for Assessing Compliance with Full Protection and Security* (Springer, 2019) 259-279; International Centre for Settlement of Investment Disputes [hereinafter ICSID], "The ILC's Articles on State Responsibility in Investment Treaty Arbitration" (2022), available at: < https://icsid.worldbank.org/news-and-events/events/ilcs-articles-state-responsibility-investment-treaty-arbitration > accessed 12 May 2023.
[93] *Ibid*.
[94] S. Sucharitku, "State Responsibility and International Liability under International Law" (1996), *Loyola of Los Angeles International and Comparative Law Journal*, Vol. 18, 821.
[95] *Ibid*.
[96] Vattel (n 91).
[97] H. Grotius, *De Jure Belli ac Pacis Tres* (1625), [translated by A.C. Campbell, *The Law of War and Peace* (Kitchener Publishing, 2010)].

their home state law, and the host state law should not apply to them. They argue that if the law of the host state were to apply to foreign investors, the host state could easily expropriate the assets of foreign investors by enacting legislation. Similarly, most early investment treaties supported the view that the home states' rules should be applied to foreign investors.[98] On the other hand, there was a different view that neither the home state's law nor the host states' law should regulate foreign investment activities, and the international minimum standards of justice and equity should apply to all foreign investments.[99]

The international minimum standard of treatment (IMST) defines the law about aliens, as the body of law that grants them certain rights independent of the treatment of their home state.[100] The traditional principles of justice, fairness, equality, the practice of states and international human rights (IHR) law should be considered to determine the IMST. There are two main reasons for the involvement of the IHR law in defining the international minimum standard. First, there are a few defined property rights in the IHR.[101] Next, this would expand the property law of the investors' home state to IIL. It means that the host state, like the home state of foreign investors, could not expropriate the foreign nationals' assets without providing adequate compensation.[102]

Nevertheless, the initial source by which the IMST could be ascertained is the international treaties. In case of the absence of such treaties, customary international law should be considered. According to customary international law, as the case law on foreign investment tends to be originated from investors' home state, the standard of treatment should be the

[98] S. Sutton, "Emilio Augustin Maffezini v Kingdom of Spain and the ICSID Secretary General's Screening Power" (2014), *Arbitration International Law*, Vol. 21, No. 1.
[99] A. Kaczorowska, *Public International Law* (4th edition, Routledge, 2010) 439- 447.
[100] *Ibid*, H. Haeri, "Tale of Two Standards: Fair and Equitable Treatment and the Minimum Standard in International Law" (2011), *Arbitration International*, Vol. 27, No. 1.
[101] Subedi (n 2) 15-20.
[102] N. Mahmood, "Democratizing Investment Laws: Ensuring Minimum Standards for Host States" (2013), *The Journal of World Investment and Trade*, 9-13.

standard of the investor's home state. It can be declared that, to some extent, the home state's standard has been disguised as the IMST.

For a long time, the concept of IMST has been a point of contention between developed and developing countries.[103] In 1957, Garcia-Amador, the rapporteur of the International Law Commission (ILC), aimed to make a bridge between the treatment of aliens and human rights.[104] He claims that the best standards of treatment of aliens are the standards established by the international law of human rights. These standards ensure that aliens could access justice if any other state mistreated them. However, the IHR law has not considered the newly emerged concepts, such as the indirect injury/wrong to aliens by the host state in the foreign investment regime. Thus, it was necessary to work towards creating a set of modern, codified, and universal rules for the state's responsibilities and treatment of aliens.[105]

In the early 1960s, the ILC worked towards codifying rules regarding state responsibilities. In 2001, it adopted the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. Likewise, on 12 December 2001, the UN General Assembly adopted Resolution 56/83.[106] The adopted articles and regulations form the basis of international law on state responsibility and the treatment of aliens. Supplementary, the General Assembly resolution 62/61 of 6 December 2007 further examined the establishment of a convention on the responsibility of states for internationally wrongful acts or other inappropriate actions based on the Articles. By 2010, several states and the ICJ widely approved and applied the Articles in practice.[107]

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[103] Subedi (n 2) 11- 19; The OECD, Directorate for Financial and Enterprise Affairs, "Working Papers on International Investment; Fair and Equitable Treatment Standard in International Investment Law" (2004), No. 8.
[104] F. Garcia-Amador, "Second Report on State Responsibility"(1957), UN Document, A/CN.4/106, available at: < http://legal.un.org/ilc/documentation/english/a_cn4_106.pdfl > accessed 13 May 2023.
[105] Kaczorowska (n 99) 443.
[106] United Nation General Assembly Resolution, (12 December 2001), UN Document, A/RES/56/83.
[107] J. Crawford, "Articles on Responsibility of States for Internationally Wrongful Acts" (2001), available at: < http://legal.un.org/avl/ha/rsiwa/rsiwa.html > accessed 12 May 2023.

It is worth mentioning that the tension exists between the developed and developing states regarding the concept of IMST due to their political and economic differences.[108] The supporters of the IMST are among the economically developed nations and many international courts. On the other hand, less developed countries and newer states have long favoured national standards of treatment, many of which have challenged the existence of IMST by arguing that they are indeed the law of developed countries.[109] Accordingly, it has been hotly debated which standards are universally acceptable. Before responding to the above question, it is necessary to initially consider the concept of the national standard of treatment.

C) The Calvo Doctrine

Once colonies gained independence, they began to reject the concept of IMST and the idea of applying the law of the investor's home state as, in practice, home state law would emanate from developed nation and therefore typically would provide greater protection for foreign investors. Newly independent states argued that based on the doctrine of state sovereignty, the state is supreme within its territory, and the law of the host state should therefore apply to the foreign investor.[110] Indeed, they justified their expropriation of the alien's assets based on such an argument.[111]

Notwithstanding the assertion of some [112] at the time that the IMST of foreign nationals became part of international law, a strong opposing idea from the Latin American states became

[108] B. Legum, "The International Minimum Standard of Treatment and Human Rights: A Pedigree in the Rule of Law" (2016), *European Investment Law and Arbitration Review*, Vol. 274; A. Falsafi, "International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard" (2007), *Suffolk Transnational Law Review*, Vol. 30, No. 2; M. Emami, " Minimum Standard of Treatment in international Investment Law: Interpretation and Evolution" (2021), *South East Asia Journal of Contemporary Business, Economics and Law*, Vol. 24, No. 1.
[109] K. Leite, "The Fair and Equitable Treatment Standard: A Search for a Better Balance in International Investment Agreements" (2016), *American University International Law Review*, Vol. 32, No. 1; T. Yalkin, "The International Minimum Standard and Investment Law: The Proof Is in the Pudding" (2013), available at: < http://www.ejiltalk.org/international-minimum-standard/ > accessed 23 May 2023.
[110] B. Montefiore, *The Diplomatic Protection of Citizens Abroad* (Columbia University Publishing, 1915) v-vi.
[111] *Ibid*.
[112] Vattel (n 91); Grotius (n 97).

apparent. Calvo (an Argentine jurist) claimed that foreign nationals should not be entitled to a more favourable treatment than that available to the nationals of the host state. Also, the Calvo clause (as it become known), which was raised by the Calvo doctrine precluded arbitration and replaced it with national courts of the host state by which all the investment disputes are to be heard.[113] Additionally, he believed that the home state could not intervene by any means in the other states' affairs: not even in the name of exercising their rights of diplomatic protection rights.[114]

Although the Calvo Doctrine has never become a principle of customary international law itself,[115] many Latin American states naturally embraced the Calvo doctrine for a long time. It was significantly incorporated into most of these states' constitutions, investment legislations, and investment treaties. Also, it had some impacts in the twentieth century since the evolutionary governments in Mexico and Russia started their massive expropriation of assets and properties of many foreign investors without providing adequate compensations based on the Calvo doctrine.[116] It is argued that these expropriations cannot be justified by Carlo's views. In reality, it was an extremist form of the Calvo doctrine.[117]

Mexico, among the revolutionary governments, agreed to compensate the US foreign investors, yet the provided compensation was neither adequate nor effective.[118] They agreed to establish a commission to deal with their disputes. Since the commission was ineffective, the

[113] A. Fachiri, "Expropriation and International Law" (1925), *British Yearbook of International Law*, No. 159, 163–64.
[114] B. M. Cremades, "Resurgence of the Calvo Doctrine in Latin America" (2006), *Transnational Dispute Management*, No. 5, 53-55; C. K. Dalrymple, "Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause" (1996), *Cornell International Law Journal*, Vol. 29, 161,164–66; A. S. Hershey, "The Calvo and Drago Doctrines" (1907), *American Journal of International Law*, Vol. 1.
[115] K. Greenman, "Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels" (2018), *Leiden Journal of International Law*, Vol. 31, No. 3; D. R. Shea, *The Calvo Clause* (University of Minnesota Press, 1955); M. Hood, *Gunboat Diplomacy 1895-1905* (George Allen and Unwin, 1975); J. Cable, *Gunboat Diplomacy, 1919-1979: Political Applications of Limited Naval Force* (2nd edition, Macmillan, 1981).
[116] J. M. Hart, "Agrarian Reform," in W. Raat and W. Beezleys (eds.), *Twentieth century Mexico* (University of Nebraska Press, 1986) 6; M. Rippy, *Oil and the Mexican Revolution* (Brill Publishing, 1972) 206–41.
[117] *Ibid*.
[118] A. F. Lowenfeld, *International Economic Law* (2nd edition, Oxford University Press, 2008) 470-482.

USA utilised diplomatic protection to solve the issue. The US Secretary of State, Cordell Hull, found a formula that subsequently became the leading formulation of the full compensation standard.[119] He stated that, "The right of prompt and just compensation for the expropriated property is a part of the whole structure of international trade and commerce."[120]

Although it might be claimed that the Calvo doctrine has lost its credibility, in recent years, there has been an indication that the Calvo doctrine has been re-considered in several states, especially in Latin American countries.[121] The increasing number of arbitration cases led these states[122] to re-evaluate the issue of acceptance of BITs and the investment arbitration procedure for the resolution of investment disputes.[123] In addition, some legal changes in investment law of some Latin American states, such as Brazil[124], Ecuador,[125] and Bolivia[126] demonstrate the revival of the Calvo doctrine, which suggest that they are more in favour of a nationalistic approach (national standard of treatment).[127]

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[119] *Ibid*.
[120] The complete USA-Mexican exchange of correspondence in English and Spanish was published in the Department of State, "Compensation for American-Owned Lands Expropriated in Mexico" (1939), *Inter American Series,* No. 16, as cited in Lowenfeld (n 118) 475-481.
[121] For instance, the Attorney General of Ecuador has highlighted that Ecuador governments' dissatisfaction with the investment treaties and the investment arbitration by declaring that it is being considered whether Ecuador should terminate the BIT with the United States, see, P. Di Rosa, "The Recent Wave of Arbitrations against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues" (2004), *The University of Miami Inter-American Law Review*, Vol. 36, No. 1,74-80.
[122] *Ibid*.
[123] W. Shan, "Is Calvo Dead?" (2007), *The American Journal of Comparative Law*, Vol. 55, No. 1; D. Manning-Cabrol, "The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors" (1995), *Law and Policy International Business*, Vol. 26, 1173.
[124] In 2004, in case of *MBV v Resil*, the Brazilian Supreme court constitutionally challenged the Arbitration Act which permitted the parties to choose arbitration as a method of dispute settlement. The Federal Supreme Court confessed that this Act is not valid as it violates the constitution of Brazil. For details of the case, see, J. B. Lee, *Brazil in International Arbitration in Latin America* (Nigel Blackaby, 2002) 61-66.
[125] Ecuador's cancellation of oil contracts with Occidental Petroleum, see, L. Peterson, "Ecuador Moves Against Occidental Petroleum Contract and Assets" (2006), International Treaty News, available at < https://www.iisd.org/itn/?s=Ecuador+Moves+Against+Occidental+Petroleum+Contract+and+Assets > accessed 23 May 2023; *Ibid*, Shan.
[126] Bolivia's nationalization of its hydrocarbons sector in May 2006, see, J. Bonifaz and S. Lefebvre, "Lessons from Bolivia: Re-nationalising the Hydrocarbon Industry" (2014), available at: < https://www.opendemocracy.net/en/opendemocracyuk/lessons-from-bolivia-renationalising-hydrocarbon-indust/ > accessed 23 May 2023.
[127] B. M. Cremades, "Resurgence of the Calvo Doctrine in Latin America" (2006), *Business Law International Journal*, Vol. 7, 53.

2.3 Attempts to Formalise the Regulation of International Investment Law

As we have seen, customary law principles initially regulated foreign investment activities. Nonetheless, after the Second World War, the world witnessed the initiation of some attempts to formalise IIL.[128] The following sub-section briefly analyses whether any of the previous attempts have produced successful results. The importance of this section is it elucidates the significance of formalising the regulation of the IIL and its impact on the efficiency of the foreign investment dispute settlement system.

- ***Havana Charter***

The UN held a conference on Trade and Employment between 21 November 1947 and 24 March 1948 in Havana, Cuba. Its outcome was the draft of the Havana Charter, which created the foundation for establishing the International Trade Organisation (ITO). However, due to the constant rejection of the US Congress, neither the Havana Charter nor the ITO came into existence.[129]

- ***Abs-Shawcross Convention***

In 1959, several capital-exporting states attempted to establish an international investment treaty known as the Abs-Shawcross Convention. Nonetheless, as the core focus of this treaty was on protecting foreign investors, it was opposed by the capital-importing countries.[130] Consequently, it was never adopted.[131]

[128] Lowenfeld (n 118) 480-483.
[129] *Ibid*.
[130] N. Schrijver, "A Multilateral Investment Agreement from a North-South Perspective" in E. Nieuwenhuys (eds.), *Multilateral Regulation of Investment* (Kluwer Law International, 2001) 22.
[131] S. Picotto, "Linkages in International Investment Regulations: The Anatomies of the Draft Multilateral Agreement on Investment" (1998), *University of Pennsylvania Journal of International Economic Law*, Vol. 19, 731.

- ***The United Nations Initiatives***

The introduction of the Declaration on the Establishment of a New International Economic Order (NIEO) was one of the attempts of the UN. It seems to be a reformed format of the Bretton Woods regime.[132] It has been claimed that the original Bretton Woods regime unfairly favoured the interests of its creator; the developed nations.[133] The purpose behind the introduction of the NIEO was to reform the investment regulations and creation of a balance which did not exist in the Bretton Woods regime. It aimed at promoting trading conditions for developing countries. It attempted to tackle several issues, such as limiting the power of multilateral corporations to intervene in the governance of developing countries.[134] The NIEO is almost entirely forgotten. The main reason behind its failure is the strategy upheld by the leaders in the north, which were not compatible with the strategic choices on the part of the south.[135] The Declaration was unable to create a formulated and aspirational statement which can be used by developing countries in their claims.[136]

- ***The World Bank Initiatives***

The Multilateral Investment Guarantee Agency (MIGA) was introduced by the World Bank as a promoting initiative. The main objective of MIGA is to provide further guarantees in terms of non-commercial risks for the investment of foreign investors and to encourage investment

[132] M. Bordo, "The Berton Woods International Monetary System: A Historical Overview" (1992), National Bureau Economic Research, available at: < http://www.nber.org/papers/w4033.pdf > accessed 23 May 2023; B. Eichengreen, "Epilogue: Three Perspectives on the Bretton Woods System" (1993), available at: < http://www.nber.org/chapters/c6883.pdf > accessed 23 May 2023.
[133] G. White, "A New International Economic Order" (1975), *Virginia Journal of International Law*, Vol. 16, No. 2.
[134] UN Declaration on the Establishment of a New International Economic Order 1974, established by United Nation General Assembly Resolution (1 May 1974), UN Document, A/RES/S-6/3201, available at: < http://legal.un.org/avl/pdf/ha/ga_3201/ga_3201_e.pdf > accessed 23 May 2023.
[135] Eichengreen (n 132).
[136] K. Ryan, "Towards a New International Economic Order" (1976), *The University of Queensland Law Journal,* Vol. 9, No. 1.

in less economically developed countries.[137] The International Monetary Fund (IMF) and the World Bank requested the MIGA to prepare a legal framework to promote foreign investment. As a result, in 1992, the Guidelines on the Treatment of Foreign Direct Investment were created. However, they did not form a binding international instrument.

It is considerable to note that at first glance, the aim of those who created the guidelines is the promotion of foreign investment. Yet, by critically assessing, it becomes clear that the initial purpose of the creators is to provide greater protection for foreign investors. Several of their provisions are either extending existing protections to foreign investors in many respects or creating new ones.[138] In addition, it is notable that the Guidelines address the conduct of states against foreign investors, but not the conduct of foreign investors against the states.[139]

The World Trade Organisation (WTO) has also been an active player that put efforts to formalise the regulation of foreign investment law. The Agreement on Trade-Related Investment Measures (TRIMS) was the outcome of the Uruguay round of negotiations on multilateral trade. The purpose of creating such an agreement was to improve economic efficiency by prohibiting the WTO member states from making quantitative restrictions and applying any trade-related investment measure inconsistent with the principle of national treatment. The Agreements' focus is on regulating trade-related aspects of foreign investment and promoting trade and investment by removing trade and investment-related barriers.[140] Nevertheless, it may only be applicable in limited situations since its establishment was never

[137] Convention Establishing the Multilateral Investment Guarantee Agency was submitted to the IBRD Board of Governors on 11 October 1985 and came into effect on 12 April 1988. The Convention was amended on 14 November 2010, the text is available at :< http://www.miga.org/sites/default/files/archive/Documents/miga_convention_november_2010.pdf, > accessed 29 April 2023.
[138] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International, 2009) 49; I. Shihata, *Legal Treatment of Foreign Investment: The World Bank Guidelines* (The World Bank, 1993); C. Wendrich, "The World Bank Guidelines as a Foundation for a Global Investment Treaty: A Problem-Oriented Approach" (2005), *Transnational Dispute Management*, No.5.
[139] Subedi (n 2) 34-35.
[140] C. Correa and N. Kumar, *Protecting Foreign Investment: Implications of a WTO Regime and Policy Options* (Zed Press, 2003) Chapter 2; Newcombe and Paradell (n 138) 419-42.

supported by all the WTO member states. The United States was among those that were very much against its creation. The US disputed that the Agreement is restrictive, and it causes trade barriers. Some developing states negatively regarded the Agreement and argued that the WTO could not be an appropriate forum to discuss and consider investment matters by undertaking such initiatives.[141]

The Organisation for Economic Co-operation and Development (OECD) has been involved in the process of negotiation for several investment agreements and investment-related guidelines.[142] In the 1950s, the Draft Convention on the Protection of Foreign Property was among the first initiatives in that the OECD became involved.[143] Nevertheless, this was never ratified, and it remained a mere Draft since it failed to gain the approval of a considerable number of states. Opposing states to the text of the Draft were seriously concerned about some of the Draft's provisions, in particular, the relevant provisions to the level of compensation that must be provided for the injured foreign investors whose properties were expropriated by the host state. In 1976, the OECD, after many unsuccessful attempts to involve itself in the process of regulation of international investment, established the Declaration on International Investment and Multinational Enterprises and the Guidelines for Multinational Enterprises, both of which were only voluntary codes of conduct.[144]

The OECD decided to step into the realm of mandatory investment rules and attempt to conclude a multilateral investment agreement following the conclusion of the mere voluntary codes of conduct. As a result, it negotiated the draft of the Multilateral Agreement on

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[141] *Ibid*.
[142] OECD, "Mapping of Investment Promotion Agencies in OECD Countries" (2018), available at: < http://www.oecd.org/investment/mapping-of-investment-promotion-agencies-in-oecd-countries.htm > accessed 23 May 2023; The Royal Institute of International Affairs, "Growth in a Multilateral World: The Role of Inclusive Trade and Quality Investment" (2018), available at: < https://www.oecd.org/investment/role-of-inclusive-trade-and-quality-investment-uk-2018.htm > accessed 23 May 2023.
[143] Draft Convention on the Protection of Foreign Property 1967 approved by OECD Council Resolution 12 October 1967, 7 ILM 117, available at: < http://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf > accessed 23 May 2023.
[144] R. Geiger, "Towards a Multilateral Agreement on Investment" (1998), *Cornell International Law Journal*, Vol. 31, No. 3; Newcombe and Paradell (n 138) 30-31.

Investment (MAI) between 1995 and 1998. The OECD alleged that it is necessary to have a multilateral agreement to respond to the remarkable growth and transformation of FDI, which has been stimulated by ever-increasing liberalization and competition for investment capital.[145] It appears that the OECD was initially encouraged by the 1992 World Bank Guidelines. Though, it offers a higher standard of protection, as its provisions were heavily weighted in favour of the foreign investor.

On the other hand, the opponents of the MAI argued that foreign investors have been given several rights by this document at the cost of placing many obligations on the host state. Also, it failed to contain necessary provisions which could regulate the conduct of foreign investors. For all the above reasons, the draft was abandoned, and the OECD was forced to produce a much-diluted set of guidelines on multinational enterprises, which was no more than a soft law instrument. The Guidelines successfully created a balance between the interest of investors and the host states by containing provisions that promote sustainable development in the foreign investment regime and offer greater human rights and environmental protection.[146]

- ***Multilateral Investment Agreement Back on the WTO Agenda***

The efforts to regulate foreign investment made their way onto the WTO agenda at the Doha Ministerial Conference in 2001. At the Conference, it was declared that a fresh round of negotiations should be started for establishing a multilateral investment treaty. However, the existing issues, such as differences between the views of developing and developed inevitably reappeared in the supposedly fresh round of negotiations, therefore, no successful outcome was

[145] S. J. Canner, "The Multilateral Agreement on Investment" (1998), *Cornell International Law Journal*, Vol. 31, No. 3.
[146] OECD, "The New OECD Guidelines for Multinational Enterprises" (2000), available at :< http://www.oecd.org/corporate/mne/1922428.pdf > accessed 19 May 2023; OECD, "The Old Printed OECD Guidelines for Multinational Enterprises" (1997), available at: < https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=ocde/gd(97)40 > accessed 19 May 2023.

ever achieved. These two groups were never able to reach an agreement about the basic concepts in this field. Predictably, the negotiations were abandoned in the meeting of the WTO member states in July 2004, and it was removed from the WTO agenda altogether.[147]

Another effort to regulate foreign investment at the WTO is the introduction of the Joint Statement issued by the Joint Initiative on Investment Facilitation for Development (IFD).[148] The IFD aims to develop a multilateral agreement, (Investment Facilitation for Development Agreement or IFDA)[149] that will support the investors to invest in all sectors of the economy (goods and services) and expand their operations and improve the investment and business climate. Nevertheless, it has been confirmed that the agreement does not cover matters relating to market access, investment protection, and investor-state dispute settlement (ISDS).[150] As a result, it can be argued that the WTO attempted to facilitate investment, though, in a very limited way and one that specifically excludes investor protections.

2.4 Bilateral Investment Treaties (BITs)

The United Nations Conference on Trade and Development (UNCTAD) defines BITs as "Agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country."[151] Principally, BITs deal with the substantive and procedural rules related to admission, treatment

[147] Subedi (n 2) 48-52.
[148] World Trade Organization [hereinafter WTO], "Investment Facilitation for Development" (2022), available at: < https://www.wto.org/english/thewto_e/minist_e/mc12_e/briefing_notes_e/bfinvfac_e.htm > accessed 23 May 2023.
[149] The co-coordinators of the process (South Korea and Chile) have announced that it is expected for the legal text of the Agreement to be finalised by July 2023. International Institute for Sustainable development, "The Investment Facilitation for Development Agreement" (2023), available at: < https://www.iisd.org/articles/deep-dive/investment-facilitation-development-agreement > accessed 15 May 2023.
[150] *Ibid*, Section I.
[151] UNCTAD, "Scope and Definition" (2011), available at: < http://unctad.org/en/Docs/diaeia20102_en.pdf > accessed 23 May 2023.

and protection of foreign investment.[152] The appearance of BITs introduced a revolutionary change in the realm of the IIL.[153] BITs have emerged as the primary source of international investment law. One of the initial reasons behind the emergence of BITs was to regulate international investment relationships between states and provide a more structured framework under which states could operate foreign investment relationships.[154] BITs provide a high degree of flexibility for state parties, enabling them to specifically tailor and conclude their agreements and regulate their investment relationships individually. Although each BIT is technically unique, in practice, they tend to contain similar provisions.[155]

The first BIT was concluded between Germany and Pakistan in 1959.[156] Since then, thousands of BITs have been negotiated between various states.[157] It is generally accepted that the modern BIT era did not start until 1989. In fact, from 1959 to 1969, only seventy-five BITs were concluded worldwide.[158] By the end of 1988, the total number of BITs was 386.[159] Their relatively small number in this period was mainly due to the scepticism of the developing countries towards foreign investment. It was perceived that the nature of BITs is nonreciprocal, and the purpose behind the conclusion of these agreements is to support foreign investors. Nonetheless, the world witnessed a rapid increase in the number of BITs. By the end of 1999,

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[152] R. Chen, "Bilateral Investment Treaties and Domestic Institutional Reform" (2016), *Columbia Journal of Transnational Law*, Vol. 55, No. 3; Lowenfeld (n 118) 554.
[153] Newcombe and Paradell (n 138) 41-48.
[154] United Nations, "Bilateral Investment Treaties 1959-1999", available at: < https://pdrives.manchester.ac.uk/horde/gollem/view.php?actionID=view_file&type=pdf&file=BITS.pdf&dir=%2FDesktop%2FPHD%2FChapter+2-+Investment+Law&driver=ftp > accessed 22 May 2023; Lowenfeld (n 118) 550-555.
[155] For a thorough discussion of the history and purpose of BITs, see Sornarajah (n 90) 180-210; Subedi (n 2) 83-86; Newcombe and Paradell (n 138) 41-49.
[156] Germany- Pakistan, BIT (1959), available at: < https://treaties.un.org/doc/Publication/UNTS/Volume%20457/volume-457-I-6575-English.pdf > accessed 25 May 2023.
[157] For a list of BITs concluded from the inception of the program through 1989, see K. Vandevelde, V. Aranda, Z. Zimny, and K. Sauvant, "Bilateral Investment Treaties in the Mid 1990s" (1998), United Nations Digital Library, available at: < https://digitallibrary.un.org/record/264901?ln=en > accessed 23 May 2023.
[158] *Ibid*.
[159] *Ibid*.

their total number was 1857,[160] and up until now, the number is 2957.[161] It appears that one of the main reasons for such an increase is the perception that BITs would contribute to creating a more stable investment and legal climate for foreign investors to invest in other states. It has been claimed that based on such a perception, developing countries started to sign more BITs to attract more FDI.[162] This raises an important question of whether concluding more BITs would indeed increase the flow of FDI.

It must be stated that there is mixed evidence regarding the real effect of BITs on the inflow of FDI. Some scholars claim that BITs provide clear and enforceable rules to protect foreign investors which leads to the reduction of possible risk, and a risk reduction would ultimately promote investment.[163] Similarly, others attempt to explain the link between BITs and the increase in the flow of FDI by linking it with the concept of the rule of law.[164] Considering the general connection between economic growth and the recognition of property rights, it can be claimed that BITs by recognising and protecting foreign investments would correlate with higher levels of international investment. Indeed, the principal purpose of BITs is to serve as an internationalised substitute for the domestic legal systems of host states in which the place of the rule of law (recognition and protection of property rights) may be unreliable or uncertain.[165] Thus, it could be regarded as a commitment device which would send a signal to foreign investors that the host state is willing to abide by the rules of law as

[160] UNCTAD, "Recent Developments in International Investment Agreements (2009)" available at:< http://www.unctad.org/en/docs/webdiaeia20098_en.pdf > accessed 23 May 2023.
[161] UNCTAD, "Investment Policy Hub" (2023) available at: < https://investmentpolicy.unctad.org/international-investment-agreements > accessed 23 May 2023.
[162] J. Jowell, J. C. Thomas, J. Z. Smit, "Rule of Law Symposium 2014; The Importance of the Rule of Law in Promoting Development" (2015), *Singapore Academy of Law*; P. Egger and M. Pfaffermayer, "The Impact of Bilateral Investment Treaties on Foreign Direct Investment" (2004), *Journal of Comparative Economics,* Vol. 32, No. 1.
[163] *Ibid*.
[164] C. Schreurer, L. Malintoppi and A. Sinclair, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) 352; C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007) 128.
[165] *Ibid*.

articulated in the BITs.[166] Although it is not surprising to find a strong connection between the concept of the rule of law and economic growth,[167] there are some examples which question the existence of such a connection. One of the best examples is China which experienced considerable economic growth even though it is a state with collective ownership and little respect for private property rights.[168]

Others argue that, in reality, attracting foreign investment depends more on the political and economic climate for its existence rather than on the creation of a legal structure for its protection.[169] The proponents of this view maintain that there are examples of countries with large FDI inflows and few, if any, BITs.[170] For instance, some major investment host states such as Brazil or Mexico have been reluctant to sign BITs for a long time.[171] Likewise, UNCTAD conducted a study based on cross-section analysis which concluded the existence of a weak connection between signing BITs and changes in FDI flows.[172] Similarly, Hallward-Driemeier finds little evidence of any positive impact of BITs on FDI. She illustrates that the existence of a BIT between two countries does not lead to an increase in the flow of FDI from the developed to the developing signatory country.[173] She suggests that BITs might only be seen as credible in an environment of good institutional quality. This implies that BITs could be effective in countries where they are least needed.[174] There is limited evidence to prove that

[166] E. Snyder, "Protection of Private Foreign Investment: Examination and Appraisal" (1961), *International and Comparative law Quarterly*, Vol. 10.
[167] S. Haggard and L. Tiede, "The Rule of Law and Economic Growth: Where Are We?" (2011), *World Development*, Vol. 39, No. 1.
[168] B. Z. Tamanaha, "The Primacy of Society and the Failures of Law and Development" (2011,) *Cornell International Law Journal,* Vol. 44, No. 1.
[169] M. Sornarajah, "State Responsibility and Bilateral Investment Treaties" (1986), *Journal of World Trade Law*, Vol. 20; C. Raghavan, "Bilateral Investment Treaties Play Only a Minor Role in Attracting FDI" (1997), *Third World Economics,* Vol. 162; UNCTAD, "Bilateral Investment Treaties in the Mid-1990s" (1998), UNCTAD/ITE/IIT/7.
[170] *Ibid*.
[171] *Ibid*.
[172] *Ibid*.
[173] M. Hallward-Driemeier, "Do Bilateral Investment Treaties Attract FDI? Only a BIT and They Could BIT" (2003), *World Bank Policy Research Paper,* No. WPS/3121.
[174] *Ibid*.

BITs could function as substitutes for poor institutional quality.[175] However, this is not a strong argument since there are various specifications of institutional quality. Another study suggested that the signing a BIT with the United States could lead to an increase the flow of FDI whereas signing BITs with other OECD countries would not create a similar outcome regarding the increase of the FDI.[176]

Poulsen put forward a different suggestion to address the controversy. He asserts that, "a useful approach for future studies would perhaps be to ask foreign investors themselves whether they take these treaties into account when deciding where, and how, to invest".[177] All in all, it can be claimed BITs are like a two-handed sword. This is because even though they could have some positive impact on the flow of FDI, they created a basis for an increase of arbitration awards according to which the losing party (in most cases developing countries) are obliged to pay a huge sum of money as compensation.[178]

Apart from the possible impact of BITs on FDI, perhaps, the most significant aspect of the BITs that is one of the main concerns of this thesis is providing direct access to a reliable and impartial mechanism for settling disputes that may arise during foreign investment: ISDS. BITs enabled the private foreign investor to bypass diplomatic protection as well as the national courts of the host state and directly bring a claim against the host state through ISDS.[179]

Recently it has been argued that the time has come to revise BITs. One of the main concerns is that they could not balance the rights of the host states and the rights of foreign

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[175] *Ibid*.
[176] J. W. Salacuse and P. N. Sullivan, "Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" (2005), *Harvard International Law Journal*, Vol. 46.
[177] K. P. Sauvant and L. Sachs (eds), "The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows" (2009), *European Journal of International law*, Vol. 20.
[178] K. Von Moltke and H. Mann, "Towards a Southern Agenda on International Investment" (2004), International Institute for Sustainable Development, available at: < https://www.iisd.org/system/files/publications/investment_sai_sum.pdf > accessed 23 May 2023.
[179] R. Al-Louzi, "Bilateral Investment Treaties as Tools for Enhancing Foreign Investment Climate and Increasing Competitiveness" (2017), *Manchester Journal of International Economic Law*, Vol. 14, No. 1; Sornarajah (n 90) 180-210.

investors. In other words, BITs mainly protect the investment of foreign investors in the territory of other states.[180] There have been several states that went further and terminated some of their BITs. For instance, Indonesia, in 2014, started the termination of the 67 bilateral investment treaties (BITs) it has signed since the late 1960s.[181] Likewise, South Africa, in 2012, began progressively the termination of its BITs with some European countries such as Belgium and Luxembourg.[182] Similarly, on 26 April 2018, the Dutch Minister for Foreign Trade and Development Cooperation stated that, "following the *Achmea* judgment, the Netherlands saw no other option than to terminate its bilateral investment treaty with the Slovak Republic."[183] The next chapter will discuss in detail the actual impact of BITs on the functioning of the ISDS system.

2.5 Traditional Investment Dispute Settlement Mechanisms

Traditionally, in case of any dispute arising during foreign investment, foreign investors cannot bring a claim against the host states' government. This is because international law is the law between sovereign states.[184] Subsequently, private parties had virtually no rights to bring a claim against a state through a dispute settlement mechanism administered by a third

[180] J. Tobin, "The Social Cost of International Investment Agreements: The Case of Cigarette Packaging" (2018), *Ethics and International Affairs*, Vol. 32, No. 2; J. Tobin and S. Rose-Ackerman, "When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties" (2011), *The Review of International Organizations*, Vol. 6, No. 1.
[181] A. Crockett, "The Termination of Indonesia's BITs: Changing the Bathwater, But Keeping the Baby?" (2017), *The Journal of World Investment and Trade*, Vol. 18.
[182] M. Mossallam, "Process Matters: South Africa's Experience Existing Its BITs" (2015), The Global Economic Governance Programme, available at: < https://www.geg.ox.ac.uk/sites/default/files/GEG%20WP_97%20Process%20matters%20-%20South%20Africas%20experience%20exiting%20its%20BITs%20Mohammad%20Mossallam.pdf > accessed 23 May 2023.
[183] M. Davoise and M. Burgstaller, "Another One BIT the Dust: Is the Netherlands' Termination of Intra-EU Treaties the Latest Symptom of a Backlash Against Investor-State Arbitration?" (2018), available at: < http://arbitrationblog.kluwerarbitration.com/2018/08/11/another-one-bit-dust-netherlands-termination-intra-eu-treaties-latest-symptom-backlash-investor-state-arbitration/ > accessed 23 May 2023; Netherlands - Slovakia BIT (1991), available at:< http://investmentpolicyhub.unctad.org/IIA/treaty/2650 > accessed 23 May 2023.
[184] A. Weiss, E. Klisch, and J. R. Profaizer, "Techniques and Tradeoffs for Incorporating Cost- and Time-Saving Measures into International Arbitration Agreements" (2017), *Journal of International Arbitration*, Vol. 34, No. 2; A. Hayes, "Private Claims against Foreign Sovereigns" (1925), *Harvard Law Review*, Vol. 38, No. 5.

party.[185] Therefore, in case of a disagreement, foreign investors had two potential courses of action: diplomatic protection and referral of the dispute to be heard by national courts of the host state.[186]

The following section examines each of these possibilities in turn. The main reason for conducting such a study is to analyse the efficiency of the mechanisms utilised before the emergence of the ISDS system to assess how and why ISDS gained popularity and replaced traditional dispute settlement mechanisms.

2.5.1 Diplomatic Protection

Vattel, in his classic work, *Le Droit Des Gens*, defined diplomatic protection as "Whoever uses a citizen ill, indirectly offends the state, which ought to protect this".[187] In his view, foreigners' citizenship in their state would also extend to their property. Thus, states' mistreatment of nationals of another state or their properties should be regarded as an injury to that state. This view was the bedrock for the emergence of the international legal principle of diplomatic protection. [188]

The term diplomatic does not refer to the notion of diplomacy or diplomatic channels but the governmental level of protection that includes any means adopted by the protected states. The primary method for resolving a dispute under diplomatic protection is negotiation. However, states, depending on the level of their development, might exercise a whole host of

[185] Subedi (n 2) 3-9.
[186] *Ibid*, 5-14.
[187] Vattel (n 91) 224.
[188] E. M. Borchard, *Diplomatic Protection of Citizens Abroad or The Law of International Claims* (Bank Law Publishing, 1915) 35-36; A. Roth Leiden and A. Sijthoff, *The Minimum Standard of International Law Applied to Aliens* (Cambridge University Press, 2017); also see, PCIJ declaration in the case of *Mavrommatis Palestine Concessions (Greece v UK)* [1924] PCIJ Rep Ser, No 2, 12.

political or military means to protect their citizen's interests, seek compensation on their behalf and resolve the dispute.[189]

The exercise of diplomatic protection can be traced back to the Middle Ages and throughout the eighteenth and nineteenth centuries. Before the first World War, Western countries, such as Great Britain, the United States, France and Germany, were aggressively asserting their right to exercise diplomatic protection over their nationals in other countries.[190] In this era, diplomatic protection was in the format of threats or use of force by these states to ensure the rights of their injured nationals were fully vindicated.[191] Apart from the use of military force by a single state, in 1863, a form of joint military intervention was developed by Spain, France and Great Britain as a response to Mexico's suspension of paying the interest to their nationals. Such a military force to protect injured nationals became commonplace among Western countries in the early twentieth century.[192] According to the evidence, in the 1840s, Great Britain was the main utilizer of gunboat diplomacy for protecting its citizens in other states.[193]

There are a few requirements before a state can exercise diplomatic protection.[194] First, a claim should be brought by states under the general rules of nationality of claim.[195] These

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[189] J. R. Dugard, "First Report on Diplomatic Protection" (2000), International Law Commission, United Nations Digital Library, available at: < http://legal.un.org/ilc/documentation/english/a_cn4_506.pdf > accessed 23 May 2023.
[190] *Ibid*.
[191] *Ibid*.
[192] N. Mitchell, *The Danger of Dreams: German and American Imperialism in Latin America* (The University of North Carolina Press, 1999) 64–107, (In 1902, British and German naval forces jointly blockaded Venezuela to force the government of that country to pay debts owed to their respective nationals); V. Purcell, *The Boxer Uprising: A Background Study* (Cambridge University Press, 1963) 249–62, (The international force deployed to suppress the Boxer Rebellion threatening foreign interests in China in 1900–01 included contingents from Great Britain, Russia, Japan, the United States, France, Germany, Italy, and the Austro- Hungarian Empire).
[193] J. Snyder, *Myths of Empire: Domestic Politics and International Ambition* (Cornell University Press, 1991) 156–57.
[194] Report of the International Law Commission [hereinafter ILC], (2004), UN GAOR, 56th Session No. 10, UN Document, A/59/10; F. O. Vicuna, "The Changing Law of Nationality of Claims" (2000), *Report for the International Law Association Committee on Diplomatic Protection of Persons and Property*, 69th Conference.
[195] J. P. Grant and J. C. Barker, *Encyclopaedic Dictionary of International Law* (3rd edition, Oxford University Press, 2009); also, nationality issues have arisen in a series of IIA cases such as: *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (1998), ICSID Case No. ARB(AF)/98/3; *Tokios Tokel ̇es v. Ukraineand Waguih Elie George Siag (*2010), Case No. ARB/07/16, 8*; Clorinda Vecchi v. Egypt Thrsasga Szabadsigjogok & tv. Hungary* (2009), App. No. 37374/05.

rules would determine the eligibility of the alleged injured national for whom their home state was convinced to bring a claim.[196] According to these rules, states could only exercise diplomatic protection for their national citizens. Although this seems to be straightforward, it is an argumentative issue. Some maintain that from the time of alleged injury until the presence of the claim by the home state, the injured individual must have remained as a national of that state.[197] Another group of scholars, such as Orrego Vicuña believe that the injured person should remain a national of the state until the settlement of the claim.[198] Secondly, the exercise of diplomatic protection depends on utilising local remedies by the injured nationals in the host state.[199] In addition, it is a discretionary power in the hands of home states. Therefore, the injured party should convince their home state to take a claim on behalf of its nationals. Persuading the home state to take up a claim is not an easy task. For any reasons related or unrelated to the merit of a claim, states may wish not to exercise diplomatic protection. Exercising diplomatic protection and making a claim may have several consequences for the home state, such as compromising its military and geopolitical objectives.[200] Also, it might significantly affect the state's international relations. It is specifically applicable to developing countries. In a case where a developing state employs diplomatic protection against a developed state, the developed state can pressurise them to agree to a reduced settlement. It might significantly and negatively affect their relationship. Likewise, diplomatic protection

[196] See, *Nottebohm (Liechtenstein v. Guatemala)*1955 I.C.J. Rep. 4; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 1970 I.C.J. Rep. 4 at 33; *Dickson Car Wheel Company (U.S.A.) v. United Mexican States* (1931), 4 R.I.A.A. 660.
[197] E. Schlemmer, "Protection of Investors and Investments" (2009), *Transborder Commercial Law South African Mercantile Law Journal*, Vol. 21, No. 5; A. Lowenfeld, "Diplomatic Intervention in Investment Disputes" (1967), *American Society of International Law Proceedings*, Vol. 61.
[198] Report of the ILC (n 194); Grant and Barker (n 195).
[199] United Nations, International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001), Article 44(b); United Nations General Assembly Official Records, 56th Session, No. 10, UN Doc A/56/10; J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge University Press, 2002).
[200] A. Fagbemi, "A Critical Analysis of the Mechanisms for Settlement of Investment Disputes in International Arbitration" (2017), *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, Vol. 8, No. 1; Dolzer *et al.,* (n 14) 211-215.

will invariably involve financial detriment to both states involved. If a state is convinced to take up the claim on behalf of its injured national, regardless of all the possible consequences, it still has the power to end the protection at any time.[201] Hence, in this method, there is not much room for the injured nationals to control the case, the outcome is unpredictable and highly likely undesirable, and the dispute could be left unresolved.

2.5.2 Recourse to Host State National Courts

The referral of an investment dispute to be heard by national courts of the host state was traditionally a second option for the resolution of investment disputes. As mentioned, the availability of diplomatic protection depended upon whether foreign investors initially exhausted local remedies from the host state's national courts. It has been one of the customary international law traditional requirements.[202] The purpose behind such a requirement was to safeguard states' sovereignty and provide an opportunity for the host state to redress the allegedly harmed foreign nationals within its national framework.[203]

This method has long been criticised as taking the dispute to be heard by the national court of the host state would have no considerable result but would create additional costs and delays for foreign investors. Thus, a question that might arise is why foreign investors cannot seek international remedies in the first place.[204] The BITs attempted to address this question by enabling the claimants to institute international arbitration directly. [205]

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[201] Schreuer *et al.,* (n 14) 211-214.
[202] Newcombe and Paradell (n138) Chapter 1.
[203] A. Cancado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (Cambridge University Press, 1983) 1.
[204] C. Schreuer, "Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration" (2005), *The Law and Practice of International Courts and Tribunals,* Vol. 4, No. 1.
[205] *Lanco v. Argentina*,40 ILM 457, 469/70 (2001) Decision on Jurisdiction, para 39; *Generation Ukraine v. Ukraine,* Award, 16 September 2003, paras.13.1-13.6; Y*aung Chi Oo v. Myammar*, *ILM 540, 547/48,* Award, 31 March 2003, para, 40, 42*, Loewen v. United States*, *42 ILM 811*, Award, 26 June 2003, paras, 142; also see, the Preamble to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1966), the text is available at: < https://icsid.worldbank.org/sites/default/files/ICSID_Convention_EN.pdf > accessed 23 May 2023.

On the other hand, it has been asserted that there are a few advantages in utilising local remedies and referring disputes to be settled in the national judiciary of the host state.[206] Firstly, the resolution of a given dispute is relatively inexpensive, and it could be settled in a less timely manner. It has been counter-argued that domestic courts are bound to apply domestic law even though that law is incapable of protecting investors' rights. Therefore, such a method could not be fair and reliable. In addition, it might negatively affect the host state as public proceedings in national courts may affect the host states' investment climate and reputation. It has been asserted that such a method lacks the objectivity that foreign investor desire.[207] It is because in a case where investment activities are being operated in a third country, domestic courts usually do not have the necessary capability to resolve the given dispute. Since there might be a lack of territorial jurisdiction over investment matters. Also, they could be prevented from exercising jurisdiction by the host state's sovereign immunity.[208]

From the investor's point of view, this mechanism is ineffective and unreliable. The typical concern of investors is that the host state judges are impartial when a claim is brought before them against their own countries' governments. The reason for such a claim is that usually, the countries that they invested in are less developed countries with a judiciary system in which the judges are obliged to apply their local law instead of international or treaty rules. They might feel obliged to settle the claim in favour of their government. Moreover, the local judges of host states do not have the expertise and knowledge to deal with technical and complex issues involved in foreign investment disputes.[209]

2.6 General International Dispute Settlement Mechanisms

[206] Schreuer *et al.,* (n 14).
[207] *Ibid*.
[208] *Ibid*.
[209] Dolzer *et al*., (n 14) 214; Schreuer *et al.,* (n 14) 8.

The proceeding section discussed that the traditional investment dispute settlement mechanisms fell out of favour over time as they have not been reliable and effective mechanisms for settling foreign investment disputes for the reasons elucidated above. The focus of the present section is on analysing various methods for the settlement of general international disputes. This section will examine whether either of these methods could effectively resolve foreign investment disputes.

- ***Consultation***

Although consultation is not a mechanism by which a dispute can be resolved, it could be utilised to prevent the occurrence of a dispute in the first place. Indeed, a state, before making any decisions, could seek consultations through discussion and exchange of views with other states assumed to be negatively affected by such a decision.[210] Accordingly, the outcome would be for the state to modify its plans and alter its decision based on the information obtained through the consultation process.[211]

It could also be used by the host state to exchange information with the home state. By doing this, the host state could consider the rights and interests of the potential foreign investors who could be potentially affected by its decision.

Although it might be argued that consultation is a voluntary method and the states are not forced to utilise it, such a method could still indirectly create negative impacts on the principle of sovereignty. It is because this could, to some extent, lead the state to priories the interest of foreign investors over the interests of its nationals. It raises the question of whether

[210] E. Storskrubb, "Alternative Dispute Resolution in the EU: Regulatory Challenges" (2016), *European Review of Private Law*, Vol. 24, No. 1.
[211] P. T. Hopmann, *The Negotiation Process and the Resolution of International Conflicts* (University of South Carolina Press, 1996) 135; M. O'Connell, *International Dispute Settlement* (Ashgate Publishers, 2003) 41.

the host state would willingly alter its plans following the provided information by the home state via this method.

- ***Negotiation***

Negotiation is one of the most common and oldest methods of international dispute settlement. It is known as one of the most satisfactory methods of dispute settlement as it is bilateral, voluntary, and self-help. In Article 33(1) of the Charter of the United Nations,[212] negotiation has been classified as one of the first pacific methods for resolving disputes.

This method consists of a series of discussions between parties, through which they attempt to understand each other's opinions and positions. The parties can directly engage in the process, and intervention of a third party is not required.[213] What distinguishes this method from others is it enables the parties to retain the highest degree of control over the dispute.[214] Nonetheless, the success of this method depends on the degree of importance that the parties are willing to attach to it.[215]

It can be claimed that negotiation can be served as an initial step which the parties can take with the hope of resolving the dispute at hand, before considering any other consensus-based methods or before taking a claim to any adjudicative bodies. It is crucial as there is less chance of obtaining such a degree of control in the adjudicative procedures. Indeed, some BITs included escalation clauses. These clauses provide for alternative dispute resolution (ADR) options, such as negotiation and mediation to take place before the relevant dispute is referred

[212] The United Nations, "United Nations Charter", Chapter VI: Pacific Settlement of Disputes", (Articles 33-38) available at: < https://www.un.org/en/about-us/un-charter/chapter-6 > accessed 23 May 2023.
[213] J. Merrills, *International Dispute Settlement* (5th edition, Cambridge University Press, 2011) 1-5.
[214] *Ibid*, 10-11.
[215] J. Wilkenfield, K. Young, V. Asal, and D. Quinn, "Mediating International Crisis" (2003), *Journal of Conflict Resolution*, Vol. 47, No. 3; J. Burton, "The Resolution of Conflict", International Studies Quarterly" (1972), *International Studies Quarterly*, Vol. 16.

to arbitration or the courts.[216] For instance, in the US Model BIT 2012[217], the Argentina-UAE BIT 2018[218] and the Taiwan-Viet Nam BIT 2019[219] provided that legal disputes should as far as possible be settled amicably through negotiations or non-binding third-party procedures such as mediation between the investor and that other Party.

It must be noted that despite the exitance of a number of benefits associated with this method, it cannot be the sole and ultimate method for solving foreign investment disputes for different reasons.[220] The most important reason is it is a voluntary dispute settlement method. There is no obligation for any parties to engage in the process, and they can refuse to engage with or without providing any reason. In the past, segregation of diplomatic relations between the states was one of the possible consequences of refusal to engage in the negotiation process. It could also lead to physical violations such as the Falkland war.[221] The channel of negotiation would never be established had any of the parties failed to engage in this process. It would lead the dispute to be remained unresolved. It is recommended that this method should be initially used, however, the lack of balance of power between the parties might limit the effectiveness of this method. There is a risk that a more powerful party, economically or politically, pressurises the weaker one to accept its preferred solution.[222]

[216] ICSID, "Overview of Investment Treaty Clauses on Mediation" (2021), available at:< https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_Treaties.pdf > accessed 23 May 2023.
[217] US Model BIT (2012), Article. 23.
[218] Argentina-UAE BIT (2018), Article. 20.
[219] Taiwan-Viet Nam BIT (2019), Article. 18.
[220] N. Ebner, "Negotiation Is Changing" (2017*), Journal of Dispute Resolution*; Merrills (n 213) 16-18.
[221] O'Connell (n 211) 41.
[222] *Ibid*.

- ***Mediation***

When the negotiation fails to settle the dispute, the intervention of a third party becomes necessary. A third party would be intervened as a mediator who would endeavour to resolve the given dispute through the mediation process.[223] The mediator can assist the parties in settling the dispute by encouraging them to continue with their negotiation, albeit in the presence of the mediator, who plays an active role in guiding the parties to reach an agreement. Likewise, based on the provided information, they can make a few informal suggestions for the parties to choose from to settle their dispute.[224]

In this process, the parties can control the case and achieve a suitable outcome based on their terms, values, interests, and the nature of their disputes. Other advantages of mediation are confidentiality, development of long-term relationships and provision of win/win consequences rather than lose/win results.[225] Furthermore, another considerable aspect of this method is the adoption of the United Nations Convention on International Settlement Agreements Resulting from Mediation (also known as the Singapore Convention) in 2018 which enabled the enforcement of settlement agreements arising out of international commercial mediation faster and easier.[226]

Recently, it has been argued that mediation can also be served as an appropriate mechanism to settle foreign investment disputes. It is in response to the criticisms of ISDS,

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[223] J. Bleiberg, "Activist Investors and Mediation" (2016), *Activist Investors and Mediation*; N. Gren, "The Principles of Mediation" (2016), *Journal of Eastern European Law*, Vol. 1, No. 24; H. I. Abramson, "Time to Try Mediation of International Commercial Disputes" (1998), *ILSA Journal of International and Comparative Law*, Vol. 4, No. 323.
[224] Merrills (n 213)17-20.
[225] T. Gaultier, "Cross-Border Mediation: A New Solution for International Commercial Settlement?" (2013), *International Law Practicum*, Vol. 26, No.1; J. Lande, "Getting the Faith: Why Business Lawyers and Executives Believe in Mediation" (2000), *Harvard Negotiation Law Review*, Vol. 5, No. 137.
[226] United Nations Commission on International Trade Law [hereinafter UNCITRAL], "United Nations Convention on International Settlement Agreements Resulting from Mediation" (2018), text available at: < https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements > accessed 23 May 2023.

which have been raised in recent years.[227] Like negotiation, a number of BITs[228] contained an escalation clause which requires the parties to seek to settle their dispute resolved through mediation. This highlights the intention of states to encourage the disputing parties to attempt to settle their disputes by initially utilising consensus-based methods. The main concern is, like negotiation, mediation is a voluntary method, and it cannot be commenced until both parties give their consent to it. Therefore, the efficiency of this process depends on the degree of importance the parties attach to it. In other words, this process would be effective until the parties want it to be. In addition, selecting a mutually acceptable mediator is not an easy task. Also, this mechanism does not provide a binding decision. [229]

- ***International Commission of Inquiry***

Apart from negotiation and mediation, another form of diplomatic/consensual settlement procedure is utilising an international commissioner. An international commissioner is a third party who can provide an objective assessment and revive the progress of settlement of the dispute where attempts to settle the dispute through mediation and negotiation procedures have failed.[230] For the first time, the Treaty of Amity, Commerce and Navigation 1974 introduced the commission of inquiry as a new form of dispute settlement. However, they gained credibility as a form of dispute settlement from the Hague Convention of 1899.[231] The delegates of the Hague Peace Conference were impressed by the work of the commission of

[227] N. Welsh and A. K. Schneider, "Becoming Investor-State Mediation"(2012), *Penn State Journal of Law and International Affairs*, Vol. 1.
[228] See, US Model BIT (2012); Argentina-UAE BIT (2018), Article; Taiwan-Viet Nam BIT (2019).
[229] J. E. Alvarez, "A BIT on Custom" (2012), *New York University Journal of International Law and Policy*, Vol. 2, No. 17; For an in-depth discussion about mediation as a means of settling international disputes see J. Bercovitch, *Resolving International Conflicts: The Theory and Practice of Mediation* (Lynne Rienner Publishing, 1996).
[230] L. Brilmayer, C. Giorgetti, and L. Charlton, *International Claims Commissions: Righting Wrongs After Conflict* (Edward Elgar Publication, 2017).
[231] The Hague Convention for the Pacific Settlement of International Disputes 1899, available at: < https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1899-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf > accessed 23 May 2023.

inquiry to a degree that they decided to discuss the possibility of including a fact-finding process within the Convention. However, several smaller states feared that the new commissions would be used as a cloak for foreign intervention.[232] It was declared that commissions would be subject to a few conditions. First, they should only be utilised for disputes which involve neither honour nor essential interest. Also, they should only consider questions of fact and not the law. In addition, their utilisation should not be mandatory, and their findings should not be binding on the parties.[233]

These commissions have been a significantly valuable method for resolving disputes since their establishment in 1794. Various commissions were established between 1840 and 1940 to protect foreign nationals and their interests. They were mainly relied on as a form of diplomatic protection as one of the parties to the disputes was the states.[234]

Although conducting inquiries could ease the process of fact-finding and empowers the parties to retain a high degree of control over the dispute, their findings are not mandatorily enforceable. It limits their effectiveness, specifically, when states are hesitant to adhere to the outcomes. As a result, it cannot be the sole mechanism for settling foreign investment disputes. At the most, it can be utilised along with other dispute settlement methods.

2.7 Current Investment Dispute Settlement Mechanism: International Investment Arbitration

ISDS was introduced as a flexible procedure which grants direct access to international arbitration to companies and individuals against investment host states. It also enables the

[232] Merrills (n 213) 42.
[233] *Ibid*.
[234] J. Crawford, *Brownlie's Principles of Public International Law* (9th edition, Oxford University Press, 2019) Part XI.

parties to tailor such a procedure based on their exact needs and desires. It is claimed that ISDS has offered the most suitable manner by which investment disputes can be resolved. This is because it provides a basis to harmonise the interests of both foreign investors and investment host states.[235]

The system (if one may call it that) of ISDS is more complicated than might be expected. It does not operate in the same manner as a national judicial process. This is because in ISDS, the parties can select their preferred arbitrators and their numbers, the place of arbitration, and the overall time of the process.[236] In addition, unlike the national judicial process, in this procedure, disputes are not submitted to a single, authoritative body, instead international investment disputes are submitted to the parties' tribunal of choice (which is usually specified in the BIT between the disputing state party and the state of which the disputing investor is national).[237] There is a multitude of fora which may be referred to in BITs. One of the most interesting aspects of this procedure is that whatever forum is chosen to settle the investment dispute, the tribunal to which the dispute is submitted would usually provide the final decision (award) since there currently exists no possibility of appeal in ISDS.

There are two types of the arbitral institution; ad hoc tribunals and permanent bodies. It is worth noting that in order to analyse the system of ISDS, it is necessary to examine these types since they are both commonly used by the disputing parties.

A) Ad Hoc Arbitration

[235] Dimsey (n 20) 7.
[236] M. Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, 2000) 151- 154.
[237] *Ibid*.

In ad hoc arbitration, individual tribunals are assembled on a case-by-case basis to merely resolve the dispute that has been put forward before them. The parties can conduct their arbitration under either existing rules (i.e., UNCITRAL Arbitration Rules)[238] or rules agreed upon by themselves (completely ad hoc).[239] Both of these forms are considered under the general term ad hoc arbitration in this section.

One of the most considerable aspects of this form is it offers a great deal of flexibility, and it has enabled the parties to retain a considerable amount of control over the dispute. The parties could decide on every aspect of the arbitration, including choosing the seat of arbitration, the procedural rules and the arbitrators who hear the case and their numbers.[240] It is believed that such flexibility would increase the chance of upholding and implementing the decision of the tribunal by the parties.[241] Furthermore, this form of arbitration could assist the parties where they are unable to choose between the available arbitral institutions, and where parties are hesitant to submit their dispute to an institution.[242] Nonetheless, flexibility is also the greatest downfall of ad hoc arbitration as it has led it to be procedurally much more hazardous than institutional arbitration.[243] The issue is the parties with a high degree of control may not be the best people to make such important decisions. For example, they may be too close to the dispute to exercise impartiality or may simply lack the relevant expertise and knowledge.[244]

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[238] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, available at: < https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration > accessed 23 May 2023.
[239] O. Rakesh, "A Critical Analysis of Institutional Arbitration vs. Ad-Hoc Method" (2022), *International Journal of Law Management and Humanities,* Vol. 5 No. 1.
[240] P. Muchlinski *et al*., (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 711.
[241] M. Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Kluwer Law International, 1993) 9.
[242] M. Hasan and M. I Haque, "Choosing Institutional Arbitration over Ad-Hoc Method: A Critical Analysis" (2021), *International Journal of Law Management and Humanities*, Vol. 4 No. 5.
[243] G. Blanke, "Institutional versus Ad Hoc Arbitration: A European Perspective" (2008), available at: < https://link.springer.com/article/10.1007/s12027-008-0055-6 > accessed 23 May 2023.
[244] C. Harris, "Arbitrator Challenges in International Arbitration" (2008), *Transnational Dispute Management,* No. 4.

Another considerable aspect of ad hoc arbitration is that it enables the settlement of disputes more quickly and economically.[245] This is because it is not delayed by institutionally imposed deadlines and institutional bureaucracy. Likewise, it could be cheaper in comparison with the most permanent arbitral institutions, which charge relatively high administration fees. Nevertheless, it could only be speedy have the parties adhered to their initially agreed strict deadline.[246] The following chapter will further discuss that this type is now being regarded as a costly and timely mechanism for settling foreign investment disputes.

B) Institutional Arbitration

Institutionalised arbitration is administrated by an institution. Several permanent arbitral institutions are, routinely, called upon to hear international investment disputes. The most obvious advantage of this form is that the institution provides a rigid procedural framework and process for arbitral proceedings. It also supervises to ensure that the proceedings are efficient.[247] However, the fixed process could be a disadvantage since the institution's bureaucracy can lead to excessive delay and subsequently contribute to higher costs (a longer period is required to settle the dispute).[248] Cost indeed is the major disadvantage of institutionalised arbitration. This is due to the high administrative fees which are usually charged by the institutions. In particular, fees may be very high if a large amount of money is

[245] N. Shah and N. Gandhi, "Arbitration: One Size Does Not Fit All: Necessity of Developing Institutional Arbitration in Developing Countries" (2011), *Journal of International Commercial Law,* Vol. 6.
[246] G. Asken, "Ad Hoc Versus Institutional Arbitration" (1991), *ICC International Court of Arbitration Bulletin,* Vol. 2.
[247] *Ibid*.
[248] *Ibid*.

in dispute.[249] However, even if there is a relatively small amount in dispute, the base fee could be proportionally higher than that amount.[250]

Another advantageous aspect is the institution imposes tight time limits and deadlines (i.e., for the submission of documents and required responses). In the case of failure to comply with the deadlines, sanctions are applied.[251] Although strict deadlines are desirable as they contribute to the settlement of disputes more quickly, the imposed rigid deadlines and strict timeframe to submit documents or responses would have the negative consequence of not providing enough time for the parties to fully prepare their submissions and documents.[252]

Furthermore, arbitral institutions usually provide the parties with a large pool of potential experts who may be appointed to settle disputes. The parties could either choose the arbitrators themselves or they can ask the institution to appoint arbitrators.[253] Another important advantage is that an appropriate venue and associated facilities are available for the arbitration.[254]

- ***Specific Arbitral Bodies***

Among all the available arbitral bodies, this section specifically focuses on analysing one of the most prominent institutions: International Centre for the Settlement of Investment Disputes (ICSID). The main reason for their selection is that the awards which have been rendered by the ICSID tribunals would be regularly discussed in the following chapters.

[249] *Ibid*.
[250] *Ibid*.
[251] Blanke (n 243).
[252] *Ibid*.
[253] *Ibid.*
[254] Shah and Gandhi (n 245).

- ***International Centre for the Settlement of Investment Disputes***

The ICSID is the most popular of all institutions in the settlement of international investment disputes. The ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States to encourage foreign investment through the provision of a credible mechanism for settling disputes.[255] The ICSID is the only forum dedicated exclusively to the settlement of foreign investment disputes. The ICSID provides two sets of procedural rules: the ICSID Convention, Regulation and Rules and the ICSID Additional Facility Rules. The ICSID along with offering standard clauses and specific rules of procedure, provides institutional support including assistance with the selection of arbitrators and the conduct of the proceedings.[256] Today, the 158[257] member states and several bilateral and multilateral investment treaties grant ICSID jurisdiction in case disputes arise during investment.[258]

The Convention provides an effective system of enforcement of awards, which are binding in its member state.[259] All awards rendered by ICSID tribunals are fully binding and final. However, the award can be reviewed in very limited situations (i.e., procedural issues).[260] It must be noted that the domestic courts have no power to intervene in proceedings, review or set aside any awards rendered by the ICSID.[261] Also, it manages the appointment of arbitrators. However, the ICSID lacks a mechanism to tackle conflicts of interest among arbitrators.[262]

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[255] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966 (n 205)
[256] Dolzer *et al.,* (n 14) 223.
[257] ICSID, "ICSID Member States", available at < https://icsid.worldbank.org/about/member-states > accessed 23 May 2023.
[258] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (n 205), Article 25 and 26 (defining the ICSID's jurisdiction).
[259] Dolzer *et al.,* (n 14) 224.
[260] They can be reviewed by the limited conditions set out by Articles 49-52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966 (n 205).
[261] L. Reed, J. Paulsson, and N. Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International, 2004) 223.
[262] For a more detailed treatment of possible arbitrator bias in international investment arbitration, see W. Park, "Arbitrator Integrity" in M. Waibel *et al., (*eds.), *The Backlash Against Investment Arbitration: Perceptions and*

Perhaps, one of the main serious criticisms associated with the ICSID is the lack of legitimacy.[263] It has been asserted that the lack of legitimacy has led to the lack of legal security due to inconsistencies in jurisprudence.[264] The evidence shows that the ICSID arbitral tribunals have rendered a number of inconsistent decisions[265] The following chapter will analyse a few of these decisions in detail.

Recently, a few states have completely withdrawn or seriously limited their ICSID Convention membership. For instance, Bolivia fully withdrew its membership in 2007.[266] It asserts that there is a bias within the ICSID towards investors as it provided the investors with a mechanism to threaten the states with arbitration when they face policy decisions and legislation that adversely affected them.[267] Ecuador followed Bolivia's assertation, provided similar reasons and denounced the ICSID Convention in 2009 as Bolivia did in 2007.[268]

- ***Specifical Arbitration Rules***

Reality (Kluwer Law International, 2010) 189; N. Peter and C. Lemarie, "Is There a Different Yardstick for Arbitrator Bias in Investment Treaty Arbitration?" (2008), *Transnational Dispute Management*, Vol. 4; C. Mouawad, "Issue Conflicts in Investment Treaty Arbitration" (2008), *Transnational Dispute Management*, No. 4. For arbitrator bias in general arbitration, see, A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (7th edition, Oxford University Press, 2022) 184-224; J. Marshall *et al.,* (eds.), "Six Degrees of Separation: Arbitrator Independence in International Arbitration" (2008), *Transnational Dispute Management*, No. 4; H. Raeschke-Kessler, "Impartiality and Independence of Arbitrators - A Problem of Transnational Law" (2008), *Transnational Dispute Management*, No. 4.

[263] *Ibid*.

[264] I. Penusliski, "A Dispute Systems Deign Diagnosis of ICSID" in M Waibel et al (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010).

[265] *CME Czech Republic B.V. v Czech Republic, Ad hoc* – UNCITRAL, Partial Award of 13 September 2001 and IIC 62, Final Award of (14 March 2003), also see *Lauder v Czech Republic*, Final Award, (3 September 2001), Ad hoc- UNCITRAL.

[266] K. Supnik, "Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law" (2009), *Duke Law Journal*, Vol. 59.

[267] *Ibid*.

[268] N. Grossman, "Legitimacy and International Adjudicative Bodies" (2010), available at: < http://docs.law.gwu.edu/stdg/gwilr/PDFs/41-1/41-1-grossman.pdf > accessed 23 May 2023.

Among all the available arbitration rules, this section analyses specifically the UNICTRAL Arbitration Rules since the following chapters frequently examine the awards rendered by several ad hoc arbitral tribunals under these rules.

- ***United Nations Commission on International Trade Law (UNCITRAL)***

The UNCITRAL was established on 17 December 1966 by the Resolution 2205(XXI) of the United Nations General Assembly.[269] Its main objective is to eliminate or at least reduce barriers which could be created due to the existence of different trade laws of member states by developing the progress of harmonizing international trade.[270] The Commission cannot deal with the case as it is not a judicial body. Instead, disputes are settled under the UNCITRAL Arbitration Rules.[271] Around 20-30% of publicised investment arbitration cases are settled UNCITRAL arbitration rules.[272] There are several famous cases which have been settled under the UNCITRAL rules.[273] The UNCITRAL rules are often the rules of choice for arbitration under the NAFTA and in ad hoc arbitration.[274]

One of the advantages of choosing the UNCITRAL Rules is these Rules are characterized by a high level of confidentiality.[275] This is because UNCITRAL proceedings are governed by

[269] UNCITRAL, "Origin, Mandate and Composition of UNCITRAL", available at: < https://uncitral.un.org/en/about/faq/mandate_composition > accessed 23 May 2023.
[270] *Ibid*.
[271] UNCITRAL, "Texts and Status: International Commercial Arbitration and Conciliation", available at: < https://uncitral.un.org/en/texts > accessed 23 May 2023.
[272] UNCTAD, "Investment Policy Hub", available at: < https://investmentpolicy.unctad.org/investment-dispute-settlement > accessed 23 May 2023; UNCITRAL, "UNCITRAL Arbitration Rules (2021); UNCITRAL Expedited Arbitration Rules; UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration" (2021), available at: < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf > accessed 23 May 2023.
[273] For instance, Iran- US claims Tribunals, US Department of States, available at: < https://www.state.gov/iran-u-s-claims-tribunal/ > accessed 23 May 2023.
[274] D. Caron and L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edition, Oxford University Press, 2011) 93.
[275] *Ibid*.

the local law of the seat of the arbitration. The local law often imposes a duty of confidentiality. The Rules also refer to the privacy and confidentiality of the hearings and the awards, though, not the proceedings themselves.[276] However, it has been counter-argued that confidentiality could lead to uncertainty and unpredictability.[277] The following chapter will discuss this aspect of the UNCITRAL Rules in depth.

2.8 Conclusion

This chapter has demonstrated that by virtue of its piecemeal emergence, IIL naturally has a decentralised and fragmented character. There is no single coherent body of law within this division of international law. There are many different sources of international investment law, including customary international law, treaties, conventions, and guidelines. The previous attempts to establish a central source of foreign investment law (conclusion of a MIA) were unsuccessful due to disagreements between negotiating parties (developing and developed countries) on different occasions. Undoubtedly, BITs are a significant phenomenon in the history of IIL. Thousands of BITs between various states have had a deep-rooted impact on the regulation of foreign investment. However, their revolutionary effect was the introduction of clauses that empowered the investors to bypass national courts/local remedies and make direct recourse to ISDS. Investment arbitration provided a valuable opportunity for settling foreign investment disputes. The discussions regarding the state of IIL would be further utilised in the following chapters, where the author argues that without reform of the whole framework of

[276] *Ibid*.
[277] E. Gottwald, "Levelling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?" (2006), available at: < http://law.bepress.com/expresso/eps/1804/ > accessed 23 May 2023.

IIL, it is not possible to establish a prompt and effective foreign investment dispute settlement system.

The chapter analysed the effectiveness of traditional dispute settlement mechanisms. These mechanisms, due to several disadvantageous aspects, fell out of favour. One of the most considerable aspects is that either the dispute would be left unresolved, or it provides an ineffective and unfair solution. The outcome of such analysis creates the necessary basis for chapter four which examines the most prominent reform proposal (re-emergence of diplomatic protection). It would assist the author in assessing how this mechanism could still be considered as an effective method at present.

The analysis of the general dispute settlement mechanisms, such as consultation and medication, demonstrated that none of these mechanisms has the required capacity to be classified as the best possible dispute settlement mechanism through which investment disputes could be effectively resolved. However, it contributed to the thesis to respond to whether each could be one of the credited pillars of the multi-track foreign investment dispute settlement system, which would be discussed in chapter six.

This chapter created a basis for the following chapter by explaining the framework of the ISDS system. This is because even though ISDS initially gained considerable credit and popularity, recently, it has become the target of frequent criticism. The general belief is that the time has come to reform this system. Nonetheless, before considering the desirability of the reform, it is crucial, firstly, to understand how this system works and, secondly, to determine whether ISDS is indeed suffering from fundamental flaws. The next chapter evaluates the deficiencies which claimed to be associated with ISDS. The findings of the next chapter would guide the author to take further steps in the following chapters to determine whether reforming the current system of ISDS is necessary and desirable. The author confirms that this chapter has a descriptive nature. However, its importance is it sets the scene for the upcoming chapters.

It was crucial to consider the substantive law in the foreign investment regime to assess the effectiveness of the current ISDS system and the possibility of its reform.

Chapter III: Adequacy and Effectiveness of the Current System of ISDS

3.1 Introduction

The previous chapter demonstrated that an effective, reliable, and unbiased dispute settlement mechanism plays an important (if not the most important) role in encouraging foreign investment and enhancing global prosperity and social development.[278] The most frequently used mechanisms is ISDS, which has revolutionised foreign investment dispute settlement system since its inception. The purpose of this chapter is to build on the work in the previous chapter by setting out in more detail some of the key features of ISDS in order to evaluate this system as the primary investment dispute settlement mechanism against the benchmarks of legitimacy, efficiency, transparency and feasibility discussed in chapter one. Crucially, this chapter will respond to the research question which asks whether ISDS is currently the most effective and reliable mechanism for settling foreign investment disputes. The outcome of this analysis will provide the necessary foundation to move on to evaluate reform and replacement proposals, and specifically whether the EU's MIC proposal and its potential suitability for the resolution of international investment disputes.

Accordingly, this chapter has been divided into three substantive sections. The first section assesses the most significant characteristics of ISDS, which set this mechanism apart from other dispute settlement mechanisms. It is crucial to clarify the main factors behind the success of ISDS before examining the reform of the foreign investment dispute settlement system. The second section traces the backlash to ISDS, examining the reasons why it has been so heavily criticised by commentators. The final section reflects upon what the deficiencies

[278] Dimsey (n 20) 6.

identified with ISDS mean for its future, specifically whether the mechanism itself is fundamentally sound, but could be subjected to reforms (by way of either minor or more significant changes), or whether the system is fundamentally unsuitable for the resolution of investment disputes. If the latter is found to be the case, the next logical question to consider is whether the time has come to replace it entirely with a different dispute settlement mechanism.

3.2 The Framework of International Investment Arbitration

The main reason behind ISDS's initial popularity is that it significantly improved upon the two traditional dispute settlement mechanisms; it successfully avoided many of the issues associated with diplomatic protection and host state national courts. Additionally, ISDS has a few specific features that lend itself well to the effective resolution of foreign investment disputes.[279] This section will examine the most significant features of ISDS, analysing whether they pertain to an adequate and effective mechanism for the resolution of foreign investment disputes. This assessment will form the basis for the following chapters assessing how reform proposals and/or alternative dispute settlement mechanisms would measure up to ISDS.

3.2.1 Direct Investment Claims

As we highlighted in the previous chapter, before the development of the modern ISDS, in case of any dispute, foreign investors only had two courses of action: referral of disputes to

[279] W.Alschner, "The Impact of Investment Arbitration on Investment Treaty Design: Myths versus Reality" (2017),*Yale Journal of International Law*, Vol. 42, No.1; K. P. Sauvant, "Emerging Markets and the International Investment Law and Policy Regime" (2018) in R. Grosse and K. Meyer (eds.), *The Oxford Handbook of Management in Emerging Markets* (Oxford University Press, 2019); Newcombe and Paradell (n 138) 41-49; *K Vandevelde, Bilateral Investment Treaties* (Oxford University Press, 2010); Sornarajah (n 90) 179-211.

national courts of the host state and diplomatic protection.[280] ISDS enables the investors to initiate an arbitration claim directly.[281]

Although empowering investors to bring a direct claim against the host state has been highlighted as one of the main advantages of ISDS, individuals have been empowered by ISDS to the extent that they can threaten the state's ability to implement regulations that are within the public interest, such as public health and environmental policies.[282] This is known as the 'regulatory chill' effect of the ISDS system. It has been defined as, "the situation in which a state actor will fail to enact or enforce bona fide regulatory measures because of a perceived or actual threat of investment arbitration."

There have been several scholarly debates about the issue of regulatory chill.[283] Schill contends that, "investment treaties should not lead to a chill on environmental regulation nor obstruct measures that are introduced in an attempt to mitigate climate change."[284] On the other hand, some scholars counter-argue that the investors are vulnerable to the arbitrary exercise of the state's power, specifically, those with poor records of upholding the rule of law.[285] Evidence suggests that, in some cases, international investment treaties have had chilling effects on the

[280] Dugard (n 189); Subedi (n 2) 16-25.
[281] UNCTAD, "Series on International Investment Policies for Development", available at: < https://www.un-ilibrary.org/content/series/1814201x > accessed 23 May 2023.
[282] E. Warren, "The Trans-Pacific Partnership Clause Everyone Should Oppose" (2015), Washington Post, available at: < https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.ac4d71b46e23 > accessed 23 May 2023; C. Provost and M. Kennard, "The Obscure Legal System That Lets Corporations Sue States" (2015), available at: < https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid, > accessed 23 May 2023.
[283] S. Schill, "Do Investment Treaties Chill Unilateral Regulation to Mitigate Climate Change?" (2007), *Journal of International Arbitration*, Vol. 24, No. 5; K. Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (Cambridge University Press, 2013); J. G. Brown, "International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?" (2013), *Western Journal of Legal Studies*, Vol. 3, No. 1; K. Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement" (2017), *Transnational Environmental Law*, Vol. 7, No. 2.
[284] *Ibid*, Schill, 469.
[285] C. Schreuer, "Do We Need Investment Arbitration?", Chapter 38, in J. E. Kalicki and A. Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System - Journeys for the 21 Century* (Brill Publishing, 2015).

state's regulatory power.[286] For instance, in the case of open-pit mines,[287] Indonesia, in 1999, reformed its environmental protection laws, following which no open-pit mining was permittable in protected forests. Yet, the new law conflicted with the contract of work which had been entered into with many international investors.[288] As a result, investors threatened the government by taking the matter to international arbitration. The government took the threat of international arbitration seriously, not only because they could not afford the cost of arbitration and having to pay compensation, but also to maintain their reputation to attract future foreign investments. Therefore, in 2002, the Indonesian government made exceptions to its forestry law and provided the right to continue with open-pit mine plans in protected forest areas for twenty-two companies. It stated that these companies would not operate under the new forestry laws but instead under a special decree from the Ministry of Forestry.[289]

It should be noted that making such an exception by the Indonesian government was not exclusively attributable to the threat of arbitration, and other factors, such as revenue and employment, did play a role in their decision.[290] However, it is questionable whether the government would have made such a decision if no international arbitration clause included within the contract of works. It is alleged that had the government known that the new forestry law could only be challenged in their domestic court system, they might have acted differently.[291] Indeed, by considering the fragile economy of the government at the time (Asian

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[286] E. B. Lydgate, "Biofuels, Sustainability and Trade-related Regulatory Chill" (2012), *Journal of International Economic Law*, Vol. 15, No. 1; K. Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science, in Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 606-628.
[287] Tienhaara (n 283); D. Fogarty, "Risks Remain Despite Indonesian Forest Moratorium: Study" (2011), available at: < https://www.reuters.com/article/us-indonesia-climate-moratorium/risks-remain-despite-indonesian-forest-moratorium-study-idUSTRE79T0OR20111030 > accessed 23 May 2023.
[288] K. Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press, 2009) 115; UNCTAD, Systemic Issues in International Investment Agreements (2006), IIA Monitor No.1, UNCTAD/WEB/ITE/IIA/2006/2.
[289] *Ibid*.
[290] P. Jepson, J. K. Jarvie, K. MacKinnon, and K. A. Monk, "The End for Indonesia's Lowland Forests?" (2001), *Science Journal*, Vol. 292, No. 5518.
[291] R. Steiner, "El Salvador: Gold, Guns, and Choice" (2010), *International Union for the Conservation of Nature and the Commission on Environmental, Economic, and Social Policy*, Report No. 5.

Financial Crisis of 1997),[292] it can be argued that the threat of arbitration played a significant role in making such an exception by the Indonesian government. It is impossible to measure different categories of chill that result from ISDS, and it is impossible to discover which draft legislation has been suspended due to the threat of arbitration.[293]

There have been a few suggestions to minimise the possibility of challenging the regulatory power of investors. For instance, the OECD Declaration on International Investment suggests it is crucial to clarify the internationally recognised standards on various public policy areas such as corporate governance, human rights, employment, environment, anti-bribery, and taxation.[294] It recommends that the government that corporate with business and trade unions can create guidelines and set them at the OECD, International Labour Organisation (ILO) or the United Nations (UN) level. They provide an implicit indication of what standards should not be challenged by investors.[295] Allegedly, countries which attempt to make their laws and regulations in line, for example, employment or environmental protection, with the international standards related to these policy fields are unlikely to be challenged by foreign investors through ISDS. It can be argued that aligning domestic regulations with the related international standards and creating guidelines at international levels cannot be regarded as an effective solution for addressing the alleged regulatory chill effect of investment arbitration. It is because the investors have been empowered by the investment agreements or contracts to initiate an arbitration process once the government implements a regulation that prevents them from their investment activities and threatens their interests.

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[292]Congressional Research Service (CRS), "The 1997-98 Asian Financial Crisis" (1998), CRS Report, available at: < https://fas.org/sgp/crs/row/crs-asia2.htm > accessed 23 May 2023.
[293] C. Tietje and F. Baetens, and E. Rotterdam, "The Impact of Investor State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership" (2014), *The Minister of Foreign Trade and Development Cooperation*.
[294] OECD, The OECD Declaration, available at: < www.oecd.org/investment, > accessed 23 May 2023.
[295] See *Chemtura Corporation (Formerly Crompton Corporation) v. Government of Canada (2010) UNCITRAL 2008/01,* NAFTA ch.11, Award, (the existence of a governmental decision taken for a public purpose renders the standard for challenging the regulatory decision very high).

Moreover, ISDS was promoted as a mechanism to provide fair compensation for the investors whose rights have been violated by the host states' activities. What is critical is the existence of harmony between the host states' laws and regulations with the investment agreements and contracts, not the conformity of the law and regulations with the relevant international standards.

This issue can be considered from a different angle. It must be clarified whether the state must adopt policies that follow the terms of treaties or provide fair compensation for an injured investor in case of breaching their investment treaty or investment contract by adaptation of a regulatory measure. It appears that the focus is on providing adequate compensation rather than holding the host state committed to complying with the investment treaties or contracts. The court acknowledged such an argument in the Indonesian open mining case.[296] Hence, states are not obliged to maintain their investment agreements and contracts at the cost of not exercising their regulatory power. States can implement regulations which conflict with their existing investment agreements/contracts at the expense of providing fair and adequate compensation for the investors whose rights have been violated by such regulatory actions.

A key example of this is the Australian plain packaging case where Australia introduced the law of plain packaging of cigarettes.[297] Subsequently, France and New Zealand followed suit. It is hard to accept that these countries were not aware of possible challenges that they could have faced upon enactment of such legislation. However, such a suggestion could not be applicable in every case. It is because several states cannot afford the fee of the arbitration

[296] Tienhaara (n 283) 606-628; Fogarty (n 287).
[297] Panel Report, Australia — *Certain Measures Concerning Trademarks, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R Panel Report, (28 June 2018); Australia — *Certain Measures Concerning Trademarks, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (9 June 2020) ('Appellate Body Report').

process or the provision of proper compensation for investors. It is one of the negative aspects associated with ISDS that could subsequently discourage states (specially developing states) from incorporating arbitration provisions within their investment agreements. It can be argued that the limitation of states' regulatory power in any given case could be regarded as a consequence of their desire for financial assistance and the economic growth of the country as a whole. [298] Chapter four and chapter five will analyse in detail whether the issue of regulatory chill is also associated with other suggested dispute settlement systems (such as the proposed MIC).

3.2.2 Neutrality

Most, if not all, arbitration rules have accepted that arbitrators are to be neutral, impartial, and independent.[299] Also, the arbitration process can take place in a neutral location, which might be distinct from the host state or home state.[300] This section focuses on clarifying whether neutrality is an exclusive character of ISDS.

Generally speaking, from the host states' perspective, resolving disputes through the national judicial system is more advantageous as they believe that their judicial system may look upon their position more favourably. Conversely, from the investors' perspective, the courts of the host states may be perceived as ineffective and potentially biased.[301] Historically, the states in which investors typically used to invest were from less developed countries.[302] In

[298] S. Lalani and R. Polanco Lazo, "The Role of State in Investor-State Arbitration" (2015), *Brill Nijhoff International Investment Law Series*, Vol. 3.
[299] F. Sourgens, "Evidence in Investor-State Arbitration – The Need for Action", (2017), Kluwer Arbitration Blog, available at: <https://arbitrationblog.kluwerarbitration.com/2017/03/16/evidence-in-investor-state-arbitration-the-need-for-action/ > accessed 23 May 2023; C. Verbruggen, "The Arbitrator as a Neutral Third Party" (2011), available at: < http://www.youngicca-blog.com/the-arbitrator-as-a-neutral-third-party-by-caroline-verbruggen/, > accessed 19 April 2023.
[300] *Ibid*.
[301] Neumayer and Spess (n 17).
[302] *Ibid*.

these countries' judicial systems, conventional wisdom dictates that judges might feel obliged to settle the claim in favour of their government, and they might be obliged to apply more favourable local law which contradicts the international or treaty rules.[303]

The previous chapter demonstrated that national courts could not provide an effective, reliable, and impartial mechanism for resolving foreign investment disputes. Despite this, labelling all the domestic judicial systems of the developing host states as corrupted and/or biased tag is a strong accusation. However, considering the less developed judiciary systems in the developing states is a leading factor in the investor's claim that the judges in these states cannot decide against their government, knowing that their government cannot afford to pay such substantial damage and compensation.[304]

It is questionable whether the same would be applicable in situations where the host state is from a developed country with a developed judicial system. The investment world requires a unique, fair, reliable, and universal mechanism for resolving all disputes between foreign investors and host states of developing and developed countries. Therefore, no distinction should be drawn between two groups of states while assessing the effectiveness of their national judicial system for settling foreign investment disputes. In addition, an international dispute could be effectively resolved by a method that cannot be negatively affected by any national element and has the required expertise to deal with technical issues associated with foreign investment disputes.[305]

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[303] UNCTAD, "World Investment Report 2017", Available at :< http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf > accessed 23 May 2023; S. Mandelbaum, "The Measure of Finality: A Dialectal Analysis of Legitimacy Concerns in International Investment Arbitration" (2020), *UCL Journal of Law and Jurisprudence*, Vol. 9; S. Akinlolu Fagbemi, "A Critical Analysis of the Mechanisms for Settlement of in International Arbitration" (2017), *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, Vol. 46.

[304] *Ibid*, Mandelbaum.

[305] G. Dimitropoulos, "The Conditions for Reform: A Typology of Backlash and Lessons for Reform in International Investment Law and Arbitration" (2020), *The Law and Practice of International Courts and Tribunals*, Vol. 18, No. 3.

3.2.3 Nomination of Arbitrators

Following the two main arbitration rules utilised in ISDS (the UNCITRAL Rules and the ICSID Rules), each party to a dispute has a right to appoint one arbitrator to the panel of three arbitrators and nominated arbitrators would mutually appoint the third arbitrator.[306]

There are two main criticisms concerning this aspect of ISDS. First, the legitimacy of an award issued by privately appointed arbitrators has been the target of criticism.[307] Some argue that the decisions of investment arbitrators do not contain the law. Also, such decisions are affected by other extra-legal factors, such as their ideology, self-interest and strategic reaction to other institutions and judicial backgrounds.[308] On the other hand, some counter-argue that the right to nominate arbitrators would develop the legitimacy of the procedure in many ways. For instance, a party-appointed arbitrator plays a considerable role in ensuring that the tribunal evaluates the evidence and arguments presented by the parties.[309]

Further, there are issues when it comes to the nomination of neutral arbitrators in ISDS. This is because the disputing parties would (in all likelihood) select an arbitrator that they believe would be the most sympathetic to them/their position. They may well be true, with investment arbitrators favouring their appointing party intending to increase the likelihood of

[306] Under the ICSID, the third arbitrator becomes the Chair of the panel, and under UNCITRAL, the third arbitrator will act as the presiding arbitrator of the arbitral tribunal, see ICSID, "Selection and Appointment of Tribunal Members - ICSID Convention Arbitration" (2013), available at< https://icsid.worldbank.org/en/Pages/process/Selection-and-Appointment-of-Tribunal-Members-Convention-Arbitration.aspx > accessed 23 May 2023; NCITRAL Arbitration Rules 2010, Article. 9, available at: < https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf > accessed 23 May 2023.

[307] M. Sornarajah, "Power and Justice: Third World Resistance in International Law" (2006), *Singapore Year Book of International Law and Contributors*, Vol.10; P. Eberhardt and C. Olivet, "Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom, Corporate Europe Observatory" (2012), available at: < https://corporateeurope.org/international-trade/2012/11/profiting-injustice > accessed 23 May 2023.

[308] *Ibid*.

[309] C. A. Rogers, "The Politics of International Investment Arbitrators" (2014), *Penn State Law*, Vol. 12. No. 1: C. N. Brower and S. W. Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?" (2009), *Chicago Journal of International Law*, Vol. 9, No. 2.

future appointments.[310] This is by virtue of the fact that it is impossible for an arbitrator to render a decision that could satisfy both parties.[311] The critical issue is therefore ensuring the selection of impartial and reliable arbitrators who render fair and accurate awards.[312]

On the issue of whether party-selected arbitrators can indeed render an unbiased, lawful, and accurate decision, there have been a few empirical research which attempted to respond to the above question.[313] The findings suggest that due to the nature of the arbitration procedure and the selection of private arbitrators, there can be no definitive response to the question. Van Harten acknowledges this by stating that, "there is not, and probably never will be, conclusive empirical evidence of the presence or absence of systemic bias in investment arbitration."[314]

It is undeniable that the arbitrators' skills, knowledge, and expertise provide a significant effect on the development of dispute resolution. Accordingly, it is crucial to fill the gap in the current literature. The thesis's chapters four and five focus on responding to the mentioned question.

3.2.4 Confidentiality

One of the fundamental principles of ISDS is the principle of confidentiality. Confidentiality applies to the proceedings, the associated documents, and the final arbitral

[310] G. Sisk, "The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making" (2008), *Cornell Law Review*, Vol. 93, 873; Sornarajah, (n 307) 30-3, 40-43.
[311] F. G. Sourgens, "Value and Judgment in Investment Treaty Arbitration" (2018), *Journal of Dispute Resolution*, Vol. 1, No.1; J. Dammann and H. Hansmann, "Globalizing Commercial Litigation" (2008), *Cornell Law Review,* Vol. 94, No. 1.
[312] J. Lee, "Is the Emergency Arbitrator Procedure Suitable for Investment Arbitration" (2017), *Contemporary Asia Arbitration Journal*, Vol. 10, No. 1; D. Kapeliuk, "The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators" (2010), *Cornell Law Review,* Vol. 96, No. 1.
[313] P. Nunnenkamp, "Investor-State Dispute Settlement: Arbitrators Biased in Favour of Claimants?" (2017), available at: < https://www.ifw-kiel.de/wirtschaftspolitik/zentrum-wirtschaftspolitik/kiel-policy-brief/kpb-2017/kpb_105.pdf > accessed 23 May 2023.
[314] G. Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration" (2012), *Osgoode Hall Law Journal*, Vol. 50, No. 21.

award.[315] In fact, there exists a number of limits regarding accessing the public hearings, the amici/third-party participation, publication of awards and access to documents.[316]

It must be noted that due to the nature and type of disputes arising in ISDS, confidentiality has a special place in this system.[317] Investment disputes often consist of sensitive matters, such as the regulatory activity of the host states that might directly or indirectly have disadvantageous impacts on foreign investment.[318] ISDS thus offers an effective mechanism for the legitimate protection of these matters. Nevertheless, the principle of confidentiality is the root of many problems in ISDS as it would transform it into a less transparent mechanism.[319] The lack of transparency undermines legal certainty that subsequently increases inconsistency and decreases general confidence in the dispute resolution process.[320]

Furthermore, initiating arbitration by private investors against a sovereign state differs significantly from an arbitration claim brought by a private party against another private

[315] In *Methanex* and *UPS*, the third party could attend the hearing as both the disputing parties agreed. However, the tribunal in *Aguas Argentinas* rejected the request for the participation of a third party on the basis that one of the parties (claimant) had not admitted the third party to the hearing. See *Methanex Corporation v. United States of America, UNCITRAL*, (1976), NAFTA case. *UPS v. Canada United Parcel Service of America, Inc. (UPS) v. Government of Canada,* (ICSID Case No. UNCT/02/1)*; Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, SA. and Vivendi Universdal, SA. v. Argentine Republic*, ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus curiae.

[316] M. D. Stanivukovic, "Confidentiality and Transparency in International Arbitration (2018*), Zbornik Radova*, Vol. 52, No. 2; C. Knahr, "Transparency versus Confidentiality in International Investment Arbitration" (2007), *Law and Practice of International Courts and Tribunals*, Vol. 6, No. 1.

[317] W. Alschner, "The Impact of Investment Arbitration on Investment Treaty Design: Myths versus Reality" (2017), *Yale Journal of International Law*, Vol. 42, No.1.

[318] The regulatory activities of the host states and their impact on the foreign investment were explained above under the subsection 'regulatory chill'. See, the case of Indonesia open-pit mines, Fogarty, Fogarty (n 287).

[319] Dimsey (n 20) 36; B. M. Bravo and C. Figueiras, "The Problem of Reconciling the Principle of Confidentiality in Foreign Investment Arbitration with the Public Interest" (2018), *International Journal of Law and Political Sciences*, Vol. 12, No. 3, 480 – 484.

[320] *Ibid*, Figueiras; A. Menaker, "Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration" in K Yannaca-Small (eds.) *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010); M. A. Belohlavek, "Confidentiality and Publicity in Investment Arbitration, Public Interest and Scope of Powers Vested in Arbitral Tribunals" (2011), *Czech Yearbook of International Law,* Vol. 2, No. 1, 23.

party.[321] The difference lies in public interest in investment arbitration claims, whereas there is no interest in international commercial arbitration.[322] Moreover, there is a potential monetary liability for public treasuries in ISDS. Any award of compensation has significant effects on the host state's budget. The initiation of arbitration against the host state could be a direct result of misconduct. Therefore, there is a public interest in knowing what the misconduct was, what the outcome would be, and how such an outcome can affect individuals.[323] However, under the current system, the public cannot know whether there exist any investment arbitration claims.[324]

One of the advantages of enhancing transparency through the publication of awards, public participation and submission of the amicus brief is the creation of a type of precedent in ISDS. It could assist the arbitrators in making more accurate decisions.[325] The rule of law has also supported this concept which refers to establishing easy access to procedures and information for parties and the public, holding decision-makers accountable for their decisions, and creating a basis for criticism or complaints to be heard and redressed.[326] On the other hand, the lack of confidentiality could potentially provide several negative consequences, such as the risk of disclosure of secret and sensitive information.[327] As a result, there should be a balance between maintaining confidentiality, transparency and public interest. A few proposals

[321] A. Newcombe, "Confidentiality in Investment Treaty Arbitration" (2010), Kluwer Arbitration Blog, available at: < https://arbitrationblog.kluwerarbitration.com/2010/03/03/confidentiality-in-investment-treaty-arbitration/ > accessed 23May 2023.
[322] H. Yu, "Who Is In? Who Is Out? How The UNCITRAL Transparency Rules Can Influence the Upcoming Amendments of the ICSID Arbitration Rules" (2018), *Contemporary Asia Arbitration Journal*, Vol. 11, No. 1.
[323] *Ibid.*
[324] S. Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy" (1963), *Yale Law Journal*, Vol. 72, No. 4, 694; E. Angell, "The Amicus Curiae American Development of English Institutions" (1967), *International Comparative Law Quarterly*, Vol. 16, No. 4; United Nations General Assembly (1976), UN Doc A/Res/31/98.
[325] J. D. Kearney and T. Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court" (2000), *University of Pennsylvania Law Review*, Vol. 148, No. 743.
[326] Security Council of United Nations, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (2004), S/2004/616.
[327] Newcombe (n 321); *Abaclat and Others*, Case formerly known as *Giovanna Abeccara and Others v. The Argentine Republic*, (2013), ICSID Case No. ARB/07/5.

attempted to draw such a balance in ISDS by reforming the relevant rules in ICSID and non-ICSID arbitration.

The amendments to the ICSID Arbitration Rules in 2006 expressly provided an opportunity for the participation of the non-disputing parties *amicus curiae.*[328] The criteria outlined in Arbitration Rule 37(2) permit arbitral tribunals to find a balance between the public interest, the interest of the parties and the proceeding. The new ICSID Regulations and Rules 2022[329] introduced a few changes towards enhancing transparency by permitting the publication of a final award by default in the absence of an objection by any party within 60 days.[330] In addition, they enabled the publication of written submissions or supporting documents upon the parties' consent.[331] The new Rules also permitted the attendance of a third party unless either party objected.[332]

In respect of publication of awards, the ICSID new Rules permitted the Centre to publish the legal excerpts of the award in a case where only one of the parties has consented.[333] However, a more considerable change was introduced by Rule 64. It enabled the tribunals to deal with disputes regarding the publication of the documents and any redaction of submissions. It leads the Centre to take instruction from the tribunal, not the parties, to publish an award.[334]

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[328] ICSID, "ICSID Convention, Regulations and Rules" (2022), Article 37(2), available at: < https://icsid.worldbank.org/procedures/arbitration/convention/confidentiality-transparency/2022#:~:text=ICSID%20is%20required%20to%20publish,Rule%2063(1)) > accessed 23 May 2023.
[329] *Ibid*.
[330] *Ibid*, Rule 62.
[331] *Ibid*, Rule 63.
[332] *Ibid*, Rule 64, 65.
[333] E. Karimov, "Are the ICSID Arbitration Clauses in Investment Contracts Concluded via Smart Contracts Valid?" (2022), *Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi Stiinte Juridice*, Vol. 68, No.1.
[334] ICSID Convention, Regulations and Rules 2022 (n 324) Rules 64; I. Rasilla, "The Greatest Victory'? Challenges and Opportunities for Mediation in Investor-State Dispute Settlement" (2022), *ICSID Review, Foreign Investment Law Journal.*

It appears that the ICSID, in respect of the non-disputing parties' participation, was inspired by the new treaty of the United States-Mexico-Canada Agreement (USMCA).[335] Under the new Rules, non-disputing parties have the right to submit comments on the interpretation of the treaty. Where the non-disputing party wishes to comment on another topic, they must request the tribunal for permission. The tribunal has been obliged to assure that the participation of a non-disputing party would not unduly burden or unfairly prejudice a party.[336]

The final change relates to the non-parties attendance at hearings. The new Rules changed the old policy according to which the tribunal should decide whether a third party should be allowed to a hearing. Under the new Rules, the non-parties could observe the hearings unless either party objects. Also, it is dubious how tribunals would address Rule 65(2) in practice since it requests the tribunal to establish procedures to prevent the disclosure of confidential or protected information defined in Rule 66 to persons observing the hearings.[337] It is questionable how the tribunals apply the restrictions at the time of the hearing. Since, in some circumstances, the tribunals should request non-disputing to leave the hearing room. It could cause several disruptions in the hearing process unless the tribunal could appropriately deal with such a matter.[338]

The new Rules came into effect in July 2022. Therefore, it is too early to provide a conclusive response to the question of whether the ICSID has been successful in properly addressing the issue of lack of transparency in ISDS. While we must wait and see how the new Rules are being implemented in practice by the ICSID tribunals, there are a few concerns regarding the efficiency of the new Rules (i.e., third-party participation in the arbitration procedure is still a topic of controversy).

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[335] United States-Mexico-Canada Agreement [hereinafter USMCA] 2018, available at: < https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between > access 23 May 2023.
[336] ICSID Convention, Regulations and Rules 2022 (n 324) Rule 68.
[337] ICSID Convention, Regulations and Rules 2022 (n 324) Rule 66.
[338] Shaw (n 73).

The introduction of new UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014[339] is a substantial attempt for drawing a balance between confidentiality and transparency in ISDS. These Rules cover all stages of the arbitration proceedings, including submissions to arbitral tribunals, publication of arbitral awards and the participation of non-disputing third parties such as *Amici Curiae*.[340] Some criteria must be met before participation of *an Amici Curiae* in the procedure. For instance, they should demonstrate how their background, experience, and expertise could assist in the particular case.[341] This practice has supported the development of transparency in ISDS by providing an opportunity for the tribunal to consider the general public interest within the arbitral process.[342]

Articles 2 and 3 of the new Rules limit the disputing parties' power in deciding what information to share with the public. However, Article 7 assures investors that protected information, such as sensitive business data, strategies, and trade secrets stay protected.[343] However, this Article failed to clarify how the arbitrators should consider contractual confidentiality in light of the Rules.

It must be noted that while the initial purpose of these Rules was to enhance transparency and to address public interest concerns, in practice, these Rules provided a shield for investors' businesses from possible harmful effects of public accessibility. Nonetheless, the degree of success of the Rules in creating a balance between the interest of parties to an

[339] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014), available at: < https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency > accessed 23 May 2023.
[340] *Amicus Curiae* translated from Latin as (friends of the court), and it is a term used where a voluntary third party seeks to participate in a specific investment arbitration disputes' hearing in order to provide a neutral and a well-supported opinion in relation to an issue about which there is a public concern. Briefs are accepted under general power of Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966, Article 44.
[341] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas ServiciosIntegrales del Agua S.A v. Argentina* (2006), ICSID Cases No. ARB/03/17.
[342] At the European Court of Justice, you have the advocate general, who is there to bring the public interest of the Communities to bear, and *amicus briefs* are a substitute for the advocate general. See, T. Wälde, "Transparency, Amicus Curiae Briefs and Third Party Rights" (2004), *The Journal of World Investment and Trade,* Vol. 2.
[343] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014 (n 339) Article 7.

arbitration and public interest depends on how well the tribunals can apply them to a given case.

Furthermore, on 18 October 2017, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention") entered into force after being ratified by Canada, Mauritius and Switzerland.[344] It aims to facilitate the application of the 2014 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration.[345] The Mauritius Convention introduced a significant degree of publicity of the arbitral proceedings, such as the public disclosure of awards and other sensitive documents (Articles 2 and 3), open hearings (Article 6) and submissions by non-disputing parties (Articles 4 and 5).[346] The most significant aspect of the Convention is it does not only apply to the arbitration under treaties conducted on or after 1 April 2014, but it introduced an efficient mechanism through which states can express their consent to its application, which were arisen out of earlier treaties (prior 1 April 2014).[347] The retrospective effect of the Convention demonstrates the possibility of reforming the IIL through an opt-in approach.[348] In the case of wide adaptation of the Convention, there is a greater chance for enhancing transparency in ISDS. The new Rules apply to arbitrations conducted under any set of arbitration rules, and they provide an opportunity for the organisations, such as the EU, to become a party to this Convention. They have also been

[344] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 2014 (hereinafter Mauritius Convention on Transparency 2014), available at: < http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html > last accessed 23 May 2023.
[345] *Ibid*.
[346] L. Johnson and N. Bernasconi-Osterwalder, "New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps" (2013), *International Institute for Sustainable Development and Vale Columbia Centre on Sustainable International*, Investment Policy Paper No. 3.
[347] UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session, (2013), UN Doc. A/CN.9/765, paras 75–78, available at: < https://unctad.org/system/files/official-document/a68d17_en.pdf > accessed 20 May 2023.
[348] L. Johnson, "The Mauritius Convention on Transparency: Comments on the Treaty and Its Role in Increasing Transparency of Investor-State Arbitration" (2014), Columbia Centre on Sustainable Investment, available at: < http://ccsi.columbia.edu/files/2013/08/Mauritius-Convention-Transparency-Paper-formatted-FINAL.pdf > accessed 22 May 2023; B. Wasiak, " The Mauritius Convention on Transparency Enters into Force" (2017), *Investment Claims Journal.*

drafted to reduce the risk of denouncement of the Convention by the states.[349] There are a few factors which indicate that the practical impacts of the Convention are limited. First, states have not shown any significant willingness to ratify the Convention. Until now, it has been signed by 23 States and ratified by 9 states.[350] The process of signing and rectifying is still ongoing. Also, its impacts should be assessed in the longer term. Another concerning issue is that out of thousands of investment treaties, which were conducted before 1 April 2014, the Mauritius-Switzerland BIT is the only BIT to which the Convention applies.[351] In addition, the Convention mainly focused on treaty-based arbitration. The investment arbitrations initiated under contracts or domestic investment-protection laws fall outside its scope.[352] It is one of the main defective aspects of the Convention, which requires re-consideration. Moreover, although economic integration organisations can become a party to the Convention, it will only be applicable where such an organisation is a respondent rather than any of its member states. Also, the Convention only applies where the claimant's home state is a party to the Convention and not any economic organisation of which that state is a member.[353]

3.2.5 Finality, Speed and Economy

Finality, speed, and economy are the most often cited advantages of ISDS. There is no appeal mechanism in ISDS due to the existence of the principle of finality. This lack of an

[349] *Ibid*, Wasiak**.**
[350] The United Nations Treaty Collection States, available at: < https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&clang=_en > accessed 23 May 2023.
[351] Wasiak (n 348).
[352] D. Euler, "Transparency Rules and the Mauritius Convention: A Favourable Haircut of the State's Sovereignty in Investment Arbitration" (2016), *Kluwer International Law*, Vol. 34, No. 2.
[353] Wasiak (n 348).

appeal mechanism undoubtedly contributes to settling investment disputes quicker and more cheaply.[354]

Although, traditionally, the principle of finality has been valued as one of the main advantages of ISDS,[355] recently, it has been suggested that states and foreign investors have prioritised justice and correctness.[356] In addition, ISDS is no longer a speedy mechanism, and to a certain extent, it has become an expensive dispute-resolution mechanism. The average time for settling a dispute through the ICSID is around four years.[357] The evidence suggests that the costs of conducting the arbitration procedure have skyrocketed.[358]

Additionally, arbitration institutions have recently dramatically increased the legal fees.[359] In many cases, fees amount to millions of dollars.[360] The legal community maintained that the arbitral institutions following gaining popularity adopted more formal patterns and structures in order to increase their profits.[361] On the other hand, some have claimed that the arbitral institutions are not responsible for the increased cost and the length of the procedure;

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[354] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 [hereinafter New York Convention 1958], Article III, available at:< https://newyorkconvention1958.org/index.php?lvl=notice_display&id=3388 > accessed 20 May 2023.
[355] Dolzer *et al*., (n 14) 277.
[356] J. Ahmad Khan, "Managing Investment Disputes: A Critical Analysis of Investor State Dispute Settlement Mechanism in Bilateral Investment Treaties" (2017), *Journal of Management and Public Policy,* Vol. 8, No. 2; C. M Brown, "A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches" (2017), *Foreign Investment Law Journal*, Vol. 32, No. 3; J. Clapham, "Finality of Investor-State Arbitral Awards: Has the Tide Turned and Is There a Need for Reform?" (2009), *Journal of International Arbitration*, Vol. 26, 437.
[357] M. Hodgson and A. Campbell, "Study of Cost Awards in Investment Treaty Arbitrations up to end of May 2017 Annulment Table" (2017), Allen and Overy LLP, available at: < http://www.allenovery.com/SiteCollectionDocuments/Master_Table_Annulments.PDF > accessed 23 May 2023.
[358] J. P. Commission, "How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years" (2016), Kluwer Arbitration Blog, available at: < http://arbitrationblog.kluwerarbitration.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/ > accessed 23 May 2023.
[359] European Commission, "Investor-to-State Dispute Settlement (ISDS)" (2015), Some Facts and Figures, available at: < http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf > accessed 20 May 2023.
[360] The average claim may cost in the region of US$9,743,000. See, Global Arbitration Review, "Counting the Costs of Investment Treaty Arbitration" (2014), available at: < http://www.allenovery.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf > accessed 23 May 2023.
[361] S. Seidenberg, "International Arbitration Loses Its Grip" (2010), available at: < http://www.abajournal.com/magazine/article/international_arbitration_loses_its_grip/ > accessed 23 May 2023.

rather, it is down to parties and their advocates to make a progress in this regard.[362] It has been argued that parties should choose between following the usual routes to have a full-fledged arbitration process or accepting certain limitation that ensures the operation of a swift and inexpensive dispute resolution process.[363] In other words, it is down to parties to choose whether to priories finality (including reduced delays and costs) or substantive correctness and/or justice.

It is important to note that ISDS is not and cannot really be made into an inexpensive method of dispute settlement due to the complex nature of disputes and the ISDS framework itself. The arbitration cost comprises arrangements for the hearings, meetings in private venues, administrative fees, arbitrators' wages, and hiring of the expert.[364] It might be argued that the national judicial systems of the host states are more capable of resolving foreign investment disputes cost-effectively. However, as discussed in the previous chapter, the national courts have proven to be ineffective when it comes to resolving foreign investment disputes. There is no supporting evidence to demonstrate that the litigation process in the national courts of host states can resolve such a dispute at a less cost.[365] This is because the cost of settling a dispute in a domestic court is not as easily measurable (due to the fact that some parts of these costs are hidden and mainly covered by the national budget). In addition, this type of litigation process could be even more expansive than ISDS since there exists a hierarchy system in such

[362] The Queen Mary University of London, "International Arbitration Survey: Choices in International Arbitration2, (2010), available at: < http://www.arbitration.qmul.ac.uk/research/2010/index.html > accessed 23 May 2023.
[363] J. Risse, "Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings" (2013), *The Journal of London Court of International Arbitration*, Vol. 29, No. 3.
[364] D. Smith, "Shifting Standards: Cost-and-Fee Allocation in International Investment Arbitration" (2011), *Virginia Journal of International Law*, Vol.51; A. Tweeddale and K. Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press, 2007) Chapter 4.
[365] G. Esposito, S. Lanau, and S. Pompe, "Judicial System Reform in Italy - A Key to Growth" (2014), *IMF Working Paper*.

a process; the option of making an appeal from an inferior court to the superior makes national court processes more costly and time-consuming.[366]

3.2.6 Treaty, Forum, and Nationality Shopping

An opportunity has been provided by ISDS for the investors to choose the most preferred arbitration rules, tribunals, and nationalities at any particular time.[367] Foreign investors may be empowered to choose from the relevant BITs under which they can initiate the arbitration process. This phenomenon is known as treaty shopping.[368] Similarly, forum shopping refers to the situation in which the investors can initiate a proceeding and start an arbitration process under the arbitration clause contained in their investment contract and the 'fork-in-the-road'[369] provision included in the relevant BITs.[370] In addition, nationality shopping is a term which defines a situation in which investors can acquire particular nationality by reallocating their home and business.[371] Having a particular nationality enables foreign investors to take advantage of a specific BIT which may have the most favourable terms for them. This has been seen in the case of *Aguas del Tunari SA v Republic of Bolivia,*[372] where a company transferred its registration from the Cayman Islands (which did not have a BIT with

[366] *Ibid*.
[367] A. Franklin, "Why Understanding the World of Investor-State Arbitration and Keeping Abreast of Recent Cases on ISDS is Important for International Investors" (2018), available at: < https://ssrn.com/abstract=3164432 > accessed 23 May 2023.
[368] J. Baumgartner, *Treaty Shopping in International Investment Law* (Oxford University Press, 2016) 7-12.
[369] Fork in the road clauses, included in some investment treaties, provide that the investor must choose between the litigation of its claims in the host state's domestic courts or through international arbitration and that the choice, once made, is final, see, Dolzer *et a*l., (n 14) 267.
[370] Dolzer *et al*., (n 14) 15-17.
[371] D. Watson and T. Brebner, "Nationality Planning and Abuse of Process: A Coherent Framework" (2018), *Foreign Investment Law Journal*, Vol. 33, No.1; *Aguas del Tunari SA v Republic of Bolivia,* (2005), ICSID Case No ARB/02/3*;* Netherlands-Bolivia BIT (1992).
[372] *Ibid.*

Bolivia) to the Netherlands (which did have a BIT with Bolivia) to bring a claim under the Dutch-Bolivian BIT.

Treaty, forum and nationality shopping are possible for a number of reasons. Firstly, the increasing number of BITs might attract further FDI. As mentioned in chapter two, in recent years there has been a proliferation of BITs. This is largely due to the conventional wisdom which dictates that BITs serve to increase FDI flows.[373] The second reason refers to the issue of jurisdictional overlap. In most BITs, there are broad definitions for the terms of investment and investors. Most BITs define investment as every kind of asset.[374] It enabled the arbitral tribunals to assume jurisdiction[375] Likewise, the broad definitions have offered investors a right to seek relief through ISDS for the breach of provisions of various BITs regarding a single investment.[376]

The problem with treaty, forum and nationality shopping is that they can fundamentally undermine stability, predictability, and certainty by creating different and conflicting outcomes.[377] Additionally, these phenomena have led to the creation of a more concerning problem in ISDS that is; parallel proceedings. There is no generally accepted definition of the term parallel proceedings. However, the International Law Association defines it as "proceedings pending before a domestic court or another arbitral tribunal, in which the parties

[373] D. Swenson, "Why Do Developing Countries Sign BITs" (2005), *U.C. Davis Journal of International Law and Policy*, Vol. 12, No. 1.
[374] See, U.S. Model Bilateral Investment Treaty (2012); Brazil - United Arab Emirates BIT (2019); Japan - Ukraine BIT (2015).
[375] K. Yannaca-Small, "Parallel proceedings" in P. Muchlinski, F. Ortino, and C. Schreuer (eds.) *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 1009- 1014.
[376] *Ibid*.
[377] Kreindler (n 20) 140-149; A. Reinisch, *Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? - Some Reflections from the Perspective of Investment Arbitration* (Brill Publishing, 2008) 114.

and one or more of the issues are the same or substantially the same as the ones before the arbitral tribunal in the current arbitration."[378]

The problem with parallel proceedings is that they undermine efficiency and legal certainty.[379] It increases the cost and the time of the dispute resolution process.[380] More importantly, it enables another arbitral body to deal with the same issue under a different proceeding. The direct result of such an issue is the emergence of inconsistent decisions in ISDS.[381] There has been several attempts to limit parallel proceedings and corresponding inconsistencies. First, it has been suggested that the principles of *res judicata* and *lis pendens* should be applied in ISDS.[382] *Res judicata* and *lis pendens* are known as preclusion doctrines as "they bar either the jurisdiction of a court or the plaintiff's right to have the substantive claims examined".[383] It means, where applicable, *res judicata* and *lis pendens* request the arbitral tribunal in the second proceeding to decline jurisdiction. The principle of *res judicata* can only apply where another tribunal has already rendered a decision. Accordingly, when there is a final judgment, it must be binding on the subsequent proceeding. On the other hand, *lis pendens* are applicable when the dispute is still pending.[384] Nonetheless, the utilisation of these principles in terms of time and substance is limited in ISDS. For instance, *res Judicata* only applies to a proceeding in which the parties, the object or subject matter, and the cause of

[378] International Law Association, "Final Report on Lis Pendens and Arbitration" (2009), *International Arbitration Journal, Oxford Academia*, Vol. 25, No. 1.
[379] N. Butler and S. Subedi, "The Future of International Investment Regulation: Towards a World Investment Organisation?" (2017), *Netherlands International Law Review*, Vol. 64, No. 1; Kreindler (n 20) 137-140.
[380] *Ibid*.
[381] T. Hale, *Between Interests and Law* (Cambridge University Press, 2015) 9, 51; N. Erk, *Parallel Proceedings in International Arbitration: A Comparative European Perspective* (Wolters Kluwer Law and Business, 2014) 15; Kreindler (n 20) 127-150.
[382] C. Titi, "Res Ludicata and Interlocutory Decisions under the ICSID Convention: Antinomies over the Power of Tribunals to Review" (2018), *Foreign Investment Law Journal*, Vol. 33, No. 2; W. Park, "Soft Law and Transnational Standards in Arbitration: The Challenge of Res Judicata" (2017), *Boston University School of Law*, Vol. 8; H. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (Oxford International Arbitration Series, 2013) 2; G. Guillaume, "The Future of International Judicial Institutions" (1995), *International and Comparative Law Quarterly*, Vol. 44, No. 4.
[383] J. Pauwelyn and L. E. Salles, "Forum Shopping Before International Tribunals" (2009), *Cornell International Law Journal*, Vol. 42, No. 1.
[384] *Ibid*.

action are identical.[385] Likewise, this principle necessarily presupposes a conclusive judgment; hence, it would apply to subsequent proceedings but not to the cases where two or more proceedings are currently in progress. In addition, it requires parallel proceedings to be taking place in the same legal system, and it cannot be applied to overlapping jurisdictions between a domestic court and an arbitral tribunal.[386]similarly, *res judicata* does not apply to proceedings between different international tribunals.[387] It has also been questioned whether *lis pendens* is a principle of international law and can subsequently be applicable in ISDS.[388] Therefore, it appears that these principles cannot effectively address the problem of parallel proceeding. They could only play a supplementary role where applicable.

Another suggestion to combat the issue of parallel proceedings is to utilise the waiver provisions. These provisions, in certain circumstances, can limit the parallel proceeding by requiring the investors to waive their right to initiate proceedings. However, there are some cases in which such provisions do not apply, such as in injunctive or declaratory proceedings.[389] In addition, investors cannot be obliged to waive such a right. It is challenging to convince investors to waive their rights by which they might secure their success in the resolution proceeding. Therefore, it is submitted that method cannot appropriately limit the problem of parallel proceedings.

Umbrella clauses might also be useful here. These types of clauses can create international law obligations for host states to observe and respect any investment commitments they have entered. This method could limit parallel proceedings by providing an

[385] Dimsey (n 20) 103.
[386] *Ibid*, 110.
[387] J. Pauwelyn and L. Eduardo Salles, "Forum Shopping Before International Tribunals" (2009), *Cornell International Law Journal*, Vol. 42, No. 1.
[388] D. W. Rivkin, "The Impact of Parallel and Successive Proceedings on the Enforcement of Arbitral Awards" in J. Lew and B. Cremades Roman (eds.), *Parallel State and Arbitral Procedures in International Arbitration* (International Chamber of Commerce, 2005) 106.
[389] Yannaca-Small (n 375) 1025-1031.

opportunity for investors to initiate a proceeding for any claim to an international arbitral tribunal rather than being required to submit certain types of claims to a domestic court.[390] Scholars[391] consider that the umbrella clause would elevate contractual obligations to treaty obligations. Prosper Weil presented the idea that, "an investment treaty would transform a mere contractual obligation between state and investor into an international law obligation."[392] Nevertheless, there is diversity in the way the umbrella clauses are formulated in investment agreements.[393] Also, there is diversity in the way the umbrella clause is interpreted in arbitral tribunals.[394] The proper interpretation of the clause depends on the specific wording of the individual treaty, its ordinary meaning, context, the object and purpose of the treaty, and the negotiating history.[395] The diversity and broad wording of these clauses may lead investors to initiate parallel proceedings. The only possible way of limiting the occurrence of parallel proceedings is through the inclusion of a specific umbrella clause which has determined the jurisdiction of a treaty-based tribunal.[396]

Fork-in-the road provisions may be another way of limiting the possibility of parallel proceedings. This provision forces the investors to irrevocably choose the forum through which a claim is to be pursued.[397] Nonetheless, arbitral tribunals are rarely and exceptionally applying

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[390] *Ibid*,1025-1031; K. Yannaca-Small, "Interpretation of the Umbrella Clause in Investment Agreements" (2006), Working Paper on International Investment, available at :< https://www.oecd.org/daf/inv/investment-policy/WP-2006_3.pdf > accessed 23 May 2023.
[391] For a comprehensive discussion and analysis on umbrella clauses, see A.C. Sinclair, "The Origins of the Umbrella Clause in the International Law of Investment Protection" (2004), *International Arbitration*, Vol. 20, No. 4; Wälde (N 342).
[392] OECD, *International Investment Law* (OECD Publishing, 2008) 208-209.
[393] M. E. Footer, "Umbrella Clauses and Widely-Formulated Arbitration Clauses: Discerning the Limits of ICSID Jurisdiction" (2017), *Law and Practice of International Courts and Tribunals*, Vol. 16, No. 1; J. B. Potts, "Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization" (2011), *Virginia Journal of International Law*, Vol. 51, No. 4.
[394] J. Wong, "Umbrella Clauses in Bilateral Investment Treaties: of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes" (2006), *George Mason Law Review*, Vol. 14.
[395] *Ibid*.
[396] *Ibid*.
[397] C. Schreuer, "Travelling the BIT Route: of Waiting Periods, Umbrella Clauses, and Forks in the Road" (2004), *Journal of World Investment and Trade*, Vol. 5, No. 2, 231; Sinclair (n 391).

this provision in favour of states. In the case of *Toto v Lebanon*, the fork-in-the-road provision did not preclude the investor from bringing treaty claims before ICSID. The tribunal stated that the two types of claims were different causes of action.[398] Moreover, there are some complex procedures to include such clauses in investment treaties. These would limit the application of such a clause. Considering all the above reasons, such a method could not effectively address the problem of parallel proceeding.[399]

A final way by which parallel proceedings might be avoided is the consolidation of claims. This essentially involves combining two or more claims to form a single procedure. This concept has been widely used in the context of commercial arbitration,[400] however, the concept is fairly new to ISDS procedure. There has not been any reference to such a concept in the UNCITRAL Rules and the ICSID Convention.[401] The North American Free Trade Agreement (NAFTA)[402] was the first multilateral agreement which addressed the consolidation of claims. Likewise, the Mexico-Japan BIT included a consolidation provision. Nonetheless, this concept has a long way to go to become a standard practice which can effectively limit the problem of parallel proceedings.[403] Also, it can only be effective provide that both parties consent to the

[398] *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon,* (2009), ICSID Case No. ARB/07/12.
[399] Redfern, and Hunter, *Law and Practice of International Commercial Arbitration* (n 262) 486; Dimsey (n 20) 81.
[400] V. Connor and M. Talib, "Joinder, Intervention and Consolidation under the HKIAC Administered Arbitration Rules 2013" (2014), *Asian Dispute Review*, Vol. 16, No. 4; S. Bhalothia, "Joinder and Consolidation of Parties in Arbitration" (2018), *Court Uncourt*, Vol. 5, No. 8; E. Fai and C. Tong, "Drafting Arbitration Agreements with Consolidation in Mind" (2009), *Asian International Arbitration Journal*, Vol. 5, No.1.
[401] *Ibid*.
[402] The North American Free Trade Agreement [hereinafter NAFTA], Article 1121, Chapter 11, Part 2, available at: < https://www.cbp.gov/trade/nafta/a-guide-to-customs-procedures > accessed 23 May 2023.
[403] G. Kaufmann-Kohler, L. Boisson de Chazournes, V. Bonnin, and M. Mbengue, "Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?" (2006), *Foreign Investment Law Journal*, Vol. 21, No.1. For discussion of the consolidation of claims in investment treaty arbitration, see, OECD, International Investment Perspectives (OECD Publishing, 2006) 226-239.

same tribunal to hear all the disputes in question.[404] It can be concluded that none of the suggested methods can address the problem of parallel proceedings.

3.3 The Crisis of Consistency in International Investment Arbitration

As mentioned in the preceding section, one of the main contributing drivers behind the rendering of inconsistent decisions is the problem of parallel proceedings in ISDS.[405] This section analyses several inconsistent decisions that have had a public attraction and produced the greatest concerns among scholars, practitioners, NGOs, and academics.

The SGSs[406] cases are the most infamous examples of inconsistent decisions in ISDS. In these two cases, the arbitral tribunals rendered dramatically opposing decisions. These decisions are the direct result of the diverse interpretations of similar legal rules in various BITs, which applied to similar cases with similar facts, but with different parties.

In the case of *SGS V Pakistan,*[407] a Swiss company, entered into the PSI Agreement with the Pakistani government, following which it conducted the exportation of goods from certain countries to Pakistan. After a while, the government notified SGS that they planned to terminate the PSI agreement. SGS argued that the umbrella clause contained within the Swiss-Pakistan BIT had the effect of elevating a breach of contract into a treaty claim under international law.[408] The tribunal held that an umbrella clause "cannot transform a failure to

[404] *Lauder v. Czech Republic,* (2001), IT 187-91, (UNCITRAL, Final Award), [Czech Republic objected to the same tribunal hearing both disputes].
[405] S. Frank, "Predicting Outcomes in Investment Treaty Arbitration" (2015), *Duke Law Journal*, Vol. 65, No. 3; I. M. Ten Cate, "The Costs of Consistency: Precedent in Investment Treaty Arbitration" (2013), *Columbia Journal of Transnational Law*, Vol. 51, No. 2.
[406] *SGS Société Générale de Surveillance S.A.v. Islamic Republic of Pakistan, Decision on Jurisdiction,* ICSID (W. Bank) Case No. ARB/01/13 (2003)*, SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, (2002), ICSID Case No. ARB/02/6.
[407] *Ibid.*
[408] This means that each time a sovereign state violates a provision of a contract, the sovereign also violates norms of international law and the BIT at the same time. See International Court of Justice, "Statute of the

pay fees under a concession contract into a treaty breach". As a result, the SGS's claim was unsuccessful.[409]

In the case of *SGS v Philippines,*[410] SGS and the government of the Philippines entered CISS Agreement under which SGS was responsible for providing import supervision services for the Philippines. After several years, the government decided to end the agreement. SGS alleged that its contract claim could be elevated to a treaty claim under the "umbrella clause" in the Switzerland-Philippines BIT.[411] The facts of this case were very similar to the SGS v Pakistan. However, the tribunal, in this case, took a much broader approach to interpret the clause. The tribunal concluded that the umbrella clause "makes it a breach of the BIT for the host state to fail to observe binding commitments, including contractual commitments, which it has assumed regarding specific investments."[412]

Another set of cases, the *Lauder/CME v Czech Republic* are also often cited examples of blatantly inconsistent decisions. These two cases comprised identical parties and almost identical legal rules. However, the tribunal in each case rendered dramatically different awards.[413] In the *CME v Czech Republic* case, An American investor, Mr Ronald Lauder and his Dutch company, CME, created the first private television station in the Czech Republic. Yet, after three years, the Czech regulatory authorities limited the activities of the company.[414] As a result, Mr Lauder initiated a proceeding against the Czech Republic, alleging a breach of

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International Court of Justice" (1945), Article. 34(1), 52(1), available at: < https://www.icj-cij.org/en/statute > accessed 23 May 2023; M. D. Rowat, "Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA" (1992), *Harvard International Law Journal*, Vol. 33, No. 1, 103.

[409] C. J. Tams, "An Appealing Option? The Debate about an ICSID Appellate Structure" (2007), *Transnational Dispute Management,* No. 5.

[410] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (n 406).

[411] G. Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection" (1998), *cueil des cours de l'Académie de droit international de La Haye* (collected courses of the Hague Academy of International Law, (1997); UNCTAD, Bilateral Investment Treaties 1959-1999, 1, 8, 2, 65, U.N. Doc. UNCTAD/ITE/IIA/2 (2000).

[412] *Ibid*.

[413] Tams (n 409).

[414] *Lauder v. Czech Republic,* (2001), IT 187-91, (UNCITRAL, Final Award).

its obligations under the US-Czech BIT. Similarly, CME[415], initiated proceedings under the Netherlands-Czech Republic BIT in 2000. The Netherlands-Czech BIT was considered by a Stockholm tribunal, and the US-Czech BIT was considered by a London tribunal. The Stockholm tribunal found that the Czech Republic had committed an illegal expropriation.[416] Therefore, the Czech Republic was ordered to pay Mr Lauder's company $355 million.[417] Surprisingly, on the other hand, the London tribunal went on to hold that the Czech Republic's actions were not arbitrary and discriminatory within the meaning of the U.S.-Czech Republic BIT.[418]

A set of NAFTA cases also demonstrate inconsistency in ISDS. In S.*D. Myers v Canada1*[419], *Metalclad v Mexico*[420] and *Pope & Talbot v Canada1,*[421] three fundamentally different interpretations of the concept of the 'fair and equitable treatment clause under NAFTA have been provided.

Scholars[422] sit on both ends of the spectrum regarding the existence and extent of the so-called crisis of consistency in ISDS. For example, Sornarajah believes that ISDS is suffering from a lack of legitimacy as a result of this inconsistency.[423] He argues that enabling the tribunals to create their interpretation of the investment treaties is problematic for two reasons. First, the interpretations of the BITs provisions offered by the tribunals are not usually compatible with what was initially intended by the parties to the investment agreements. Next, many investment disputes would be settled by the ad hoc tribunals, which is concerning as

[415] *Czech Republic v. CME Czech Rep. B.V.,* (2003), including the Judgment of the Court of Appeal, Case No. T 8735-01, available at: < https://www.italaw.com/cases/281 > accessed 23 May 2023
[416] Netherlands-Czech Republic BIT (1991), Article 5.
[417] *Lauder v. Czech Republic,* (2001), Final Award, IT 187-91.
[418] US-Czech Republic BIT 1991 Article 3; *Czech Republic v. CME Czech Rep. B.V.* (n 415).
[419] *S.D. Myers v Canada* (2000) ILM 1408 (NAFTA Arbitration).
[420] *Metalclad Corporation v United Mexican States (2000),* ICSID Case No ARB(AF)/97/1.
[421] *Pope & Talbot Inc. V Government of Canada* (2002) ILR 293.
[422] K. Yannaca-Small, "Improving the System of Investor-State Dispute Settlement" (2006), OECD Working Papers on International, available at: < https://www.oecd.org/daf/inv/investment-policy/WP-2006_1.pdf, > accessed 29 April 2023.
[423] Sornarajah (n 20) 73.

there are no mechanisms in place to control the exercise of these tribunals' interpretative discretionary power.[424]

Franck also points out that public issues (which could have economic and political consequences) are being dealt with by privately created tribunals. These tribunals are free to render conflicting decisions on the same points of law, and there is no authoritative and capable body to resolve such inconsistencies.[425] She considers that the legitimate expectations of investors and states can be negatively damaged by inconsistency which could subsequently create uncertainty. On one hand, this would prevent foreign investors from enjoying the investment agreement's advantages. On the other hand, states find themselves in an indefensible situation where they would not be able to provide an acceptable explanation to taxpayers about paying hundreds of millions of U.S. dollars to the investor as awarded compensation.[426]

Notwithstanding these viewpoints, other scholars believe that consistency is simply an unavoidable fact of life.[427] They suggest that the best way of achieving consistency is to adopt a laissez-faire policy, which means consistency and predictability will be naturally achieved as tribunals gradually begin to favour one solution over another, causing custom to evolve.[428] In this vein, Paulsson maintains that any attempt to achieve coherence and consistency in ISDS will fail, as it is impossible to achieve such consistency in this procedure. He emphasises that we should not be alarmed by inconsistency as, "inconsistent awards are much rarer than we are led to believe".[429] Legum supports Paulsson's claim that the excessively cited criticisms of inconsistency are simply not compelling enough.[430] Likewise, Gill argues that even though it

[424] *Ibid*.
[425] Franck (n 25).
[426] *Ibid*.
[427] Paulsson (n 31) 241-245; Gill (n 31).
[428] *Ibid*.
[429] Paulsson (n 31) 240-247.
[430] Legum (n 34) 30-41.

is hard to ignore the fact that inconsistency has become one of the features of the current ISDS system, it could be seen in other fields, and there is no need to make this the most argumentative issue in the field of foreign investment.[431] It can be argued that although inconsistency might exist in other fields, the negative impact of this issue is more significant in the foreign investment regime due to the involvement of considerable sums of money and sensitive environmental and human rights matters.

Whatever the view of commentators, we have seen that previous cases[432] demonstrate that inconsistency has become one of the main defective features of ISDS. It is important to make the link between consistency and predictability. It would be ideal in any dispute resolution system for the parties to have some idea about the chance of success of their case outcome before initiating costly and timely legal proceedings. It stands to reason that reviewing previous cases with similar facts is a primary step to analyse and determine the chance of obtaining an accurate outcome; however, that is not possible with international investment disputes. In addition, the inconsistency negatively damages the reputation of ISDS, characterising it as a dispute settlement mechanism that is more like a lottery.

One of the main reasons behind rendering inconsistent decisions is the lack of binding precedent in ISDS. There is an inherent link between the inconsistency and the lack of binding precedent.[433] The concept of binding precedent refers to the legal doctrine of *stare decisis*.[434] This doctrine obliges courts to follow legal precedents, which were set by previous decisions. This doctrine ensures that cases with identical facts would be dealt with in the same way, unless

[431] Gill (n 31).
[432] *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* and *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*; *CME Czech Republic BV v The Czech Republic/Lauder v The Czech Republic*; The NAFTA cases are *Pope & Talbot Inc. V Government of Canada*, *S.D. Myers v Canada, and Metalclad Corporation v United Mexican States*.
[433] Ten Cate (n 405); T. Cheng, "Precedent and Control in Investment Treaty Arbitration" (2007), *Fordham International Law Journal*, Vol. 3, No. 1, 1014.
[434] This literally means to stand by that which has been decided, see, T. Burns, "The Doctrine of Stare Decisis" (1893), *Cornell Law Library, Historical Theses and Dissertations Collection*.

overruled by the same court or a higher court.[435] This concept is not applicable in ISDS.[436] The lack of binding precedent in ISDS has been recently challenged.[437] Re-evaluation of the principle of binding precedent in ISDS could be the first step to addressing the problem of inconsistency. In addition, the lack of an appeal mechanism is also a significant factor that has exacerbated the inconsistency, as there are limited options for reviewing the arbitral awards. The following chapter will analyse all these available options and clarify whether the problem of consistency could be addressed through the establishment of an appeal mechanism within the ISDS system.

3.4 Conclusion

The current system of ISDS, its key features, strengths and weaknesses have been analysed in this chapter. From this analysis, it is evident that although this procedure was initially considered successful, to a certain extent, in resolving foreign investment disputes, it is currently suffering from several fundamental deficiencies. The fundamental problems of the ISDS system relate to inconsistency, the lack of transparency and legitimacy which does not correspond with ISDS.

Of these, inconsistency is arguably the most concerning problem, given that it is so intimately related to legitimacy. Even though some scholars[438] attempted to deny the existence of the crisis of consistency in ISDS, there is convincing evidence of the existence of such a problem. A review of the various inconsistent awards rendered by arbitral tribunals; we can see

[435] *Ibid*.
[436] Tams (n 409).
[437] Ten Cate (n 405); I. Laird and R. Askew, "Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System" (2005), *The Journal of Appellate Practice and Process*, Vol. 7, No. 2.
[438] Paulsson (n 31).

that inconsistency has become an undeniable feature of ISDS. The inconsistency in investment arbitration has undoubtedly undermined the credibility, predictability, efficiency, and legitimacy of system. As a result, it must be accepted that some level of reform is necessary.

In recent decades, several proposals have been put forward to reform the system of ISDS and address its fundamental defective aspects. Among these proposals, establishing an appellate mechanism, state-to-state arbitration, and the EU's proposed MIC system have attracted more attention. The discussions provided in this chapter paved the way for the following chapter, which assesses whether any of these proposals could appropriately address the concerns associated with the current ISDS system and can either improve its framework or replace it with an alternative method of dispute settlement.

Chapter IV: Reforming of the International Investment Arbitration System: Options

4.1 Introduction

As has been demonstrated in the previous chapter, the current system of ISDS is suffering from a number of serious defects. As such, it is arguably currently failing to provide an adequate and effective means for the settlement of investment disputes. This fact has also been recognised by the UNCITRAL Working Group III.[439] In 2018, Working Group confirmed their intention to work on ISDS reform to address concerns with regards to:

(1) consistency, coherence, predictability, and correctness of arbitral rulings;

(2) independence, impartiality, and diversity of decision-makers; and

(3) costs and duration of proceedings.[440]

Many scholars and NGOs have also confirmed their support for ISDS reform.[441] In light of this almost unanimous recognition that investment dispute resolution should be reformed, a considerable number of reform proposals have been tabled.[442] The proposals can be divided

[439] The UNCITRAL Working Group III, "Possible Reform of Investor-State Dispute Settlement" (2018), paras 40, 53, 63, 83, 90, 98, 108, 123, 127, 133, available at: < http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html > accessed 23 May 2023.
[440] *Ibid*.
[441] S. Puig and G. Shaffer, "Imperfect Alternatives: Institutional Choice and the Reform of Investment Law" (2018), *American Journal of International Law*, Vol.112, No.3; S.W. Schill, "Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward" (2015), *International Centre for Trade and Sustainable Development/World Economic Forum*; M. Hodgson, "Costs in Investment Treaty Arbitration: The Case for Reform" (2015), *Brill*, < https://doi.org/10.1163/9789004291102_034 > accessed 23 May 2023; M. Jennings, "The International Investment Regime and Investor-State Dispute Settlement: States Bear the Primary Responsibility for Legitimacy" (2016), *Business Law International*, Vol. 17, No. 2; W. H. Knull and N. D. Rubins, "Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option" (2000), *International Arbitration Law Review*, Vol. 11, No, 1, 531; Franck (n 25); ICSID Secretariat, "Possible Improvement of the Framework for ICSID Arbitration" (2004), Discussion Paper, News Release, Part VI; ICSID Secretariat, "Suggested Changes to the ICSID Rules and Regulations" (2005), available at: < http://www.worldbank.org/icsid/sug-changes.htm > accessed 20 May 2023.
[442] *Ibid*.

into two main groups. The first group focuses on retaining the basic system of ISDS, though, with some changes within the system as it currently operates. Among these proposals, the idea of creating an appeal mechanism within the current system, the Agreement for Comprehensive and Progressive Trans-Pacific Partnership (CPTPP)[443], and the Trans-Pacific Partnership (TPP)[444] provide examples of this. Similarly, India has promoted a unique model of BIT that introduces substantial changes to ISDS, such as the exhaustion of local remedies in the first place.[445] The second group contends that relatively minor tweaks or changes to the system of ISDS will not be enough. Proponents of the second group therefore suggest that the complete replacement of ISDS with an alternative is the best way forward. One of these suggestions is the creation of a world investment court.[446] The EU is in favour of this approach and accordingly has suggested establishing a MIC system. Meanwhile Brazil has suggested the development of an alternative model of state-to-state arbitration.[447]

Following this two-pronged approach to reform proposals, this chapter consists of two sections. The first will focus on analysing the first group, which will involve examining proposals which suggest reform to the current system of ISDS. It will consider several of the most prominent suggestions in this regard, such as establishing an appeal mechanism. The second section of this chapter will examine the other group's proposals to replace the ISDS completely. Accordingly, it will analyse suggestions, including state-to-state arbitration and creating a world investment court. This chapter will assess the proposals supported by each

[443] Australian Government- Department of Foreign Affairs and Trade, Comprehensive and Progressive Agreement for Trans-Pacific Partnership [hereinafter CPTPP] (2018), available at: < https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership > accessed 23 May 2023.
[444] *Ibid*.
[445] See Model Text for the Indian Bilateral Investment Treaty (2016), available at: < http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560 > accessed 23 May 2023.
[446] Van Harten (n 57).
[447] V. Geraldo and B. Stevens, "Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?" (2018), *Journal of World Investment and Trade*, Vol. 19, No. 1.

group against the benchmarks of legitimacy, efficiency, transparency, and feasibility discussed in chapter one.

Before proceeding any further, it must be noted that even though several significant proposals have been put forward and supported by many scholars, up to now, there has been no consensus in the existing literature about the most suitable option. Accordingly, one of the main objectives of this chapter is to determine why there has been no consensus and to consider whether there is any realistic possibility to arrive at such a consensus in the future. This chapter builds upon previous chapters' analysis of the current system of ISDS and its various deficiencies, in order to begin to respond to the central research question directly.

4.2 Proposals to Reform International Investment Arbitration

This section will focus on analysing the most prominent proposals which have been put forward to make changes to the current system of ISDS. For ease of analysis, this section has been divided into three substantive sub-sections, namely: establishing an appeal mechanism; reforming the adjudicator selection procedure; enhancement of transparency. The main reason for selecting these three reforms is that they are the most prominent and hotly debated reform issues that are discussed by commentators.

4.2.1 Establishing an Appeal Mechanism

A) Existing Review procedures

Currently, within ISDS, there is no recourse or right of appeal for the losing party who might feel that the arbitral tribunal has come to a wrong decision.[448] This is because ISDS is rooted in commercial arbitration which values the principle of finality. Traditionally, it was believed that this principle provides a basis for disputes to be settled most quickly and economically.[449]

I) ICSID Article 52 Annulment Procedure

Although there is currently no right of appeal, there are some opportunities providing for the review of arbitral awards. In ICSID arbitration for example, there is an annulment procedure contained in Article 52 of the Convention.[450] The annulment means nullifying a decision, and its result, at the most, is merely to set aside an award on limited grounds.[451] Annulment is primarily concerned with the legitimacy of the process, rather than with the substantive correctness of the decision. The primary function of annulment is to void a decision in whole or part and refer the case to a newly constituted tribunal.[452] On the other hand, the

[448] Dolzer *et al.,* (n 14) 277.
[449] L. M. Bohmer, "Finality in ICSID Arbitration Revisited" (2016), *Foreign Investment Law Journal*, Vol. 31, No.1; A. Gattini, A. Tanzi, and F. Fontanelli, "Under the Hood of Investment Arbitration: General Principles of Law" (2018), available at: < https://doi.org/10.1163/9789004368385_002 > accessed 23 May 2023; UNCITRAL Model Law on International Commercial Arbitration (2006), Article.34, available at: < http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html > accessed 23 May 2023; United State Federal Arbitration Act, 9 U.S.C. Sections: 9– 11; Singapore International Arbitration Act, Article. 24; Australia International Arbitration Act 1974, Section: 8; Arbitration Law of People's Republic of China, Article.70; Swiss Private International Law (PILA), Article.190(2) (e); Dutch Code of Civil Procedure (DCCP), Article.1065(1); Austrian Code of Civil Procedure (CCP), Article.595(1); Belgian Judicial Code (as amended in 1999), Article.1717(4); French Code of Civil Procedure, Article.1502(1); German Code of Civil Procedure (*Zivilprozessordnung, ZPO*), Section 1059.
[450] ICSID, "ICSID Convention, Regulations, and Rules" (2006), Text available at: < https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf > accessed 23 May 2023.
[451] K. Yannaca-Small, "Annulment of ICSID Awards: Limited Scope But Is There Potential?" in K. Yannaca-Small (eds.), *Arbitration Under International Investment Agreements* (Oxford University Press, 2010) 603- 634; L. Liu, "The Annulment Procedure under the ICSID Convention-Is the Current Practice Regarding the Standard of Review Satisfactory?" (2017), International Conference on Frontiers in Educational Technologies and Management Sciences*, Francis Academic Press*.
[452] T. Webster, "Annulment of Awards for Arbitral Bias" (2015), *Dispute Resolution International*, Vol. 9; T. Johnson, "Appeals and Challenges to Investment Treaty Awards" (2005), *Transnational Dispute Management*, No. 2; S. Audley, "Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System?" (2005), *Transnational Dispute Management*, No. 32.

appeal is concerned with the legitimacy as well as the correctness of the decision. An appeal tribunal has been empowered to substitute its view, and the result of a successful appeal is to remove the original decision and replace it with a new one.[453]

Article 52 of the ICSID Convention sets out five grounds for annulment of award.[454] An analysis of the review of awards under Article 52 explains that in both theory and practice, it provides a very narrow scope for the review of decisions. Indeed, the exhaustive list of the five grounds for review is extremely limited due to focusing on the legitimacy issues. Moreover, it is noteworthy that there have only been a few successful applications for annulment in the last nine years. According to the ICSID statics, none of the submitted applications successfully led to annulment in full[455] and only five applications[456] were annulled in part.[457]

[453] D. Caron, "Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal" (1992), *Foreign Investment Law Journal*, Vol. 7, 21; G. Bottini, "Present and Future of ICSID Annulment: The Path to an Appellate Body?" (2016), *Foreign Investment Law Journal,* Vol. 31, No. 3; G. Stephens-Chu, "Paris Court of Appeal Exerts Power to Review Allegations of Corruption During Enforcement Proceedings" (2018), *International Law Office*; F. Baetens, "Keeping the Status Quo or Embarking on a New Course? Setting Aside, Refusal of Enforcement, Annulment and Appeal", in A Kulick (eds.), *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press, 2016) 103-127; D. Kim, "Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System" (2011), *New York University Law Review*, Vol. 86; Schreuer (n 204); M. Bungenberg and A. Reinisch, "Standalone Appeal Mechanism: Multilateral Investment Appeals Mechanism (MIAM)" (2018), *Springer Nature Switzerland*.

[454] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966 (n 205) Art.52.

[455] ICSID, "Decisions on Annulment", available at: < https://icsid.worldbank.org/en/Pages/process/Decisions-on-Annulment.aspx > accessed 23 May 2023.

[456] *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No ARB/98/2), (18 December 2012); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador,* ICSID Case No. ARB/06/11, (02 November 2015); *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/5, (27 December 2016); *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* ICSID Case No. ARB/10/23, (05 April 2016); V*enezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, (09 March 2017).

[457] ICSID, "The ICSID Caseload Statics" (2018), available at: < https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-2%20(English).pdf > accessed 23 May 2023.

There are a few significant issues in respect of Article 52 that are worthy of mention.[458] First, Article 52, both in theory and practice, has provided a narrow scope for the review of arbitral decisions. The party who believes that there is an error within the rendered award need to initially find whether there exists one of the limited grounds to submit a request for annulment. Nonetheless, in the case of a successful application, the annulment procedure is unable to put an end to the parties' dispute. All it offers is restarting the clock, the legal bills and a new request should be submitted to a newly constituted tribunal to re-hear the case from the beginning.[459] The concern is that there is no guarantee for the new tribunal to render a correct decision, and the parties might find themselves in the cycle of annulment and re-arbitration. Additionally, the low figure of successful annulment applications[460] confirms that the committee accept annulment applications in rare circumstances, as the initial intention of the ICSID is to preserve the principle of finality and not the achievement of fair and accurate decisions.[461]

There are further issues concerning the ICSID annulment procedure. Article 52, by using undefined and ambiguous terms and concepts including fundamentally, manifestly, serious and failure to apply proper law, provided a basis for extensive interpretations of the grounds.[462] For instance, the concept of failure to apply proper law can be interpreted as either

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[458] J. W. Jun "The Integrity of Finality of International Arbitral Awards: International Commercial and ICSID Arbitration Awards" (2018), *Journal of Arbitration Studies*, Vol. 28, No. 3, 137; M. Feldman, "The Annulment Proceedings and the Finality of ICSID Arbitral Awards" (1987), *Foreign Investment Law Journal,* Vol. 2.

[459] For instance, the Enron Creditors Recovery Corporation (*Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, (October 2010) and Sempra Energy (*Sempra Energy International v. Argentine Republic,* ICSID Case No. ARB/02/16*,* (November 2010) registered a request to ICSID for resubmission to a new tribunal.

[460] *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, (2006); *Amco Asia Corporation and others v. Republic of Indonesia* ICSID Case No. ARB/81/1, (1992); *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, (1990); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, (2010) also including ARB/02/85, (2007).

[461] This has been acknowledged by the Secretary-General of ICSID in "Report of the Secretary-General to the Administrative Council" (1986), Foreign Investment Law, ICSID Document. No. AC/86/4, Annex A at 2.

[462] Y. Kim, "A Study on the Contractual Waiver of Article 52 ICSID Convention" (2018), *Journal of Arbitration Studies*, Vol. 28, No. 1.

a failure to apply the proper system of law, such as international law, or a particular rule of law, such as provisions of a BIT. This causes the creation of different interpretations by different committees, which can subsequently produce inconsistent decisions. Although the annulment committees in the cases of *Enron*[463], *CMS*[464], and *Sempra*[465] faced the same legal issues, they reached divergent conclusions.[466]

As has been demonstrated, the annulment procedure contained in Article 52 very much falls short of a full-blown appeal process.[467] In October 2004, the ICSID Secretariat published a discussion paper, the aim of which was to open up discussion for the creation of a single appeal mechanism to be administered at the ICSID.[468] The paper emphasised that the objectives of achieving coherence and consistency in the case law emerging under investment treaties can only be achieved by setting up such a mechanism, administered by the ICSID, and not by different appeal mechanisms under each treaty.[469]

Likewise, the following year, in 2005, ICSID published a Working paper[470] which represented a summary of the comments submitted to the Secretariat in response to the original

[463] *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Decision on Annulment, (July 30, 2010) 91- 403.
[464] *CMS Gas Transmission Co. v. Republic of Argentina,* ICSID Case No. ARB/01/8, Award, 211 (May 12, 2005).
[465] *Sempra Energy Int'l v. Argentine Republic,* ICSID Case No. ARB/02/16, Award, 85 (28 September 2007).
[466] The United Nations, "Draft Articles on Responsibility of States for Internationally Wrongful Acts" (2001), Article 52; Report of the International Law Commission on the Work of Its Fifty-third Session, Supp. No. 10, 43, U.N. Document. A156/10, available at: < http://legal.un.org/ilc/sessions/53/ > accessed 23 May 2023.
[467] C. Tams, " Is There a Need for an ICSID Appellate Structure" (2009), available at: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341268 > accessed 23 May 2023; R. Hofmann and C. Tams, *The International Convention for the Settlement of Investment Disputes: Taking Stock after 40 Years*, (Nomos, 2007); J. Devaney, "Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration" (2018), *European Journal of International Law*, Vol. 29, No. 4; J. Kalb, "Creating an ICSID Appellate Body" (2005), *UCLA International Law and Foreign Affairs*, Vol. 10; J. Clapham, "Finality of Investor-State Arbitral Awards: Has the Tide Turned and is There a Need for Reform" (2009), *Journal of International Arbitration*, Vol. 26; K. Grant, "ICSID's Reinforcement: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration" (2016), *Osgoode Hall Law Journal*, Vol. 52, No.1115; B. Appleton, "The Song Is Over: Why It's Time to Stop Talking about an International Investment Arbitration Appellate Body" (2017), *Cambridge University Press Journal*, Vol. 107.
[468] ICSID, "Possible Improvements of the Framework for ICSID Arbitration" (2004), ICSID Working Paper, available at: < http://www.worldbank.org/icsid/improve-arb.pdf, > accessed 17 May 2023.
[469] *Ibid*.
[470] ICSID, "Suggested Changes to the ICSID Rules and Regulations", ICSID Working Paper, (2005), available at: <http://www.worldbank.org/icsid/052405-sgmanual.pdf > accessed 23 May 2023.

2004 Discussion Paper. It concluded that, "most member states considered that it would be premature to attempt to establish such a mechanism at this stage, particularly in view of the difficult technical and policy issues raised in the Discussion Paper." [471]

Even though the Discussion Paper supported the idea of creating an ICSID appeal facility, such a body never came to fruition, as consensus demonstrated a hesitancy towards creating an appellate body at that time.[472] The first reason that an appeal mechanism was not introduced at that time is because the proposal faced increasing criticism. Commentators were concerned about the costs of the procedure; this was the main concern of many developing member states.[473] Several African and Asian states could not allocate the necessary funds for establishing such a mechanism. The second criticism relates to the high degree of finality that the current ICSID arbitration process provides for the resolution of disputes.[474] The principle of finality[475] has been valued more than the benefit of substantive consistency by the contracting states, such as capital exporting countries, and the investors which originate from these countries.[476]Another criticism concerned with the hotly debated ICSID's alleged pro-

[471] *Ibid*.
[472] J. Devaney, "Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration" (2018), *European Journal of International Law*, Vol. 29, No.4; Kalb (n 467); Clapham (n 467); Grant (n 467); Hofmann and Tams (n 467).
[473] K. R. Olson, "The Appeal of the Right to Appeal: The ICDR Adopts Optional Appellate Arbitration Rules to Advance the Availability of Appellate Rights in International Commercial Arbitration" (2016), *McGill Journal of Dispute Resolution*, Vol. 3, No. 1; G. Bottini, "Reform of the Investor-State Arbitration Regime: The Appeal Proposal" (2015), *The Journal of World Investment and Trade.*
[474] *Ibid*.
[475] At the early stage, after the First Preliminary Draft of the Convention was produced, the Bank held a series of consultative meetings in which, delegates emphasized the importance of the finality of awards in response to concerns about consistency and correctness. The delegates rejected the proposal to provide for a right of appeal to the International Court of Justice on the merits of the award. See, ICSID, "The History of the ICSID Convention", Volume 11(1), available at: < https://icsid.worldbank.org/resources/publications/the-history-of-the-icsid-convention > accessed 23 May 2023.
[476] D. A. Gantz, "An Appellate Mechanism for Review of Arbitral Decisions in Investor- State Disputes: Prospects and Challenges" (2006), *Vanderbilt Journal of Transnational Law*, Vol. 39, No. 2; G. Born, S. P. Finizio, D. W. Ogden, R. D. Kent, J. V. H. Pierce, and D. W. Bowker "Investment Treaty Arbitration: ICSID Amends Investors-State Arbitration Rules" (2006), available at: < https://www.wilmerhale.com/en/insights/publications/investment-treaty-arbitration-icsid-amends-investor-state-arbitration-rules-2006 > accessed 23 May 2023.

Western bias.[477] It has been claimed that the ICSID arbitration has provided more protection for capital-exporting states and their investors. Though, it has not done much to address the economic and social interests of capital-importing states in Africa, Asia, and Latin America.[478] Tams stressed that "it may not be politically feasible to introduce an appeals facility into the ICSID framework and that non-consenting member states could halt the proposal from the outset".[479]

It appears that most developing states were against the idea of creating an ICSID appeal facility, as they could have seen the creation of such a body as a further incursion into their sovereignty, which mainly protects the interests of the developed states and the investors originating from these states.[480] Additionally, it must be noted that creating an ICSID appeal mechanism requires a comprehensive amendment to the ICSID Convention, such as achieving all 140 contracting member states' consents.[481] It is a difficult task, if not impossible, with a low probability of success within a short period.

Aside from the Article 52 annulment procedure, there is some scope for the review of decisions which have been rendered in non- ICSID arbitration. These decisions may be challenged under the relevant national law and the UNCITRAL Rules Article 34 and 36. This possibility will be discussed in the following sub-sections. Additionally, some scholars have asserted that there is some scope for de facto review under the New York Convention; this will also be discussed below.

[477] D. Zaring, "Rulemaking and Adjudication in International Law" (2008), *Columbia Transnational Law Journal*, Vol. 46, No. 3.
[478] L. E. Trakman, "The ICSID Under Siege" (2012), *Cornell International Law Journal*, Vol. 45, No. 3.
[479] Tams (n 467).
[480] Y. Ngangjoh-Hodu, "ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration" (2015), *Journal of International Dispute Settlement*, Vol. 6, No. 2.
[481] Bottini (n 453); Olson (n 473); Kalb (n 467); Kim (n 453).

II) National Laws

There is a possibility for challenging the non-ICSID arbitral awards by the court of country in which the tribunal had its seat or is responsible for enforcing the award. For instance, the Arbitration Act 1996 of the United Kingdom[482] and the Canadian Commercial Arbitration Act 1985[483] provided some scope for the review of arbitral awards. Similarly, the United States Federal Arbitration Act 1925 has empowered the courts to review and strike out the awards when they found that there has been a manifest disregard of the law.[484] It should be noted that different states have different approaches. In some states such as Italy,[485] the review is only permitted where there has been an abuse of process. In other states, such as the United Kingdom, reviewing the awards on substantive issues is also possible.[486] The main issue with the review procedure under the national law is that it is impossible to analyse the effectiveness of almost 200 individual national legislations. Also, it is impossible to provide an accurate generalisation of the review procedures provided under different national laws.[487]

III) UNCITRAL Rules

Articles 34 and 36 of the UNCITRAL Rules have provided a limited number of grounds for challenging the non-ICSID arbitral awards in cases where the rules are applicable.[488] Article

[482] Arbitration Act 1996, available at: < http://www.legislation.gov.uk/ukpga/1996/23/section/69 > accessed 23 May 2023; Franck (n 25).
[483] Commercial Arbitration Act 1985, Chapter VIII, Section 35 and 36.
[484] US Federal Arbitration Act 1925, available at: < http://www.law.cornell.edu/uscode/html/uscode09/usc_sup_01_9.html > accessed 23 May 2023.
[485] Italian Civil Code Article. 829; S. Beltramo, The Italian Civil Code and Complementary Legislation (West, 2012).
[486] English courts have been authorised by the Section 45 to determine a question of law which arises out of arbitral proceedings. Likewise, Section 69 empowers the court to choose from confirming the award; varying the award, remitting the award in whole or in part to the tribunal for reconsideration, or setting the award aside in whole or in part, see, Section 69 of the Arbitration Act 1996. For discussion of the national laws of some states and an attempt to generalise findings, see Tams (n 409) 1137.
[487] Tams (n 409).
[488] UNCITRAL Model Law on International Commercial Arbitration 2006 (n 449).

34 has not offered to review the errors of law or the application of facts of law. It simply provides the possibility of applying for setting aside an arbitral award per the grounds set in Article 34.[489] Furthermore, Article 36[490] regulates the cases in which the court is required to consider the refusal to recognise or enforce an arbitration award.

One of the main concerns about the application of Article 34 and 36 is that they provide a limited scope for challenge of arbitral awards. This has been confirmed in the case of *S.D. Myers*.[491] The next concern relates to the role of national court in international arbitration. The courts must initiate a detailed scrutiny of the arbitration procedure in the relevant case to assess whether there is a reason to uphold the award. It would subsequently lead the court to have an influence on the arbitration process. It is contrary to the independence of the arbitration procedure. As, in ISDS, the arbitral tribunal has the legal power to control the hearing. Hence, the existence of power at the hands of courts to regulate procedural rules and to review the award does not seem to be compatible with the arbitration system and fundamental procedural rights.[492] Jurists claim that judicial review interferes with the finality of arbitration awards. The selection of the arbitration procedure means that the parties preferred an alternative to the courts. As a result, the judicial intervention should not be prevented.[493] The Model Law, like ICSID Convention, has failed to provide an effective review procedure. Perhaps, the lack of such a capability in the national judicial system has been one of the main reasons for empowering the national courts with a limited scope for reviewing arbitral awards.

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[489] *Ibid*.
[490] *Ibid*.
[491] *Attorney General of Canada v. S.D. Myers, Inc.,* (Jan. 13, 2004), (Fed. Ct.-TD) at 76 (10); Redfern and Hunter (n 262) 429-434.
[492] H. M. Holtzmann and J. E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation, 1989) 5-7.
[493] K. Davis, "When Ignorance of the Law is no Excuse: Judicial Review of Arbitration Awards" (1997), *Buff Law Review*, Vol. 45, No. 1.

IV) New York Convention

Furthermore, some scholars[494] have suggested that even though Article 5 of the New York Convention focuses on the enforcement and recognition of arbitral awards, it can be a type of challenge procedure. Article 5 of the New York Convention has not provided any basis for challenging or reviewing the arbitral award. It has merely provided a basis for the refusal of recognition and enforcement of an arbitral award. There are seven grounds set in this Article that their concern is with the legitimacy of the process of arbitration. Also, these grounds should be interpreted narrowly[495] It means that disputing parties are permitted to request for refusal of the award have they been able to prove the existence of one of the grounds set out in Article 5 or if the court finds that the enforcement of the award would violate its international public policy.[496]

B) The Rationale of Establishing an Appeal Mechanism

This section examines the rationale for the potential establishment of an appeal mechanism for ISDS. Recently, it has been claimed that, due to the involvement of considerable sum of money, and sensitive issues such as environmental law in today's foreign investment disputes, the time has come to re-evaluate the balance between the principle of finality and the principle of correctness in ISDS, and to assess the possibility of establishing an appeal mechanism.[497]

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[494] H. Adolf, "The Provisions on the Enforcement of Foreign Arbitration Awards in Indonesia (under the New York Convention of 1958)" (2017), *Journal of Arbitration Studies*, Vol. 27; P. Butler and C. Katerndahl, "Kastom- A Public Policy Exception under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (2018), *Indian Journal of Arbitration Law*, Vol. 7, No. 1; W. L. Wai, "Exercise of Residual Discretion under Article V of the New York Convention by Enforcement Court When Award Is Alive, Dead, and Undead in Seat" (2019), *China Legal Science*, Vol. 7, No. 1.
[495] A. Berg1, "The New York Convention of 1958: An Overview" (2003), *Kluwer Arbitration*, Vol. 1.
[496] New York Convention 1958 (n 354) Article. V (2).
[497] For more on public policy issues in international investment law and arbitration, see, Brower and Schill (n 309); M. Footer, "BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment" (2009), *Michigan State Journal of International Law*, Vol. 18, 33.

The preceding chapter demonstrated that the inconsistency leads the investment commentators to believe that ISDS is unreliable due to excessive unpredictability.[498] The assumption is that since the law in this area is decentralised, an appellate body can act as an authoritative mechanism to interpret the law, clear any confusion, and provide a basis for predicting the outcome of future cases. Nevertheless, enhancement of the alleged predictability seems to be highly unlikely without the existence of a system of formal precedent. To create a formal system, one of the main allegations is that decisions of an appellate body influence traditional case law. Thus, it would have some legal implications, such as creating precedents.[499] It is believed that if an appellate body is established as a higher-level tribunal, its decisions would have a higher value. It might be claimed that its decision over time would provide a basis for the creation of a system of precedent in ISDS, and subsequently cause enhancing the reliability and predictability of this system. The success of the highest courts at the national level in providing a coherent body of law has been mainly due to a formal system of binding precedent or *stare decisis*.[500] However, this is no doctrine of binding precedents in international law.[501]

It is argued that although there is no system of binding precedent in ISDS in the same manner as common law system, there is a persuasive system of precedent in international arbitration known as *de facto* system of precedent.[502] This means that even though arbitrators are not legally obliged to refer to prior cases to support their findings, there is a moral obligation for them to follow precedents.[503]

[498] Chapter III, 112-17.
[499] Yannaca-Small (n 422).
[500] J.W. Harris, *Legal Philosophies* (Oxford University Press, 1980) 168.
[501] Statute of the International Court of Justice (n 408).
[502] This term has been used by R. Raj Bhala, "The Precedents Setters: De Facto Decisis in WTO Adjudication (Part two of a trilogy)" (1999), *Journal of Transnational Law and Policy*, Vol. 9.
[503] Bottini (n 473); G. Kaufmann-Kohler and M. Potestà, "Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment

Kaufmann-Kohler, a highly respected and commissioned arbitrator in ICSID cases, confirmed this by asserting that "whilst tribunals that there is no doctrine of precedent per se, they also concur on the need to take earlier cases into account."[504] Likewise, in the case of *ES Corp. v. Argentine Republic.*[505] the ICSID tribunal stated that «[t]here is so far no rule of precedent in general international law, however, it was not barred, as a matter of principle, from considering the position taken or the opinion expressed by other ICSID tribunals."[506]

By taking the above into account, the creation of an appellate body would increase the chance of following the previous appellate decisions by arbitral tribunals. Also, well-reasoned appellate investment awards would authoritatively determine the correct interpretation of the investment norms, such as the umbrella clause. Subsequently, over time, they can lead to creating a coherent body of law.[507] Although such a statement is persuasive, it is questionable whether subsequent arbitral tribunals would indeed follow the previous appeal tribunals' decisions. The issue is that precedent has never been able to play any role in ISDS due to the lack of a codified set of rules governing precedents and their operation in international investment law.[508] Therefore, in the absence of such a formal unified system, it is impossible to guarantee that a subsequent tribunal would follow previous decisions.

Tribunal or an Appeal Mechanism?" (2016), *Geneva Centre for International Dispute Settlement*; Laird and Askew (n 437).

[504] G. Kaufinann-Kohler, "Arbitral Precedent: Dream, Necessity, or Excuse?" (2006), *Arbitration International*, Vol.23, No.3.

[505] *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/06, Decision on Jurisdiction, (April 26, 2005), para. 17-18.

[506] *Ibid*.

[507] S. M. Schwebel, "The Outlook for the Continued Vitality, or Lack Thereof, of Investor–State Arbitration" (2016), *Arbitration International*, Vol. 32; T W. Wälde, "Some Implications of an Investment Arbitration Appeals Facility" (2005), *Transnational Dispute Management*, No. 2; G. Kaufinann-Kohler, "Arbitral Precedent: Dream, Necessity, or Excuse?" (2006), available at: < https://lk-k.com/wp-content/uploads/Arbitral-Precedent-Dream-Necessity-or-Excuse.pdf > accessed 23 May 2023; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, (NAFTA), separate opinion of Thomas Wälde, (2006), available at < http://ita.law.uvic.ca/documents/ThunderbirdSeparateOpinion.pdf > accessed 07 May 2023.

[508] Kaufinann-Kohler (n 504).

One question that might arise therefore is whether it is possible to establish a system of formal precedent in the foreign investment regime. Considering the establishment of preliminary rulings by Article 234 of the EC Treaty,[509] it might be claimed that creating a doctrine of precedent in IIL is not impossible. Though, it would certainly require a carful crafting and a strong political will.[510] Nevertheless, it is worth mentioning that there were tensions between the national courts and the European Court of justice (ECJ) about promoting legal certainty in Community Law. They remained the same until the decision of the ICJ in *Folgia v Novello,*[511] in which the Court decided to refuse hypothetical references, and such a decision transformed its role into a supervisory rather than cooperative partner. Nevertheless, there is no similar supervisory body in the foreign investment regime.

Furthermore, scholars such as Legum[512] and Paulsson[513] contend that establishing an appeal mechanism would undermine the existent flexibility in the ISDS and limit the parties' high degree of control over the dispute settlement process. Also, it has been argued that it would damage the principle of finality.[514]Nevertheless, the prominence of the finality of the award has been criticised in the recent decade.[515] Also, it is time to focus on the importance of correctness and justice rather than simply following the primary advantageous features of the ISDS, such as the principle of finality and party autonomy. Since a dispute resolution procedure would not be effective without the existence of fairness, certainty, and consistency.[516] As the

[509] The Treaties Establishing the European Communities and Creating Related Acts, available at: < https://www.equalrightstrust.org/sites/default/files/ertdocs//EC%20treaty.pdf > accessed 23 May 2023.
[510] G. Kaufmann-Kohler, "Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?" (2004), available at:< https://lk-k.com/wp-content/uploads/annulment-icsid-awards-contract-and-treaty-arbitrations-are-there-differences-annulment.pdf > accessed 23 May 2023; C. Schreuer and M. Weiniger, "Conversations Across Cases – Is there a Doctrine of Precedent in Investment Arbitration?" (2008), available at: < https://www.transnational-dispute-management.com/article.asp?key=1237 > accessed 23 May 2023.
[511] *Pasquale Foglia v Mariella Novello* (1981), case No. 244/80.
[512] Legum (n 34) 231-240.
[513] Paulsson (n 31) 267-280.
[514] Clapham (n (356).
[515] Dolzer *et al*., (n 14) 277- 279.
[516] Yannaca-Small (n 422).

awards could create significant consequences for the parties, they prefer reaching a correct decision by the tribunal than saving money and time.

In addition, it has been argued that establishing an appellate body could increase the cost and time of settling investment disputes. The previous chapter discussed that the cost of settlement of investment disputes through ISDS has skyrocketed in the recent years.[517] Also, it was demonstrated that it can often take a few years for an arbitral tribunal to settle a dispute.[518] Therefore, an appellate body, as an extra layer of arbitration procedure, could increase the cost and time of dispute settlement within this system. Nevertheless, establishing an appeal mechanism and the consequences of furthering cost and delay should be compared to the different layers of appeal proceedings under the national judicial systems, such as the court of appeal and supreme court in many states.[519] Indeed, creating an extra layer does not necessarily automatically mean that there would be further excessive costs and delay in settling disputes. It would be possible to deal with an appeal within a reasonable period by creating strict deadlines for the arbitral tribunals to reach a decision. However, some additional delay caused by an extra layer of administrative process will cause at least minor delay; this is inevitable.

Other scholars have viewed the potential establishment of an appellate body from a different perspective. They argued that the disadvantageous aspect of creating such a body is the re-politicisation of the ISDS system.[520] Its creation enables the losing states to appeal every case to gain popularity among their citizens.[521] Chapter two[522] explained that before ISDS gained popularity, foreign investment disputes often escalated into physical conflicts that

[517] *Ibid*.
[518] Hodgson and Campbell (n 357).
[519] Yannaca-Small (n 422).
[520] M. McCann, "Law and Social Movements: Contemporary Perspectives" (2006), *Annual Review of Law and Social Science*, Vol. 2, No. 1; J. Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005) 265; C. H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) 398; also see the discussions provided in Chapter III.
[521] Yannaca-Small (n 422).
[522] Chapter II, 65-69.

subsequently became political, and negatively affected international relations. The system of ISDS contributed to the de-politicisation of international investment by providing a neutral and independent means for settling disputes. The potential full-time presence of members of an appellate body could create an opportunity for them to repeat interactions and engagement over an extended period. It leads them to take greater responsibility for an institution through decisive acts of independence.[523] This has been highlighted by Caron who states that, "[t]he more adjudicators are present and the more they can interact, the more they will operate at the extent of the powers available to them under the constitutive instrument."[524]

Moreover, the WTO Appellate Body's experience[525] demonstrates that how members of a permanent tribunal by using their evolutionary approach in conducting treaty interpretation can expand their authorities over time.[526] Such an evolutionary approach is evident in the *Shrimp/Turtle*[527] dispute, which concerned a US import ban on shrimp that could adversely affect sea turtles. The Appellate body decided to act decisively to create a balance between trade and environmental interests. By adopting such an approach, this body empowered itself to engage in balancing and modernizing the interpretation of Article XX of GATT 1994, which sets the scope of general exceptions.[528]

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[523] D. Caron, "Towards a Political Theory of International Courts and Tribunals" (2006), *Berkeley International Law Journal*, Vol. 24, No. 1, 401, 417.
[524] *Ibid*.
[525] WTO Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc No WT/DS58/AB/R,*1998, the Appellate body in this case took an evolutionary approach. It decided to act decisively to create a balance between trade and environmental interests.
[526] For detailed discussion of WTO Appellate Body practice in the context of investment arbitration appellate mechanism options, see, M. Huber and G. Tereposky, "The WTO Appellate Body: Viability as a Model for an Investor-State Dispute Settlement Appellate Mechanism" (2017), *ICSID Review Foreign Investment Law Journal*, Vol. 32, No. 3, 545–94; M. Feldman, "Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power" (2016), *Peking University School of Transnational Law Research Paper*, Vol. 16, No. 2.
[527] WTO Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products,* WTO Doc No WT/DS58/AB/R (12 October 1998) para 130.
[528] Huber and Tereposky (n 526).

It must be acknowledged that the re-politicisation may be a risk with ISDS if an appeal mechanism is established. That said, some commentators suggested that the establishment of several procedural safeguards limits the occurrence of such a problem.[529] Nonetheless, it can be argued that the potential that re-politicisation might occur will mainly depends on the architecture of an appeal mechanism. For instance, the situation would be different where there is a single appeal tribunal with a permanent panel from where the investment parties can choose an appeal panel to hear their appeal. In the latter case, there is a high risk of selecting unreliable and biased arbitrators to sit on the appellate tribunal.

Furthermore, the analysis of a number of leading cases[530] in the previous chapter demonstrated that inconsistent decisions are a reality in ISDS. It is evident that with the increase in several investment disputes overall, there is a higher potential for rendering inconsistent decisions. On this point, the OECDs' Working Paper on investment of 2006 claimed that "[an] appeal mechanism could contribute to greater consistency in international investment arbitration, and that consistency and coherence of jurisprudence create predictability and enhance the legitimacy of the system of international investment arbitration."[531] Some scholars have agreed with the OECD's arguments.[532] Dimsey supported this idea by stating that "it would prevent the inconsistency in decision-making and avoid the haphazard domestic frameworks that currently come into play in investment arbitration practice."[533] Subedi also

[529] C. Coppotelli, "Investor-State Adjudication Mechanism Negotiations in the TTIP: An Unpopular Endeavor into the Potential Politicization of Dispute Settlement" (2016), *Fordham International Law Journal*, Vol. 39, No. 5; C. Baltag, "Reforming the ISDS System: In Search of a Balanced Approach" (2019), *Contemporary Asia Arbitration Journal* (CAA Journal), Vol. 12, No. 2.
[530] *Lauder v. Czech Republic,* Final Award 2001, 187-91*; SGS Société Générale de Surveillance S.A.v. Islamic Republic of Pakistan, Decision on Jurisdiction,* ICSID Case No. ARB/01/13 (2003*), SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,* ICSID Case No. ARB/02/6*; SGS Société Générale de Surveillance S.A.v. Islamic Republic of Pakistan, Decision on Jurisdiction,* ICSID Case No. ARB/01/13 (2003); *Pope & Talbot Inc. V Government of Canada (2002) ILR 293; Metalclad Corporation v United Mexican States (2000),* ICSID Case No ARB(AF)/97/1.
[531] OECD, The OECDs' Working Paper on International Investment 2006, available at: < https://www.oecd.org/daf/inv/investment-policy/working-papers.htm > accessed 30 April 2023.
[532] Yannaca-Small (n 422); Franck (n 25); Dimsey (n 20) 172-180.
[533] Dimsey (n 20) 177.

asserted that "if there were an appeal mechanism, it would bring more cohesion and more legal certainty to this body of law." [534] On the other hand, some scholars, such as Gill and Paulsson believed that establishing an appellate body is not crucial, and any inconsistencies will remedy themselves in due course.[535]

Reviewing of the hierarchically structured systems of judicial dispute settlement at national and international levels reveals that they have been successfully in creating a consistent line of jurisprudence. For instance, the WTO Appellate Body has been successful to a certain extent to deal with appeals. Similarly, the highest courts at the national level have also proved to be successful in providing a correct interpretation of the relevant law and putting an end to long-term disputes between the district and regional courts.[536] Perhaps, one of the sources of inspiration for establishing an appeal mechanism was the significant success of similar bodies at national and international levels. Nevertheless, due to existing diversity and fragmentation within IIL it is not probable for any appellate to successfully deal with appeals. In other words, due to the existence of more than 3000 legal texts, and with the variations of language in these texts, it is highly likely that an appellate body could produce different outcomes from the same factual circumstances and legal issues.[537]

In addition, it must be noted that not all types of appellate systems have the capacity to enhance consistency. For instance, establishing various appellate structures for different treaties would increase rather than reduce the inconsistency as it is highly likely that these

[534] Subedi (n 2) 265.
[535] Paulsson (n 31).
[536] For instance, in English Legal system; *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co. Ltd* [1915] AC 847; *Foakes v. Beer* (1884), 9 App Cas 605; *Colchester Estates v. Carlton Industries,* 2 ALL ER 60, (1984); *Colchester Estates v. Carlton Industries*, 2 ALL ER 60, (1984), *also including*, Ch 80, (1986). In the US legal system: *Coral Reef Limited v Silverbond Enterprises Ltd and Another* [2016] EWHC 874 (Ch); *Sarpd Oil International v Addax Energy SA* [2015] EWHC 2426.
[537] G. M. Alvarez, B. Blasikiewicz, T. Van Hoolwerff, M. Mitsi, K. Koutouzi, N. Lavranos, E. Spiteri-Gonzi, A. Videgaray, and P. Willinski, "A Response to the Criticism against ISDS by EFILA" (2016), *Journal of International Arbitration*, Vol. 33, No. 1.

appeal structures reach different results too.[538] Indeed, an appellate body might only be successful in enhancing consistency if only a single tribunal is competent to hear appeals in all investment disputes or at least a large majority of cases. The subsequent arbitral awards should be influenced by the previous decisions rendered by the same appeal institution. It can be claimed that there is no chance for creating a single appellate body under the current system to deal with all foreign investment disputes due to the existence of different types of arbitration (ad hoc and institutional).

This section has demonstrated that even though establishing an appeal mechanism is desirable, it is highly unlikely that within the current foreign investment regime (including dispute settlement through ISDS) an appeal mechanism would be able to function effectively. However, this does not mean that the idea of creating an appeal mechanism must completely be discarded. The EU's proposed MIC includes the establishment of an appeal mechanism, as such this analysis will be utilised in the next chapter when considering that as an option.

4.2.2 Reforming the Adjudicator Selection Procedure

Aside from the issue of the establishment of an appellate mechanism, one of the other main concerns which led to growing calls for reforming ISDS is the issue of the composition of tribunals consisting of private individuals and their selection. In fact, the arbitrators are typically selected by the parties to the dispute, they are unaccountable to the electorate or higher courts, and they are of the power to render confidential decisions which can effectively overrule decisions made by democratic governments and impose large financial burdens on investment

[538] ICSID (n 468).

host states.[539] As a result, enhancing the independence, impartiality, and neutrality of the adjudicators is one of the main aspects of reform.[540] The initial focus is on providing judgments that contain features associated with the rule of law about the administration of justice and the neutrality of dispute resolvers. Indeed, to enhance democratic accountability in investment dispute settlement, the arbitrators should consider the reasons behind the order and respect the right of the states to regulate in the public interest.[541]

There have been a few attempts to improve mechanisms for the selection of adjudicators. The first is Canada Comprehensive Economic and Trade Agreement (CETA). It introduced the Investment Court System (ICS), which essentially applies the existing procedural rules for international arbitration.[542] Nonetheless, it proposed the settlement of investment disputes through a permanent adjudicatory body consisting of a Tribunal of First Instance and an Appellate Tribunal.[543] The ICS members are appointed jointly by the EU and Canada for fixed terms of five years that are once renewable.[544] CETA created some requirements for the selection of arbitrators. The panel must hold the required qualifications or have recognised competence as jurists. Also, they must be experts in public international law, international investment law, and international trade law.[545] Additionally, CETA prohibits

[539] P. Eberhardt and O. Cecilia, "Profiting from Injustice – How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom" (2012), *Corporate Europe Observatory and Transnational Institute*; A. Mestral and C. Lévesque, "Improving International Investment Agreements" in R. Routledge and P. Sauvé (eds.), *Prospects in International Investment Law and Policy* (Cambridge University Press, 2013); J. E. Kalicki, and A. Joubin-Bret, "Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century" (2015), *Nijhoff International Investment Law Series*, No. 4; K. P. Sauvant, "The Evolving International Investment Law and Policy Regime: Ways Forward" (2016), *Columbia Centre on Sustainable Investment*, Vol.1.

[540] S. W. Schill, "Authority, Legitimacy, and Fragmentation in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals" in S. Griller, W. Obwexer and E. Vranes (eds.), *Mega-Regional Agreements: TTIP, CETA, TISA: New Orientations for EU External Economic Relations* (Oxford University Press, 2016) 652-657.

[541] *Ibid*.

[542] The EU-Canada Comprehensive Economic and Trade Agreement [hereinafter CETA], available at: <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement/ceta-chapter-chapter_en > accessed 23 May 2023.

[543] CETA, Articles. 8.27 and 8.28.

[544] CETA, Article. 8.27(5).

[545] CETA, Article. 8.27(4).

dispute resolvers from double-hatting. It means that they have been prevented from acting as counsels or expert in other international investment disputes and acting in cases of conflict of interest. They must abide by the IBA Guidelines, and the ethical rules adopted by the CETA Services and Investment Committee.[546]

It can be argued that the ICS emerges as a permanent court of arbitration rather than an international court. The proposed procedure for the appointment of the ICS's judges does not meet the international requirements for the independence of courts. The ICS does not meet the criteria set out in the Magna Carta of Judges which requests for the legally secured independence of judges in professional and financial terms.[547] Firstly, considering the fixed terms of five years that are once renewable,[548] the retainer fee and any extra expense allowance in the event of actual service would raise a question of whether the criteria for the technical and financial independence of judges of an international court are fulfilled.

Furthermore, it is noteworthy to mention that the ICS's judges are not merely required to decide the questions of civil law, but they must decide about the questions which relate to the labour, social, fiscal, and administrative law.[549] As a result, the selection of judges from a group of experts in public international law, international investment law, and international trade law would significantly limit the pool of judges to the circle of persons who are professionally principally engaged in international arbitration. In addition, it appears that the independence of the judges depends on the independence of the selection committee which would not tie itself to the international arbitration, rather it ensures the selection of judges with essential expertise in other relevant fields of law.

[546] CETA, Articles. 8.30(1), 8.27(2).
[547] The Magna Carta of judges of the CCJE (2010), available at: < https://rm.coe.int/16807482c6 > accessed 23 May 2023.
[548] CETA, Article. 8.27(5).
[549] Schill (n 540).

Next, the Brazilian CIFAs have set several requirements for the selection of arbitrators. The first requirement is arbitrators must be experienced. Also, they must be specialised in public international law and international investment law. In addition, they must be elected based on objectivity, credibility, and reputation. They should be independent and not be related to either parties or arbitrators. Further, they are obliged to follow the procedure about conflicts of interest set up for adjudications at the WTO.[550] It appears that the Brazilian CIFAs attempted to enhance the impartiality of dispute resolvers. Nevertheless, the main concern is the pool of arbitrators in the Brazilian CIFAs' proposed state-to-state arbitration mechanism is very similar to the pool of arbitrators that exists in the ISDS system. Indeed, the CIFAs have not introduced significant changes which could guarantee the enhancement of independence and impartiality of the selected arbitrators to resolve the dispute through its proposed state-to-state arbitration mechanism.

4.2.3 Enhancement of Transparency

A further central reform proposal which is prominently discussed is the idea of increasing transparency of ISDS proceedings. The preceding chapter[551] considered a few recent attempts towards enhancement of transparency in ISDS; the revisions to the ICSID Arbitration Rules in 2006,[552] the ICSID Rules and Regulations 2022,[553] the adoption of the UNCITRAL Rules on Transparency 2013, [554] and the Mauritius Convention on Transparency 2014.[555]

[550] See Brazil-Chile CIFA, Annex I, Article. 4.5; Brazil-Colombia CIFA, Article. 23.8(c); Brazil-Peru CIFA, Article. 2.21:8(c) (all referring to WTO Document WT/DSB/RC/1 of 11 December 1996).
[551] Chapter III, 96-103.
[552] ICSID, "Backgrounder on Proposals for Amendment of the ICSID Rules" (2018), available at: < https://icsid.worldbank.org/sites/default/files/publications/Amendment_Backgrounder.pdf > accessed 23 may 2023.
[553] ICSID Convention, Regulations and Rules 2022 (n 328).
[554] The Mauritius Convention on Transparency 2014 (n 344).
[555] *Ibid*.

Following the UNCITRAL Transparency Rules, CETA, CPTPP[556], and USMCA[557] provided identical rules on transparency of proceedings and a basis for the participation of non-disputing parties.[558] All three agreements anticipate public hearings[559] and the publication of relevant documents[560] while ensuring the protection of confidential or protected information.[561] Likewise, India's Model BIT provides that hearings should be open to the public. It also requires the host state to make the awards available to the public along with all documents related to arbitral proceedings, including transcripts of the hearings.[562] In addition, India's Model BIT permits the non-disputing state party to make oral and written submissions to the tribunal about the interpretation of the treaty.[563]

Furthermore, among Brazil's CIFAs, only the Brazil-Chile CIFA requires the parties to make arbitral awards available to the public within 15 days, albeit with paying special attention to the information highlighted as confidential.[564] Participation of non-disputing parties is permitted by this agreement, following Brazil's state-centred dispute settlement model inserted in bilateral treaties.[565] The Brazil-Chile CIFA reproduces the provision in the WTO DSU for arbitral tribunals, which permits the WTO panel to seek information and technical advice from

[556] CPTTP (n 443).
[557] United States–Mexico–Canada Agreement, full text available at: < https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement > accessed 23 May 2023.
[558] See CETA, Article. 8.36(1) in connection with UNCITRAL Transparency Rules, Article. 4; CPTPP, Article. 9.23(3); USMCA, Annex 14-D, Article. 7.3; CETA, Article. 8.38; CPTPP, Art 9.23(2); USMCA, Annex 14-D, Art 7.2.
[559] See CETA, Article. 8.36(5)1; CPTPP, Art 9.24(2); USMCA, Annex 14-D, Article. 8.2.
[560] See CETA, Article. 8.36(2) (4); CPTPP, Art 9.24(1); USMCA, Annex 14-D, Article. 8.1.
[561] See CETA, Article. 8.36(4) and (5) (covering "confidential or protected information"); CPTPP, Article. 9.24(3) (covering "protected information that it may withhold in accordance with Article 29.2 (Security Exceptions) or Article 29.7 (Disclosure of Information)"); USMCA, Article. 14.8(4).
[562] See India Model BIT, Article 14.8, P. Ranjan and P. Anand, "The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction" (2017), *North-western Journal of Int Law and Business*, Vol. 38, No. 1.
[563] See India Model BIT, Article. 14.8(4).
[564] See Brazil-Chile CIFA, Annex I, Article. 7(4).
[565] *Ibid*.

any individual or body if it deems appropriate.[566] However, following Brazil's position, there is a broad agreement about third-party participation, at least for ISDS proceedings.

It can be stated that the previous reforms have not moved swiftly to improve the transparency of the dispute settlement system. Third-party participation in the arbitration procedure is still a topic of controversy. Although arbitration is typically confidential and constrained to the parties in question, ISDS, apart from the parties involved, would also affect other actors who might have a stake in the outcome. Subsequently, it is vital to make further efforts to implement external transparency. Nevertheless, enhancing transparency might have some potential impacts on traditional values, such as confidentiality, procedural integrity, and conflicts of interest.[567] It is questionable what the acceptable degree of transparency in the field of foreign investment is. It appears that it is not a possible task to draw a balance due to the special character of the foreign investment regime. Creating a transparent process would only be possible at the cost of putting the interests of one or both parties at risk to some extent.

4.3 Proposals to Replace International Investment Arbitration

The preceding section examined the most prominent proposals for the reform of different problematic aspects of ISDS. It is arguable that implementing one (or more) of the central reform proposals will not ameliorate the situation to a satisfactory end, as it will not address all (or even most of the main criticisms of ISDS). Accordingly, this section will move

[566] See Brazil-Chile CIFA, Annex I, Article. 5(2)(c). For the situation in the WTO, see WTO Appellate Body Report, *US – Shrimp,* (1998), WT/DS58/AB/R, paras 79-91.
[567] J. D. Karton, "A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards" (2012), *Arbitration International Journal*, Vol. 28, No. 3.

to the more radical proposals put forward to completely replace the system of ISDS with another mechanism, such as state-to-state arbitration and the world investment court.

4.3.1 State-to-State Arbitration

This method has become more relevant following the trend towards investment chapters in FTAs and CEPAs in which state-to-state arbitration clauses have been included. [568] Such a clause in investment treaties usually contains three types of claims.[569] The first is diplomatic protection claims brought by home states to seek redress on behalf of their nationals. The second is interpretive claims seeking interpretation of an investment treaty. The last type is declaratory relief which seeks a determination for breach of a specific measure in the treaty.[570]

It has been argued that the re-emergence of state-to-state arbitration contributes to creating a new era in the field of foreign investment in which the rights of both parties, investors, and states, are being identified and valued.[571] It could tackle one of the main defective aspects of the ISDS procedure, namely the prioritization of the rights of foreign investors over host states' rights. Indeed, it shifts the power from foreign investors to treaty parties and investment tribunals to state-to-state tribunals.[572] Nevertheless, it may result in distributing the power between the state parties unfairly (i.e., when one of the state parties (home state) is from the developed country and the other state party (host state) is from the developing country).

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[568] V. Geraldo and B. Stevens, "Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?" (2018), *Journal of World Investment and Trade*, Vol. 19, 475.
[569] M. Potestà, "State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is the Potential in Boschiero" in N. Scovazzi, T. Pitea, and C. Ragni (eds.), International Courts and the Development of International Law, Essays in honour of Tullio Treves (T.M.C. Asser Press, 2013); A. Roberts, "State-to-State Investment Treaty Arbitration: A hybrid Theory of Interdependent Rights and Shared Interpretive Authority" (2014), *Harvard International Law Journal*, Vol. 55, No. 1; J. Seifi, "Investor-state Arbitration v State-State Arbitration in Bilateral Investment Treaties" (2004), *Transnational Dispute Management*, No. 2.
[570] *Ibid*, Roberts.
[571] J. Wong, "The Subversion of State-to-State Investment Treaty Arbitration" (2014), *Columbia Journal of Transnational Law*, Vol. 53, No. 6.
[572] *Ibid*.

Moreover, it could address the criticism of the hybrid nature of the ISDS system.[573] The main character of the era in which ISDS clauses were added to investment treaties was the replacement of customary international law with private international law and the commercial arbitration paradigm.[574] Consequently, the adjudicatory system was replaced by the arbitral tribunals that could interpret and apply vague treaty standards to a dispute where one of the parties is a sovereign state. Thus, to capture the hybrid nature of the ISDS, it is necessary to create a new theoretical framework.[575] It might be claimed that by utilizing state-to-state arbitration, investors would no longer be able to challenge the ability of host states to regulate. Critics of ISDS have placed their attention on the public international law principle which affirms that private parties have no right to bring a claim against a state through a dispute settlement mechanism administered by a third party.[576] Where a state's national suffered an injury within the territory of another state, it should be regarded as an injury to that state.[577] Thus, any disputes arising out of these injuries become disputes between states. However, such an argument is outdated in our current era when individuals are granted substantive and procedural rights under international law.[578]

In addition, it has been claimed that state-to-state arbitration should be regarded as a threat

[573] J. Coe, "Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected, Themes, Issues and Methods" (2008), *Vanderbilt Journal of Transnational Law*, Vol. 36, No. 1; T. Weiler, "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order" (2004), *B.C. International and Comparative Law Review*, Vol. 27, 429; W. Park, "The Specificity of International Arbitration: The Case for FAA Reform" (2003), *Vanderbilt Journal of Transnational Law*, Vol. 36, 1241; B. M. Cremades and D. J. A. Cairns, "The Brave New World of Global Arbitration" (2002), *The Journal of World Investment and Trade*, Vol. 2.
[574] I. F. Shihata, "Towards a Greater De-politicization of Investment Disputes: The Role of ICSID and MIGA" (1986), *Foreign Investment Law Journal*, Vol. 1 (providing an overview of these concerns leading up to creation of the ICSID Convention).
[575] Roberts (n 569).
[576] Subedi (n 2) 3-9; B. Stem, "Comments - International Economic Relations and the MAI Dispute Settlement System" (1999), *Journal of International Arbitration*, Vol. 16.
[577] Vattel (n 91).
[578] M. Bennouna, Special Rapporteur on Diplomatic Protection, Preliminary Report on Diplomatic Protection, U.N. Document. A/CN.4/484 (Feb. 4, 1998), available at: < https://legal.un.org/ilc/documentation/english/a_cn4_506.pdf > accessed 23 May 2023.

since it could lead to the re-politicization of the dispute settlement system.[579] On the other hand, some hold a contradictory view by referring to the performance of the ICJ and WTO, which claimed to be successful for keeping disputes outside of the political realm.[580] Additionally, it is argued that de-politicization should not be regarded as a distinct feature of this method, but it is one of the main features of international adjudication generally.[581] Also, the occurrence of politicization is not impossible in ISDS. Since some home states might put pressure on host state governments behind the scenes before or during ongoing foreign investment disputes, or some home states might intervene at the enforcement stage. It has been evident in the Australian case in which the United States cut trade preferences for Argentina to pay damages awarded by the investment tribunals regarding a dispute between Argentine and a U.S. investor.[582]

Arguably, reverting to state-to-state arbitration appears to be a revival (of sort) of the principle of diplomatic protection. Diplomatic protection was characterised as ineffective, inherently unreliable, and discretionary, could now be classified as an appropriate replacement for ISDS. There are several concerns about the effectiveness of this method. Chapter two demonstrated that requirements associated with this method would have no result but create further hardships for the parties and the tribunal.[583] It might be claimed that these issues can be resolved through the conclusion of an investment treaty agreement which provides for a specific type of state-to-state arbitration that departs significantly from the general international

[579] W. M. Reisman, "Expert Opinion with Respect to Jurisdiction in the Interstate Arbitration Initiated by Ecuador Against the United States" in the case of *Republic of Ecuador v. United States of America, PCA Case No. 5, 2012*.
[580] L. J. Daly, "Is the International Court of Justice worth the effort?" (1987), *Akron Law Review*, Vol. 20, No. 3; B. R. Bilder, "Adjudication: International Arbitral Tribunals and Courts" in I. Zartman, *Peace-Making in International Conflict: Methods and Techniques* (United States Institute of Peace, 2007); D. Evans, C. G. Shaffer, R. Meléndez-Ortiz, *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press, 2010) 342–348.
[581] D. Palmer, "Obama Says to Suspend Trade Benefits for Argentina" (2012), Reuters, available at: < http://www.reuters.com/article/2012/03/26/us-usa-argentina-tradeidUSBRE82P0QX20120326 > accessed 20 May 2023.
[582] *Ibid*.
[583] Chapter II, 65-69.

law rules governing diplomatic protection.[584] The treaty parties can set out specific procedures for exercising diplomatic protection through the state-to-state arbitration clause. For instance, such a clause could contain different requirements. However, the problem might arise where there is a general clause within an investment treaty. For instance, in the case of *Italy v Cuba*, the tribunal upheld that the state-to-state arbitration clause in the treaty did not depart from the general requirements provided by the customary international law on diplomatic protection.[585] It is worth mentioning that once states include this mechanism within a new treaty, at the negotiating stage, they must clarify their position to the requirements of the investor's nationality and exhaustion of local remedies. It is because general law on diplomatic protection would subsequently create several difficulties and damage the effectiveness of this mechanism.

Furthermore, state-to-state arbitration cannot be the sole dispute settlement mechanism due to the discretionary nature of diplomatic protection claims. The dispute would remain unresolved had the home states rejected exercising such a right. This issue could be tackled by requiring the treaty parties to add a provision to their investment agreement by which the home state is obliged to bring a diplomatic protection claim on behalf of its injured national under a certain circumstance. Nonetheless, it is difficult, if not impossible, to convince the treaty parties to place such an obligation upon home states. Also, there is no enforceable mechanism in case of the home state's non-compliance.

Moreover, it is concerning whether this mechanism could address the fundamental issues associated with ISDS, such as the lack of transparency and legitimacy crisis. Generally, there is little difference between the procedure of state-to-state arbitration with ISDS. Indeed, both

[584] United Nation, The ILC Draft Articles on Diplomatic Protection 2006, Article. 17, available at:< https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf > accessed 20 May 2023.
[585] *Italian Republic v. Republic of Cuba*, ad hoc state-state arbitration, Interim Award (sentence preliminaries), (15 March 2005), para. 53, para. 90; *Italian Republic v. Republic of Cuba*, ad hoc state-state arbitration, Final Award, (January 15, 2008), para. 204.

mechanisms follow similarly structured rules, often modelled on the UNCITRAL arbitration rules.[586] Taking this into account, most of the issues associated with ISDS could also occur in the realm of state-to-state arbitration, such as the impartiality of arbitrators, the lack of transparency, the lack of consistency, and the lack of appeal mechanism. Perhaps, the most distinct feature of this method is that some treaty agreements have enabled the disputing parties to choose between judicial settlement and international arbitration. For instance, the Germany–Pakistan BIT 1959 in Article 11 provides that where a solution was not provided through consultation, they can submit their dispute to the ICJ.[587] In the case of *ELSI*,[588] the United States filed a diplomatic protection claim against Italy over the alleged injury caused to its national. The ICJ upheld its jurisdiction over the U.S. claim based on Article 36(1) of the ICJ Statute [589] in conjunction with the state-to-state arbitration clause in the 1948 Italy–U.S. FCN treaty. Therefore, this mechanism could only address the issue of legitimacy if states select judicial settlement over arbitration.

In addition, it must be clarified whether this mechanism could provide greater transparency than ISDS. It is worth mentioning that some of the investment agreements, such as the U.S. Model BIT[590] and COMESA[591], provided that the transparency rules in ISDS would also apply

[586] In the case of *Ecuador v. United States*, PCA Case No. 2012-5 (Perm. Ct. Arb. 2011), all three arbitrators (Prof. Luiz Olavo Baptista [Presiding Arbitrator], Prof. Donald McRae and Prof. Raúl Emilio Vinuesa) have also arbitrated other treaty-based investor-state cases. Among the three arbitrators in the case of *S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award (Feb. 7, 2005). It appears that only Yves Derains has acted as arbitrator in investment treaty disputes before, while this seems not to be the case for Prof. Attila Tanzi and Dr. Narciso Cobo-Roura. In the case of *Lion Mexico Consolidated L.P. v. United Mexican States,* (2021), ICSID Case No. ARB(AF)/15/2, J. Martin Hunter (Presiding Arbitrator) and David A. Gantz have acted as arbitrators in treaty-based investor–state cases. The other three arbitrators, Luis Miguel Diaz, Michael Hathaway, and Alejandro Ogarrio appear not to have been active in this area. It is not known whether and which arbitrators were appointed in *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru,* ICSID Case No. ARB/03/4.

[587] The Germany–Pakistan BIT 1959, Article. 11(2) (a) (b).

[588] *Elettronica Sicula SpA (ELSI), United States v Italy, Judgment, Merits*, ICJ GL No 76, [1989] ICJ Rep 15, 28 ILM 1109, ICGJ 95, (2005).

[589] International Court of Justice Statute, Article. 36(1): The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

[590] The U.S. Model BIT (2012), Article. 37(4).

[591] The Investment Agreement for the Common Investment Area of the Common Market for Eastern and Southern Africa, Article. 27(3)-(4); Annex A, Article. 9.

to the state-to-state arbitration. Nevertheless, the issue is that there is little case law to work with since most state-to-state cases have not resulted in awards and there are very few publicly available awards.[592] Thus, like ISDS, lack of transparency is also a part of this mechanism.

Currently, this method is, as correctly labelled previously, not the most efficient mechanism for resolving foreign investment disputes. There is no convincing reason to believe that there have been any significant changes with this mechanism which can subsequently make it an alternative for ISDS. Also, the author's view is similar to a number of scholars[593] who maintain that such a mechanism should be a supplementary mechanism which can co-exist with other available means of dispute settlements.

4.3.2 Creation of a World Investment Court

Establishing an international investment court system has been and is still one of the most hotly debated proposals for reform. A number of scholars have evaluated this idea in the abstract.[594] Van Harten asserts that, "the way forward is to encourage states to support a multilateral code that would establish an international court with comprehensive jurisdiction over the adjudication of investor claims."[595] He articulates that his proposed world investment court would ideally have obligatory jurisdiction over all claims filed by investors in the first instance, where the states involved are members of the multilateral code. He continues by

[592] *Ecuador v. United States*, (2012), PCA Case No. 2012-5; S.*A. v. Republic of Peru,* ICSID Case No. ARB/03/4; *Republic of Italy. v. Republic of Cuba*, Interim Award, (Mar. 15, 2005).
[593] N. Bemasconi-Osterwalder and A. Roberts, "State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority" (2014), *Harvard International Law Journal*, Vol. 55, No. 1; N. Bemasconi-Osterwalder, "State-to-State Dispute Settlement in Investment Treaties, International institution for Sustainable Development" (2014), *International Institute for Sustainable Development*, Vol. 1, No.1; V. Vadi, "Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration" (2010), *Denver Journal of International Law and Policy*, Vol. 39, No. 2.
[594] Van Harten (n 57); Qureshi (n 74) 1165; Goldhaber (n 74); Subedi (n 2) 208- 209; H. Mann and K. Moltke, "A Southern Agenda on Investment? Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States" (2005), *International Institute for Sustainable Development* (IISD).
[595] Van Harten (n 57)180-184.

stating that giving a world investment court only appellate jurisdiction over the awards rendered by the numerous different tribunals is the less desirable option. He also places his attention on the staffing of the court. He asserts that twelve or fifteen judges would be required, and they should be appointed by states for a set term based on the model of other international courts. Also, he supports the idea that the first instance decision should be appealable.[596] The acceptable investment court's awards should be enforceable under the ICSID Convention and the New York Convention, which would create a basis for the review of decisions by national courts. However, there is an independent judicial body that decides where to locate claims for purposes of the national court's review.[597] Finally, he stresses out that, "the court can only be created if the key state players in international investment law prioritise the reform of the system, not so much because it fits their particular interests, but because they wish to defend long-cherished principles of judging in public law."[598] He highlights one potential criticism his proposal might face is the multiplication of international courts. He discusses that hundreds of tribunals would be consolidated once a world investment court is created, even if such a court never becomes the only investment tribunal in the world. He believes that such a world investment court is worthy of states' support as it is open, accountable, consistent, and independent.[599]

Other commentators also support this proposal.[600] They assert that such an institution could create a balance between competing interests. It has been argued that, "a single, preferably institutionally managed and widely accepted mechanism for reviewing investor-state arbitral awards would be best suited to address the risk of fragmentation of the

[596] *Ibid*.
[597] *Ibid*.
[598] *Ibid*.
[599] *Ibid*.
[600] E. Gleason, "International Arbitral Appeals: What Are We So Afraid Of?" (2007), *Pepperdine Dispute Resolution Law Journal*, Vol. 7, 286; Qureshi (n 74); Howard (n 70).

dispute settlement system that might otherwise ensue".[601] It is claimed that, by establishing a world investment court system, it is possible to achieve a more consistent and predictable case law which consequently leads to enhancing the legitimacy of the foreign investment regime.[602] Qureshi suggests that such a court could either be set up as an independent institution or as a chamber of the ICJ.[603] Howard also claims that the transparency concerns associated with ISDS could be resolved through creating a centralized investment court since its proceedings would be open to the public, and all its decisions would be published.[604] He asserts that establishing a world investment court would enhance the legitimacy of the dispute settlement procedure. As it could create a predictable legal framework for international investment law, and by establishing a consistent and coherent body of investment law, states would willingly accept the court's legitimacy and comply with its rendered decision.[605]

Despite widespread support for the idea, there are a number of detractors who argue that the basis of the call for creating a world investment court has yet to be properly established, and that it will not be able to remedy ISDS's central deficiencies.[606] Goldhaber branded such a court as politically unfashionable and unfeasible.[607] Similarly, Giorgetti believes that currently establishing such a court is an impossible task as a mere political will is not sufficient to establish a multilateral agreement on this issue.[608]

4.4 Conclusion

[601] *Ibid*, Gleason.
[602] Van Harten (n 57) 181.
[603] Qureshi (n 74).
[604] Howard (n 70).
[605] *Ibid*.
[606] Goldhaber (n 74).
[607] *Ibid*.
[608] C. Giorgetti, "Who Decides Who Decides in International Investment Arbitration?" (2014), *University of Pennsylvania Journal of International Law*, Vol. 35.

This chapter has analysed the most prominent proposals for reform or replacement of ISDS. However, it is important to note that it is beyond the scope of this chapter to provide an exhaustive list of every possible proposal that has been put forward, since there have been so many different suggestions in this regard. Instead, this chapter has focused on the proposals that have gained the most traction and those which are claimed to have the capability of responding to the criticisms of ISDS. Although some of these proposals, such as establishing an appeal mechanism, have been discussed and discarded previously, analysing them in this chapter provided a valuable opportunity for the author to take a lesson and focus on their most remarkable elements and dismiss their defective aspects.

This chapter has demonstrated that due to the decentralised system of IIL and the existence of various BITs, there is no capacity in the current foreign investment regime for creating an appeal mechanism. It was also clarified that regardless of the advantageous aspects of state-to-state arbitration, it cannot be the most appropriate method to replace ISDS. The requirements associated with this method impose additional costs and delays. Also, they create further hardships and confusion for both the parties as well as the tribunals. More importantly, it cannot be the sole mechanism for resolving investment disputes due to the discretionary right of diplomatic protection. At the most, such a mechanism could co-exist with ISDS.

The author argues that traditional dispute settlement mechanisms (diplomatic protection and referral of disputes to national courts of the investment host state) lack the capacity to resolve today's foreign investment disputes. Thus, there is no significant point in reconsidering these mechanisms, even by making several changes. The author therefore asserts that the right time has come to look for new alternative methods that address all (or many of) the concerns associated with ISDS. As other alternative proposals have failed to gain the necessary credibility, this chapter focused on analysing a credible alternative proposal: creating a world investment court. This chapter formed a basis for the following chapter to assess the

most prominent proposal for establishing a world investment court; the EU's proposal to establish a MIC system. The following chapter will examine the EU's proposal to establish a MIC in detail.

Chapter V: The European Unions' Proposed Multilateral Investment Court

5.1 Introduction

The preceding chapter considered the proposal to create a world investment court. The analysis of the views of various commentators regarding this proposal created a basis for the present chapter to assess the EU's concrete proposal to establish an international investment court, which it terms a Multilateral Investment Court (MIC). The central aim of the chapter is to examine whether the MIC has the potential for effective resolution of foreign investment disputes. This chapter examines whether the proposed features of the MIC would respond to the ongoing backlash against the ISDS system and could be regarded as the best possible option for replacing that defective system.

In order to achieve this aim, this chapter will assess the EU's proposal from four different angles: the selection and appointment of the adjudicators, the establishment of an appellate body, transparency (public hearings, third-party participation and publication of awards), and the enforcement of judicial awards. These angles correspond directly with the benchmarks discussed in chapter one as well as the criticism of the ISDS system, therefore enabling the present author to analyse the proposed MIC systems' legitimacy, efficiency, transparency, and feasibility.

It is important to note that the EU's proposal has generated extensive literature.[609] However, existing treatment of the topic remains fairly superficial. This chapter aims to examine the proposal in depth and in the wider context of international investment law and its historical evolution more generally. In order to achieve this purpose, this thesis extends the

[609] See, Bungenberg and Reinisch (n 55); Weiß (n 55); Jan van den Berg (n 55); Zárate (n 55); Hyoeun (n 55); Lam and Ünüvar (n 55).

analysis beyond the confines of the law of foreign investment, examining dispute settlement systems in other divisions of international law. In doing so, this thesis investigates how successful the most prominent international courts, such as the ECHR, ICJ, and CJEU, have been in working towards improving the legitimacy, efficiency, and transparency of dispute settlement in other fora. The main reason for conducting such a study is to examine whether the proposed MIC could benefit from following these institutions' structures, aspects, frameworks, and experiences, or at least utilising them for inspiration in terms of design and operation of the MIC.

5.2 Background of the Proposal

The European Commission's intention to reform the investment dispute settlement system became apparent in the context of the ongoing negotiations on TTIP between the EU and the United States.[610] Indeed, the initial step was taken in 2014 when the EC organised the public consultation on investment protection and dispute settlement in TTIP. The result of such a public consultation was the provision of more than 150,000 replies and comments which demonstrated significant concerns in respect of the effectiveness of the whole system of ISDS and the desirability of introducing an appeal mechanism.[611] In May 2015, the Commission published a concept paper to respond to public consultation. [612] Subsequently, on 16 September 2015, it unveiled an informal text proposal for TTIP,[613] which focused on establishing an

[610] The European Commission, "The Transatlantic Trade and Investment Partnership (TTIP)", available at: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1230 > accessed 23 May 2023.
[611] The European Commission, European Commission News Archive, "Consultation on Investment Protection in EUUS Trade Talks" (2015), available at:< http://trade.ec.europa.eu/doclib/press/index.cfm?id=1234 > accessed 23 May 2023.
[612] European Commission, "Investment in TTIP and Beyond – the Path for Reform" (2015), Concept Paper, available at: < http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF > accessed 23 May 2023.
[613] The EU Commission, "Transatlantic Trade and Investment Partnership, Trade in Service, Investment, and E-Commerce" (2015), Chapter III, available at: < http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf, > accessed 07 May 2023. For an overview of this earlier draft, see C. Titi, "The European Commission's Approach to the Transatlantic Trade and

ICS.[614] It was proposed that the new system would replace the current ISDS in all the ongoing and future EU investment negotiations, including the EU-US talks on TTIP.[615] Later, in December 2015, the EC announced the conclusion of negotiations on the EU-Vietnam FTA, with a permanent investment dispute resolution system with an appellate mechanism.[616] Subsequently, in February 2016, the EU released the new text of CETA. [617] The next stage of the EU plan to reform the current system of ISDS became apparent on 20 March 2018. The Council adopted the negotiating directives to authorise the Commission to represent the EU and its member states to initiate intergovernmental negotiations in the framework of UNCITRAL and conclude a convention for establishing a MIC.[618] The main objective is to replace all the new set-up ICS[619] with a permanent MIC.[620] In In October 2019, the EU and its member states started UNCITRAL talks,[621] and subsequently, they submitted a concept paper

Investment Partnership (TTIP): Investment Standards and International Investment Court" (2015), *Transnational Dispute Management*, Vol. 6.

[614] The European Commission, "Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations" (2015), available at: < http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364 > accessed 23 May 2023.

[615] The EU Commission, "Transatlantic Trade and Investment Partnership, Trade in Service, Investment, and E-commerce" (2015), Chapter II – Investment; the 12th TTIP round of talks took place on 22-26 February 2016. The Statement by the EU Chief Negotiator, Ignacio García Bercero, following the conclusion of the 12th TTIP negotiation round is available at: < http://trade.ec.europa.eu/doclib/press/index.cfm?id=1454 > accessed 23 May 2023.

[616] European Commission, "EU and Vietnam Finalise Landmark Trade Deal" (2015), available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1409 > accessed 07 May 2023. See also Blog post by C. Malmström, Commissioner for Trade, "Done Deal with Vietnam" (2015), available at: < https://ec.europa.eu/commission/2014-2019/malmstrom/blog/done-deal-vietnam_en > accessed 23 May 2023. The text of the agreement following conclusion of the negotiations, prior to legal revision is available at: < http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 > accessed 23 May 2023.

[617] CETA (n 542).

[618] The European Council, "Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes", (2018), available at:< http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf > accessed 23 May 2023.

[619] This is because the ICS, due to its bilateral nature, is unable to resolve disputes under the whole multitude of existing investment treaties, and inclusion of ICS in the EU newly signed agreements such as CETA and EU-Vietnam FTA should be regarded as a test or pilot phase for a future multilateral system.

[620] The European Council of the European Union, "Multilateral Investment Court: Council Gives Mandate to the Commission to Open Negotiations" (2018), available at: < https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/ > accessed 23 May 2023.

[621] European Commission, "Multilateral Investment Court" (2017), available at: < http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 > accessed 07 May 2023.; European Parliament, "Multilateral Investment Court Overview of the reform proposals and prospect" (2020), available at: < https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf > accessed 23 May 2023.

to determine how such a system can be set up.[622] According to the records, the last round of discussion was in February 2022.[623] In addition, in March 2023, the EC held a stakeholder meeting on establishing a multilateral investment court.[624] The purpose of the meeting was to provide an update for stakeholders on the latest developments in this area. It is worth mentioning that the highlight of this meeting is the EU was not its sole moderator, and the Civil Society Coordination - Transparency, Civil society and Communication Unit also played the moderator role in such meeting.[625]The EC has not provided any time scale for establishing the proposed MIC system. It has been stated that "This will require building consensus with other likeminded countries, and this cannot be achieved overnight. We will work with our partners to identify the best way forward."[626]

As noted in the previous chapter, creating an international investment court is not a novel idea, and was previously considered by various scholars.[627] Reviewing the previous attempts to create a world investment court demonstrates that one of the main obstacles to establish a MIC system is the difficulty, to some extent impossibility, of achieving a consensus among the sovereign states. However, based on the discussions provided in the previous chapter, there is no doubt that the foreign investment regime is at a crossroads, and the current system of ISDS is suffering from several fundamental deficiencies. It is arguable that the time for minor changes and tweaks to the current system has passed. At present, there is more reliable evidence which supports the idea of establishing a MIC system; this was set out in the

[622] The European Commission, "Commission Presents Procedural Proposals for the Investment Court System in CETA" (2019), available at: < https://trade.ec.europa.eu/doclib/press/index.cfm?id=2070 > accessed 23 May 2023.
[623] European Commission, "Establishment of a Multilateral Investment Court" (2022), EU Trade Stakeholder Meeting, available at: < https://trade.ec.europa.eu/doclib/docs/2022/february/tradoc_160040.pdf > accessed 23 May 2023.
[624] European Commission, "Stakeholder Meeting on the Establishment of a Multilateral Investment Court" (2023), available at: < https://policy.trade.ec.europa.eu/events/stakeholder-meeting-establishment-multilateral-investment-court-2023-03-22_en, > accessed 23 May 2023.
[625] *Ibid*.
[626] European Commission, "A Future Multilateral Investment Court" (2016), Fact Sheet, available at: < https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_4350, > accessed 23 May 2023.
[627] Chapter IV, 149-51.

previous chapter. Accordingly, it could be argued that the chance of obtaining a consensus among the sovereign states for creating such a system is higher rather the previous decades due to the current high demand of establishing an efficient dispute settlement mechanism in the foreign investment regime. Perhaps, all the mentioned reasons encouraged the EU to step in and put forward its proposal.[628]

5.3 Evaluating the Proposal to Establish a Multilateral Investment Court

The EC has proposed the establishment of a MIC as a permanent body to decide foreign investment disputes. This body would have two-tier tribunals; first instance and second instance (appeal). Each tribunal consists of tenured and highly qualified judges who are obliged to adhere to the strictest ethical standards and a dedicated secretariat.[629] The EC admits that the proposed MIC would build on its ground-breaking approach to the bilateral FTAs. Also, it would depart from the system of ISDS. [630]

It must be noted that providing an analysis of a moving target (the EU's negotiations with its member states are still ongoing regarding the establishment of its proposed MIC) is a difficult task. Nevertheless, sufficient information is available for the author to analyse the main features of this proposed system.

This section discusses whether the EU has moved towards creating a transparent, fair and reliable dispute settlement system. It assesses whether it could develop the legitimacy of the dispute settlement process by appointing an impartial and knowledgeable panel that would

[628] European Commission of the European Union, "Structural Reform of ISDS: The Establishment of a Multilateral Investment Court" (2020), UNCITRAL Working Group III Resumed 38th Session.
[629] European Commission, "Multilateral Investment Court project" (2016), available at: < https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en, > accessed 07 May 2023.
[630] *Ibid*.

be able to make a careful and informed reflection on facts and laws. In addition, it considers whether the system protects the interests of both parties. Furthermore, it scrutinises whether it could effectively dismiss frivolous and spurious claims at the preliminary stage. It also examines whether it could effectively prevent multiple proceedings through which it is possible to minimise the risk of inconsistent decisions that would undermine the rule of law's demand for legal certainty and predictability. Likewise, it considers whether it could reconcile foreign investment concerns with other concerns, such as human rights and the environment. Moreover, it determines whether it is an affordable mechanism for all the states, specifically for the developing states, as a response to the rule of law's demand: providing affordable access to justice. The proposed MIC system could be compatible with the rule of law has it addressed the above issues.

5.3.1 Selection and Appointment of the Adjudicators

Impartiality, independence, and qualification are the main concerns of the MIC's selection and appointment process.[631] This section analyses whether the new proposed process for the selection and appointment of adjudicators could enhance the overall legitimacy of the foreign investment dispute settlement system. In addition, it examines whether the EU has introduced a mechanism to ensure the transparency of the adjudicator's selection process. It also assesses the source of authority for the proposed MIC.

The EU has suggested that the MIC's adjudicators must hold qualifications required for appointment to the highest judicial offices in their respective countries or recognised

[631] General Assembly of the United Nations, "Possible Reform of Investor-State Dispute Settlement (ISDS), Selection and Appointment of ISDS Tribunal Members" (2020), UNCTAD, available at: < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/selection_and_appointment_eu_and_ms_comments.pdf > accessed 23 May 2023.

competence in international law.[632] It has followed the general requirements for selecting judicial in other international courts such as ICJ[633] and ECtHR.[634] Furthermore, it has considered similar necessary qualifications in its newly conducted FTA agreements. Among these agreements, CETA has set further requirements. For instance, the panel must abide by the IBA Guidelines, and the ethical rules adopted by the CETA Services and Investment Committee.[635] It is worth noting that FTAs are bilateral agreements, and they mainly require both instances' members to be highly regarded jurists or hold similar qualifications.[636]

On the other hand, the proposed MIC is a multilateral court, therefore, the requirement for judges sitting in this body should be distinctive, and the judges should hold the highest qualification. It has been suggested that the proposed Statute should provide a broad description of the required qualifications for judges in the form of general prerequisites to create an efficient panel of adjudicators within such a court.[637] The efficiency of the MIC could be improved if the EU set a further requirement for the judges in both instances: have expertise in public international law. It is because the MICs' judges must make public law decisions, such as examining fundamental rights violations (state actions directed against foreign investors)

[632] For instance, the draft code of conduct could be the same as the code of conduct which was jointly prepared by the Secretariats of ICSID and UNCITRAL, provided that a revised version of that draft adequately reflects its applicability also to members of a standing mechanism, see, General Assembly of the United Nations (n 631).
[633] The statute of the ICJ requires the judges to hold the standard qualifications which are suitable for high judicial office or be jurists of recognised competence. Too, it states that they better have significant experience as lawyers, academics, diplomats, or domestic judges. See, the Statute of the International Court of Justice, Article 2.
[634] The ECtHR judges are selected in accordance with the criteria set out in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and the recommendations of the Parliamentary Assembly. The convention requires that judges be of 'high moral character' and have qualifications suitable for high judicial office or be jurists of recognised competence. See, the Council of Europe, "European Convention for the Protection of Human Rights and Fundamental Freedoms" (1950), available at: < https://www.echr.coe.int/Documents/Convention_ENG.pdf > accessed 23 May 2023.
[635] CETA (n 542) Art 8.27(4).
[636] *Ibid*.
[637] S. Wilske, G. Sharma, R. Rawal, "The Emperor's New Clothes: Should India Marvel at the EU's New Proposed Investment Court System?" (2017), *Indian Journal of Arbitration Law*, Vol. 6, No. 1.

based on the protection standards provided for in the IIAs.[638] Such a requirement has not been considered to any acceptable degree in the appointment procedure of arbitral tribunals.

Moreover, the EU suggested that the selection and appointment process between the first instance and the appellate body of a standing mechanism should not be different. It is questionable whether it is necessary to set a higher level of qualification for adjudicators of the appellate body. The EU followed a similar procedure in its newly concluded FTAs in which the qualification requirements for the appeal tribunal are the same as the first instance tribunal.[639] A similar mechanism also exists on the international level. For instance, one of the remarkable examples is WTO which has not set out distinctive qualifications for the WTO AB's members.[640] It must be stated that making no such a distinction could cause investors to incur substantial delays and costs. It is because their claims would be dealt with two similarly characterised tribunals with no real appellate consideration. It could decrease the overall effectiveness of the MIC and negatively affect the legitimacy of such a process. For creating a legitimate appellate body which can address any legal errors produced at the first instance, it is crucial to select the most qualified members for such a body.[641] It is more important in the case of complex cases or ambiguous legal arguments which necessitate innovative legal reasoning. As a result, it can be claimed that drawing such a distinction could lead to the development of effectiveness of the MIC system.

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[638] In a similar way it has been addressed that ISDS cases touch upon public interest or public policy. It has been stated the need of a public international law background, given the foundations of investment law. See General Assembly of the United Nations, UNCITRAL Working Group III: Investor-State Dispute Settlement Reform (2022), 43rd Session, available at: < https://uncitral.un.org/en/working_groups/3/investor-state > accessed 23 May 2023.

[639] European Union–Vietnam Free Trade Agreement [hereinafter EVFTA] 2020, Article. 13(7), Section 3, Chapter II, Chapter. 8, available at: < https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement_en > accessed 23 May 2023.

[640] World Trade Organization, The Dispute Settlement Understanding 1994, Article. 17.3, available at: < https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm > accessed 23 May 2023.

[641] Bungenberg and Reinisch (n 55) Chapter 4.

Moreover, the EU has not provided any fixed term for the duration of serving as a judge in the proposed MIC. Various international institutions selected different terms. For instance, judges in the ICJ and the ECtHR are being appointed for nine years each,[642] while the WTO AB members are initially appointed for four years with the possibility of reappointment once.[643] Yet, it is claimed that the most appropriate duration of service is 9 to 12 years. The main reason for such an argument is it could develop the consistency of decisions which later would enhance the legitimacy of the procedure. However, this could only work had this been accompanied by the element of non-renewable.[644] Since the re-appointment of judges after a short term could negatively affect their judicial independence.[645] It has been evident in the case of WTO AB, the selection procedure of which has been strongly criticised.[646] Permitting the re-election of judges could create a basis for judges to have a stronger dependency on their nominating states. Though, if initially the MIC is set up with fewer members, such a long-term service would discourage the potential member states which could be interested in joining this system. Thus, the MIC should set out a shorter term for the appointment of its judges. It can promise the newly acceding states that the judiciary system will represent their region and legal culture. Once the number of members reaches a certain amount when it adequately represents all regions' states of the world, then a longer term of office could be required for all judges.[647]

[642] Statute International Court of Justice 1945 (n 408) Article. 13, para. 1, (with the possibility of re-election); ECHR, Article, 23 paras. 1, (Without the possibility of re-election).
[643] The Dispute Settlement Understanding (n 640) Article. 17.2, The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once.
[644] Bungenberg and Reinisch (n 62) 55-57; Institute de Droit International, "Resolution on the Position of the International Judge" (2011), Sixth Commission, *Res En Final* 6; Rome Statute, Article. 36 paras. 9 (subject to subparagraph (b); 'judges shall hold office for a term of nine years' and, subject to subparagraph (c) and to article. 37, paragraph 2; 'judges shall not be eligible for re-election').
[645] Howard (n 70).
[646] J. Bacchus, "Might Unmakes Right: The American Assault on the Rule of Law in World Trade" (2018) *Centre for International Governance Innovation*, Paper No. 173; J. Dunoff and M. Pollack, "The Judicial Trilemma" "The application of The Judicial Trilemma to the WTO dispute settlement System" (2017), *American Journal of International Law*, Vol. 111, No. 2; T. Payosova, G. C. Hufbauer, J. Schott, "The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures" (2018), *Policy Brief Peterson Institute for International Economics*.
[647] *Ibid*.

It can be claimed that the EU has intentionally failed to clarify its preferred terms (6, 9 or 12) to create a basis of trust for all the states that the system would fairly represent all the states.

In respect of the method of representation, the EU, between selective (fewer seats than the number of states parties to the court's statute) and full (each state has an adjudicator on a permanent body),[648] selected former option for the following reasons. First, it is difficult to achieve full representation as a permanent body with a high number of members would be expensive, and it would be complex to manage the caseload with such a high number. Likewise, international courts are usually selective representation courts. For instance, in the UN system, with its 193 member states, the ICJ has only 15 judges[649] or the UNCLOS, [650] with its 168 member States, ITLOS has 21 judges, and in the WTO,[651] with its 164 member states, the Appellate Body has seven members.

It might be claimed that it is not necessary to enable every contracting state to have a representative judge in a permanent body to create a fair system but to establish a geographically balanced representation of genders, levels of development and legal systems. It can be suggested that each region of the world should represent a specific number of judges. For instance, the ICJ allocated a certain number of judges for every region, which reflect the regional distributions in the Security Council.[652] However, it has been claimed that this system

[648] The example of full representation includes regional courts such as the ECHR (Article. 20). The examples of selective representation courts include the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights (Protocol on the African Court), Article. 11, Agreement Establishing the Caribbean Court of Justice (2001), Article. IV, American Convention on Human Rights (1969), Article. 52; Statute of the Inter-American Court of Human Rights (1979), OAS Res No. 448, Article. 4.

[649] United Nation, Report of the International Court of Justice (2017), available at: < https://www.icj-cij.org/files/annual-reports/2017-2018-en.pdf > accessed 23 May 2023.

[650] United Nations, " United Nations Convention on the Law of the Sea", (1994), available at: < https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en > accessed 07 May 2023.

[651] World Trade Organization, "Members and Observers", available at: < https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm > accessed 07 May 2023.

[652] E. A. Posner and M. D. Figueiredo, "Is the International Court of Justice Biased?" (2004), *Law and Economics Working Paper,* No. 234; K. Keith, "The ICJ—Some Reflections on My First Year" (2008), *New Zealand Journal of Public and International Law*, Vol. 5, No. 1.

has formed a bias among the five permanent members of the Security Council, from which there is always a judge to be appointed. It indicates that there seems to be a higher opportunity for the selection of judges from wealthier states rather than poorer states.[653]

As discussed in the previous chapter, the inclusiveness of the dispute settlement process is one of the crucial factors in enhancing efficiency. It seems that the EU by choosing the selective method intended to impose its views on all member states as the proposed MIC was not previously negotiated multilaterally with other member states. One of the possible consequences is that the appointment of future judges to such a court might be subject to political constraints and veto, in particular, at the hands of the developed countries.[654] One could argue that there is always a risk that the appointed adjudicators by some states are not as knowledgeable as others. Such an issue can be addressed by creating a few safeguards. For instance, the EU could determine the qualifications and experiences that each potential adjudicator must hold. It could also create an assessment mechanism in which experienced international judges, such as previous ECHR judges, consider each application and conduct interviews with the introduced judges by different states.

The EU should consider creating a mechanism to prevent occurring a similar problem in the context of the MIC. Without providing an equal opportunity for all the contracting states with any level of development, the EU proposed selection process can be neither legitimate nor effective. Also, it is worth mentioning that with such an allocation system, the chance of obtaining consensus for establishing such a system would be considerably low. A clear example which would support such an argument is the WTO system in which there is an unfair opportunity for the participation of developed and developing countries. One of the main factors behind the hesitancy of the states, specifically, developing states, about achieving a

[653] *Ibid*.
[654] Brower and Ahmad (n 75).

consensus for creating a multilateral court in the field of foreign investment is their unpleasant past experiences within the WTO system.

In addition, in relation to adjudicator appointment, the EU attempted to address the concerns associated with ISDS about the independence of arbitrators by replacing party-appointed arbitrators with a permanent system of full-time adjudicators. It argued that one of the elements of fully independent and impartial adjudicators is to have no relationship with the disputing parties, such as financial, professional, employment, or personal. The EU disagreed with the idea of appointing ad hoc judges in a permanent body as it makes such a body pointless, increases the occurrence of ethical issues, and undermines all the efforts of the institution to ensure legitimacy, consistency, and predictability.[655]

The EU has claimed that a smaller pool of permanent professional adjudicators in both instances would potentially have the capacity to rule with greater consistency and independency from the interests of disputing parties.[656] They could prevent inconsistent decisions even with the absence of a binding precedent.[657] The EU raised some concerns about the ad hoc judges and the voting patterns of some institutions in which judges proved to have a strong tendency to favour the state that appointed them.[658] For instance, as discussed above, the ICJ is claimed to be a biased institution due to its pattern of appointing judges. The substantial evidence and the collected data confirm that about 90% of the time, the ICJ judges vote for their home states, while in case of involvement of non-home parties, they vote about half the time.[659] One might claim that the ICJ's selection process should be amended as it could cause increases in the number of biased judgements. On the other hand, it can be counter-

[655] General Assembly of the United Nations, "Possible reform" (n 631).
[656] *Ibid*, European Commission, "Multilateral Investment Court Project" (n 629).
[657] A.V. Bogdandy, "In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification" (2012), *European Journal of International Law*, Vol. 23, No. 1.
[658] *Ibid*.
[659] *Ibid*.

argued that there are some justifications behind the ICJ's selection process (enabling each state in a dispute to choose one of its nationals on the Court). For instance, one of the original justifications for such an approach is the procedure would ensure the inclusion of someone on the bench who understands the domestic legal systems and practices of each state before the Court.[660] Although it is generally accepted that the ICJ judges favour their home states and they vote for their home state,[661] it would not indicate that this institution as a whole is a biased mechanism. As the votes of party judges[662] may cancel each other out, thus, the non-party judges can be unbiased and lead the ICJ to render impartial decisions.

A notable question is whether there is an actual possibility for the non-party judge to vote impartially. To measure the bias of non-party judges, we can check the existence of a link between their states and the state parties. One general claim is that non-party judges are more likely to vote in favour of states that belong to a geopolitical bloc shared by theirs. The evidence supports the bloc voting. For instance, if the judge and one party both belong to the OECD or have similar language or religion, it is highly likely that the judge votes for the matching state rather than the nonmatching state. The data confirms that the possibility of a judge voting in favour of the applicant would increase by 26 per cent when the language of the judge's home state is the same as that of the applicant.[663]

In addition, the non-party judge is likely to vote in favour of the party which belongs to the group of wealthy states when the judge's country is similar and vice versa. Likewise, it has been approved that there is a 24 per cent higher possibility for the judges to vote in favour of

[660] E. P. Deutsch, "The International Court of Justice" (1972), *Cornell International Law Journal*, Vol. 5, 35, 37–38.
[661] *Ibid*.
[662] By 'party judges' we mean (1) judges who are nationals of one of the state parties and (2) ad hoc judges appointed by one of the state parties because it does not have a national already on the court. See, International Court of Justice, "Cases", available at: < https://www.icj-cij.org/en/contentious-cases > accessed 23 May 2023.
[663] *Ibid*.

the democratic state if the judge's country is similar. [664] Even though the evidence demonstrates that judges in the ICJ do not or could not vote impartially, there is no supporting evidence to show that judges are consciously biased. It is believed that the motivation for their votes may be psychological or cultural. Posner and De Figueiredo, who concluded a systematic study of bias among judges on the International Court of Justice, have admitted it. They stated that "We have not shown that judges consciously or unconsciously vote in a manner that promotes the strategic interests of their home states; it is possible that the judges vote in a manner that reflects their own psychological or philosophical biases."[665] It is impossible to determine what motivates the judges, yet this does not change the fact that whatever motivates the judge is not the law.

Furthermore, A 2004 study concluded that the level of compliance with ICJ judgments is around 60 per cent.[666] It indicates that states are aware that the ICJ judges are sometimes, but not always, biased, and they still utilise the ICJ and comply with its judgments. Perhaps, sovereign states might regard it as more reasonable for a judge to vote in favour of their home state, or a given bloc. They might take the judgement more seriously if judges vote against their home states or given bloc and may be more inclined to comply with such a judgement. On the other hand, the founders of the ICJ have been aware of the issue of judicial bias, and some have considered that the remedy is to prevent judges from hearing cases in which their home states are parties. Nonetheless, such a suggestion could not address the problem since non-party judges could be influenced by legally irrelevant and relevant factors.[667]

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[664] *Ibid*.
[665] E. A. Posner and M. De Figueiredo, "Is the International Court of Justice Biased?" (2005), *Journal of Legal Studies*, Vol. 34, 599-630.
[666] *Ibid*.
[667] *Ibid*.

At the other end of spectrum, the selection of permanent judges could create a basis for politicising the system. The expectation is that the proposed MIC system should have similar positive effects as ISDS on depoliticising disputes. The proposed system could negatively affect foreign investors and small and medium-sized economies since they might be subject to permanent, politically biased judges who have been pre-appointed by sovereign states and would settle the cases in their favour. The selected judges understand that the state that appointed them has the power to re-appoint or veto them in the future. Thus, there is a high risk of the process becoming politicised, and it is reasonable for the international investment law community to fear a similar outcome with the MIC.[668]

The EU attempts to address the issue of judicial bias by reforming the terms of office for the MIC judicial staff. It has proposed that adjudicators should be appointed for long, non-renewable, and staggered terms.[669] Also, they reduce judges' concerns about securing a job after their short tenure.[670] In addition, long and staggered terms contribute to creating continuous collegiality and institutional memory, which are essential for developing more consistent case law.[671] Also, the EU selected a rotation basis for nominating the adjudicators. It could prevent the disputing parties from realising, in advance, who would hear their case in the future. Furthermore, the EU confirmed that a provision should be included within the statute establishing the proposed MIC to ensure that 'geographical, gender and language diversity are all guaranteed.[672] It states that only a single-standing institution is of the capability

[668] K. F. Gómez, "Diversity and the Principle of Independence and Impartiality in the Future Multilateral Investment Court" (2018), *The Law and Practice of International Courts and Tribunals*, Vol. 1.
[669] G. Kaufmann-Kohler and M. Potesta, "The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards" (2017), Geneva Centre for International Dispute Settlement (CIDS) Supplemental Report, available at: < https://www.cids.ch/images/Documents/CIDS_Supplemental_Report_ISDS_2016.pdf > accessed 23 May 2023. 292.
[670] *Ibid*.
[671] *Ibid*.
[672] General Assembly of the United Nations, "Possible reform" (n 631) Para. 16.

to create a gender balance. It is because due to the existence of the party autonomy within ISDS, disputing parties appoint arbitrators with known predictable profiles.[673]

It has been counter-argued that the MIC's proposed appointment procedure would violate the principle of party autonomy which is vital for creating a balance in terms of governmental versus investor perceptions of the dispute.[674] The opponents claimed that the proposed pre-selected adjudicator system could create hardship for the host state as a respondent, as they could no longer choose a dispute resolver whom they believe has specialised knowledge and could effectively resolve their dispute.[675] It is questionable how willing the states are to submit to a panel of judges with no connection to or specialised knowledge of their sensitivities. Such judges might not reasonably understand the respondent's legal system. On the other hand, another group of scholars supported the EU by claiming that there are no acceptable justifications for retaining party autonomy in selecting dispute resolvers.[676] The parties cannot nominate judges in public law litigations, such as domestic or international courts.[677]

It is worth noting that the main reason behind various arguments for and against the principle of party autonomy is that IIL is known as a hybrid system at the crossroads of public and private law.[678] Thus, it is crucial to clarify which law, public or private, should govern investment disputes' investment disputes. Following the clarification of this issue, it can select

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[673] *Ibid*.
[674] R. Howse, "Designing a Multilateral Investment Court: Issues and Options" (2017), *Yearbook of European Law*, Vol. 36, No. 1; European Commission, "The Multilateral Investment Court Project" (2016); R. Howse, "Courting the Critics of Investor-State Dispute Settlement: the EU Proposal for a Judicial System for Investment Disputes" (2015), available at: < https://cdn-media.web-view.net/i/fjj3t288ah/Courting_the_Criticsdraft1.pdf, > accessed 23 May 2023.
[675] J. P. Benedetti, "The Proposed Investment Court System: Does It Really Solve the Problems" (2019), *Derecho del Estado Review*, Vol. 42, No.4.
[676] Howse, "Courting the Critics of Investor-State Dispute Settlement" (n 674).
[677] *Ibid*.
[678] S. Manciaux, "The Future of Investment Law in Latin America" (2022), *Transnational Dispute Management*, Vol. 4, No. 1; S. Manciaux, *Investissements étrangers et arbitrage entre Etats et ressortissants d'autres Etats* (LexisNexis, 2004) 103-108.

the most appropriate forum for resolving foreign investment disputes. It appears that the EU has attempted to place investment dispute settlement directly within the context of public international law. Arguably, the EU improperly favours the interest of the host states instead of finding the necessary point for rebalancing the interest of both parties. One suggestion which could be put forward for the EU to consider in its future negotiations is to create a more flexible appointment system to allow the party autonomy to some degree. For instance, a pre-approved list of adjudicators can be prepared by a committee, like the joint committee in CETA. It would enable the disputing parties to appoint their preferred adjudicator(s), just like a similar procedure exists under the WTO panel proceeding.[679] Indeed, the WTO Dispute Settlement System could serve as a model for establishing a two-tier court system. The reason is the WTO does not constitute a proper two-tier system, though it contains a mixture of the two alternatives. There is no such predetermined composition for the selection of the first instance panel, and the adjudicator is appointed ad hoc even though the institutional and procedural design of the first instance panel and AB have been defined as a whole in the DSU.[680] Hence, it is suggested that the EU adopts a similar system which would entail the members of the first instance tribunal to be appointed ad hoc though administered by the MIC, and the Appellate body consists of permanent full-time judges.[681] However, the current practice of WTO and the relevant reports indicate that the WTO appointment process is defective.[682] The United States recently criticised the Appellate Bodies' report in *US Stainless Steel Mexico*[683], in which the Appellate Body stated, "ensuring security and predictability in dispute settlement system, as

[679] World Trade Organization, The Panel Process, available at: < https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm > accessed 23 May 2023.
[680] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, available at: < https://www.wto.org/English/tratop_e/dispu_e/dsu_e.htm > accessed 23 May 2023.
[681] Bungenberg and Reinisch (n 55).
[682] T. Miles, "U.S. Bocks WTO Judge Reappointment as Dispute Settlement Crisis Looms' Reuters" (2018), available at: < https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisislooms-idUSKCN1LC19O > accessed 23 May 2023.
[683] *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico,* (2013), available at: < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds344_e.htm > accessed 23 May 2023.

contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."[684]

One of the main questions to respond is whether it is possible to appoint judges to a MIC in a non-political manner. It is because if the defect of the current system of ISDS is that a private arbitrator has a natural bias towards investors, then the counter could also exist in the MIC system: government-appointed judges could have a natural towards the state. One possible way of addressing such an assumption is to study the adjudicators' appointment system in other established international courts. Brower states that by considering the politicized appointment practices of many existing international courts, including the ICJ, it is highly unlikely to appoint judges to an investment court in an unpolitical manner.[685] It is hard to believe that there is an actual possibility for the selection of genuinely independent judges when they would ultimately be indebted to the states which have selected them to provide support in any way possible. On the other hand, the appointment process in the ECtHR or the Inter-American Court of Human Rights has not led to excessive deference to state conduct, and there is no reason to believe this could not be the case in the proposed MIC.[686]

It must be highlighted that the issue of politicization is of greater importance in the foreign investment regime due to the involvement of considerable sums of money and sensitive matters. Thus, it seems reasonable to study the reasons behind the politicized system, which allegedly exists in several international institutions. The outcome of such a study could assist the EU in choosing the most appropriate mechanism for appointing adjudicators. It can guide the EU to avoid defective aspects of other courts. As discussed above, the ICJ judges would be elected for a renewable nine-year, while the term for selecting the ECtHR Judges is nine-year,

[684] See United States, "Statement by the Unites States at the Meeting of the WTO Dispute Settlement Body" (2018), Para.116, available at: < https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_.public.pdf > accessed 23 May 2023.
[685] Brower and Ahmad (n 75).
[686] *Ibid*.

non-renewable nine-year.[687] The EU supported the ECtHR procedure. Thus, reviewing this institution in this regard can create an appropriate testing ground for the EU to assess the chance of success of its proposed MIC.[688] The evidence[689] demonstrates that the ECtHR is an unlikely context for geopolitics to matter compared to other international courts that directly settle interstate disputes, such as the ICJ and the WTO.[690] The absence of systematic geopolitical bias in the ECtHR is an inspiring sign, and it can serve as an appropriate model for the proposed MIC. The EU and member states can conduct a detailed study into the overall performance of this Court and follow its procedure for the selection of dispute resolvers.

Regarding the transparency of the procedure, the EU suggested adding a screening or selection phase for selecting the adjudicators.[691] It claimed that in this phase, the selection panel would review both candidacies proposed by the states and spontaneous individual applications to ascertain whether they fulfil the applicable requirements. The members of the selection panel should be independent. They could be ex officio appointments (for example, former judges of the standing mechanism), current or former members of international or national supreme courts and lawyers or academics of high standing and recognised competence. The EU suggested that a prominent court president, such as the ICJ, could check and confirm whether the panel's members have met the requirements.[692] It appears that the main reason for the

[687] European Court of Human Rights, "The Reform of the European Court of Human Rights" (2010), Protocol No.14, Factsheet.
[688] N. Arold, "The European Court of Human Rights as an Example of Convergence" (2007), *Nordic Journal of International Law*, Vol. 76, No. 1.
[689] H. C. Yourow, "The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence" (1995), *International Studies in Human Rights*, Vol. 28, No. 1; A. Mowbray, "The Creativity of the European Court of Human Rights" (2005), *Human Rights Law Review*, Vol. 5, No. 1; E. Voeten, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights" (2007), *Cambridge University Press*, Vol. 61, No. 4.
[690] It is notable that the Austrian judge Matscher spent 17 years in the Austrian diplomatic service before joining the Court in 1977 and has openly accused the court of engaging in "legal policy-making". By contrast, the Maltese judge Giovanni Bonello defended 170 human rights lawsuits as a private practitioner before ascending to the Court. See, E. Voeten, "The Impartiality of International Judges: Evidence from the European Court of Human Rights" (2008), *The American Political Science Review*, Vol. 102, No. 4.
[691] *Ibid*, Voeten.
[692] *Ibid*.

suggestion of establishing an independent screening mechanism is to ensure that the most qualified and objective candidates are to be appointed who did meet all the necessary standards of judicial independence. It could subsequently avoid any risk of politicisation of states' nominations.[693] It appears that the EU has been inspired by the screening mechanism which exists in the ECtHR. The Directorate General of Human Rights of the Council of Europe (DGHRCU) requests the contracting states to prepare a list of three candidates and submit it within a prescribed time frame,[694] Subsequently, the DGHRCU reviews the curricula vitae to check candidates' compliance with formal requirements and would forward the list to the Committee of Ministers to assess the applications. The final list would be forwarded to the sub-committee, which has the responsibility of interviewing the candidates and providing a report for the Parliamentary Assembly to vote on the names submitted by each state.[695] The highlight of this process is it has created various stages which assess the degree of suitability of the nominated candidates. Therefore, by creation of a similar selection process, the EU could enhance the transparency of the selection process.

All in all, this section concludes that the EU attempted to directly address the lack of legitimacy associated with ISDS by replacing private arbitrators with tenured judges who hold public office. Although it aimed at transferring the power from the hands of disputing parties to the hands of sovereign states, it has not been able to prove that the replaced judges would be more impartial and independent from the parties-appointed arbitrators. In addition, such a transfer of power could open the door for the appearance of the problem of re-politicisation in the foreign investment regime. However, the author believes that selecting a long and non-renewable term is the most effective step taken by the EU in this regard. It is because the initial

[693] *Ibid*.
[694] *Ibid*, each state must provide the list in accordance with the criteria set out in the Convention and the recommendations of the Parliamentary Assembly.
[695] Council of Europe, "European Court of Human Rights" available at: < https://www.coe.int/t/democracy/migration/bodies/echr_en.asp > accessed 23 May 2023.

step to reduce the risk of re-politicisation of the system is to prevent the possibility of re-appointment of the judges in the future.

Apart from the issue of re-politicisation, another defective aspect of the appointment procedure is setting similar qualifications for judges sitting in both instances. Also, the lack of providing a mechanism for the fair participation of all states could negatively affect the efficiency and legitimacy of a system. The investment community would not be willing to see the creation of another rich men club similar to the WTO system in which there is an exclusive opportunity for the participation of developed countries in practice. Moreover, the EU could further enhance transparency by making available for the public the full resumes of the selected adjudicators and the ultimate scores they could achieve from all the assessments and interviews. It can subsequently increase the trust between the disputing parties as they could better understand who would hear and settle their future disputes.

5.3.2 Establishment of an Appeal Mechanism

According to the proposed MIC, the appeal mechanism can modify or reverse the first-instance tribunal's decision.[696] The findings and conclusions of the body will be binding on the first-instance tribunal,[697] and it is obliged to revise its decision to reflect what is provided by the appellate body.[698]

The EU claimed that a MIC with a two-tier system could provide consistent interpretations of the overall investment systems' protection standards in the long term. It subsequently leads

[696] EU TTIP Proposal 2015, Article. 29(2) of section 3; EU-Vietnam FTA 2016, Article. 28(3).
[697] Both the EU TTIP proposal and the EU-Vietnam FTA only cite that the First Instance Tribunal will be bound by the findings of the Appeal Tribunal but remains silent as to the conclusions. In the context of the provision, this is presumed to be inadvertent, see EU TTIP proposal and the EU-Vietnam FTA.
[698] EU TTIP Proposal, Article. 28(7) of section 3, EU-Vietnam FTA, Article. 29(4).

to enhancing consistency, legal certainty, and predictability.[699] Nevertheless, establishing an appellate body within a MIC has also been a target of criticism. An appellate could negatively affect small and medium-sized enterprises. The powerful transnational corporations, which seem to be the most frequent target for attack within the current system, will be harmed the least.[700] Furthermore, there is a greater risk of re-politicisation with the presence of an appellate structure. The losing host state would likely appeal every case due to the pressure from the public (in a case where host states lost the case).[701] Such an issue is resolvable by adopting a few measures to discourage appeals and guarantee the compliance of initial awards. One of these measures is demanding securities in the form of a deposit or bond for accessing the appeal facility. It would disincentivise the erratic appellant. Also, it could provide a guarantee of compliance with the final award.[702] Though, it is not clear how such measure could provide a guarantee of compliance. In addition, it can only be regarded as a supplementary instrument as it cannot provide a solid basis for preventing the losing party appeal every case.

Another related issue is the negative impact of an appellate facility on the time and cost of dispute resolution. Time and cost are among the main factors by which the efficiency of a dispute settlement system can be assessed. Critics allege that introducing an appellate would hinder the efficient resolution of disputes.[703]The EU stated that it carefully assesses the time and cost of dispute resolution to ensure a manageable caseload for the appellate body.[704] It proposes that the appeal proceeding would not unnecessarily delay the resolution of disputes.[705]

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[699] Schill (n 441); T. Walde, "Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?" (2005), *Transnational Dispute Management*, No. 5.
[700] *Ibid*.
[701] W. Koeth, "Can the Investment Court System (ICS) save TTIP and CETA?" (2016), *European Institute of Public Administration*, Working Paper No.16/W/01.
[702] N. Butler, "Possible Improvements to The Framework of International Investment Arbitration" (2015), *The Journal of World Investment and Trade*, Vol. 14, No. 4.
[703] Tams (n 409).
[704] United Nations General Assembly, "Possible reform" (n 631).
[705] *Ibid*.

However, it fails to clarify the possible consequences of noncompliance with the given timelines. It is worth mentioning that in a few recent investment treaties, a timeline of 180 days has been provided for the appellate tribunal to render its decision. However, the WTO offers a maximum of 60 days for an appeal proceeding. The Working Group states that an appeal should not take more than 90 days. The EU should offer a shorter timeline for the body to decide on jurisdictional matters. Also, the EU could enable the body to apply accelerated proceedings in certain instances, such as where the subject of the appeal is procedural questions and can be heard only by a single member with a limited briefing.[706] Likewise, the EU acknowledges the necessity of providing a strict timeline and a mechanism for early dismissals to ensure the efficiency of the appeal mechanism. [707]

In chapter four[708] it was discussed that the ICSID annulment proceeding and the review mechanism through national courts have created considerable delays in the proceedings. Introducing an appeal mechanism with a strict time limit could be a contributing tool to accelerate the process of dispute settlement.[709] The new EU agreements, such as CETA and the EU-Vietnam FTA have elucidated that the first-instance tribunal must issue a decision within 18 months of submission of a claim. Also, the process of hearing an appeal should not take longer than six months, though this might be subject to some exceptions.[710] At the international level, in respect of the deadlines and time of dispute settlement, the outcome of reviewing the cases in the WTO AB dispute settlement system indicates that although some disputes may have run over the strict deadlines, in most cases, the deadlines have been respected.[711] Indeed,

[706] *Ibid*.
[707] *Ibid*.
[708] Chapter IV, 121-30.
[709] Butler (n 702).
[710] EU TTIP Proposal, Articles, 28(6) and 29(3) of Section 3; CETA, Article. 8.39(7); the EU-Vietnam FTA, Articles, 27(6) and 28(5).
[711] The average time to complete panel proceedings was about 19-20 months in 2013, see, S. Lincicome and D. L. Connon, "WTO Dispute Settlement-Long Delays Sit the system" (2014), available at: < http://www.lexology.com/library/detail.aspx?g=13fe0fa8-2e4c-45ca-b619-c4609ae96797 > accessed 20 May 2023; Howse, "Courting the Critics of Investor-State Dispute Settlement" (n 674).

unlike other international courts, such as the ECtHR, which have faced considerable backlogs in their work, the WTO AB has resolved cases in a less time-consuming way.[712] Therefore, the WTO AB could serve as a model in this regard. The EU could consider using similar strict deadlines for hearing cases brought before the MIC appellate. The EU stated that the entire process of dispute settlement (first instance and appeal) should last no longer than two years which is considerably shorter than the equivalent under the current system of ISDS. The average duration of an ICSID proceeding exceeds three years.[713] It could take up to a further two years at the annulment stage, which makes the overall process take around five years. Shockingly, in some cases, the proceedings lasted more than ten years.[714]

In addition, under the current system of ISDS, once an award is annulled or set aside, the parties must make a new request for reconstitution of a new panel of arbitrators which would add extra time. Thus, introducing a shorter proceeding (2 years) is one of the significant aspects of the proposed MIC system. It could tackle the problem of timely proceedings associated with ISDS. Also, it would directly contribute to the efficiency of the dispute settlement. It might be suggested that the above issue could be addressed by the expedited procedure available under Chapter XII of the ICSID Arbitration Rules. This Chapter refers to expediting the overall proceeding through a reduction of time for the conclusion of the main steps in the process.[715] The main concern regarding this suggestion is the parties to ICSID Convention must expressly provide their consent to apply Chapter XII (Arbitration Rule 75(1))

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[712] *Ibid*.
[713] D. Gaukrodger and K. Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community" (2012), *OECD Working Papers on International Investment,* No.2012/3, OECD Investment Division, Annex 2.
[714] See the case of *Antoine Goetz and others v. Burundi,* ICSID Case No. ARB/01/2. Also, the case of *Victor Pey Casado and President Allende Foundation v. Chile,* ICSID Case No. ARB/98/2 was registered in September 1998, and a decision on annulment was issued in December 2012, a little longer than 14 years after the claim was filed. Following a request for supplementation of the decision on annulment, the case has been resubmitted and, as of October 2015, 17 years after filing of the original claim, the case was still pending.
[715] ICSID, "Expedited Arbitration - ICSID Convention Arbitration (2022 Rules)" available at: < https://icsid.worldbank.org/procedures/arbitration/convention/expedited-arbitration/2022 > accessed 30 April 2023.

in addition to their consent to ICSID Convention arbitration.[716] As a result, in the case of the absence of consent, it is not possible to expedite arbitration.

One of the main methods that could lead to establishing a time-efficient proceeding is the retainer fee and the judicial' obligation of not holding parallel functions, such as counsel and legal expert. It could guarantee the ready availability of judges and members of the Appeal Tribunal.[717] Such an obligation would allow them to concentrate on the adjudication with less interference while the arbitrators work several jobs. Moreover, selecting permanent and full-time adjudicators contributes to resolving disputes in a less timely manner. It is because the adjudicators would be allocated equal workloads, thus having sufficient time on a specific case.

Furthermore, the EU could consider the provision of discontinuance, included in the new FTAs agreements such as CETA and the EU-Vietnam FTA, to reduce the time of the proceedings. It provides that the proceeding will be discontinued if the claimant fails to take any steps during 180 days or in a timeframe agreed upon by the disputing party. It is due to the authority of the tribunal will be expired. In this case, the claimant could not submit any subsequent claims on the same issue.[718] It is generally accepted that the longer the proceedings, the higher the costs. However, some commentators counter-argued that a single MIC with a two-tier system could resolve foreign investment disputes at less cost than the well-known annulment proceedings.[719] In addition, they claimed that the legal costs could be lower where there are clear rules under interpretation, the proceedings' length is shorter, parallel disputes prevented, and frivolous claims rejected.[720]

[716] *Ibid*.
[717] Howse, "Courting the Critics of Investor-State Dispute Settlement' (n 674).
[718] The EU TTIP Proposal, Article. 20, Section 3; CETA, Article. 8.35; the EU-Vietnam FTA, Article. 23.
[719] Butler (n 702).
[720] *Ibid*.

It must be noted that a permanent court, due to its daily operation, could increase the cost of settling a dispute. The EU has not clarified whether the judges' salaries are less than the arbitrators' fees, although the EU proposes to place a cap on the salaries of the judges. It suggests that the contracting parties should bear most of the remaining costs.[721] The concern is the cost of dispute settlement and providing the necessary budget might not significantly affect the developed countries. Though, it could negatively affect developing countries as it is hard to believe they could afford such high costs. Nonetheless, it can be argued that with increasing the number of states giving consensus to the establishment of a MIC in the future, they all share such fees, and the overall costs would drop considerably, which could become affordable for the developing states. Likewise, the evidence proves that although the WTO AB has successfully created a timeframe for dispute settlement, its high cost has been the target of criticism.[722] The developing states have always struggled to afford the required cost to make a complaint through the WTO dispute settlement mechanism. Such high costs caused the developing countries to argue that they are underrepresented in the WTO dispute settlement system, and they have never had a chance to play an active role within the system.[723] Considering such a negative experience, it is highly likely that the developing states show hesitancy to give consensus for establishing a MIC unless the EU assures them that the cost of dispute settlement is affordable for all the states.

[721] Bungenberg and Reinisch (n 55) 43-48.
[722] Small firms or the governments of the developing countries have not been able to afford such a cost to make a complaint through the WTO dispute settlement mechanism, thus, simply they preferred to keep it silent. It might be assumed that in such a case, they could negotiate these problems bilaterally, though, as the other side knows the complainant is unable to afford to file a WTO dispute, they would show less incentive to concede. See, F. Altemöller, "WTO Appellate Body Without Legitimacy?: The Criticism of the Dispute Settlement System and the Response of the WTO Member States" (2021), *Global Trade and Customs Journal,* Vol. 16, No. 4, 139 – 148; C. P. Bown and S. Keynes, "Why did Trump end the WTO's Appellate Body? Tariffs" (2020), *Peterson Institute for International Economics*; T. Zimmermann, "WTO Dispute Settlement at Ten: Evolution, Experiences and Evaluation" (2005), *Aussenwirtschaft*, Vol. 60, No. 1, 27-61.
[723] *Ibid*.

Moreover, it is worth mentioning that under the current system, the average legal cost for dispute settlement in recent cases did reach over 8 million US dollars.[724] These costs likely reach $30 million in some cases.[725]The arbitral tribunals' fees and the compensation granted by the arbitral tribunals in several disputes[726] have had a ruinous influence on the public finances of particularly developing states. One suggestion for developing the cost-efficiency supported by the EU member states, such as France and the United Kingdom,[727] and has been identified by UNCTAD as a reform option[728] is the loser pays principle. The ICSID system has supported the apportionment of legal costs, which means that both parties must pay their legal fees.[729] It has created significant consequences for host states as in all ISDS cases, the host state usually plays the respondent role.[730] The result would be even though an investor brings a claim and willingly pay his legal fees, the state has no power to choose and should bear the cost (an average of over $8 million).[731] In the case of Argentina, the Argentinian state had to defend itself against fifty claims brought against it during its continuing financial crisis. Likewise, an

[724] Gaukrodger and Gordon (n 713).
[725] *Ibid*.
[726] For instance, in the recent case of *Yukos Universal Limited v. Russia,* UNCITRAL, PCA Case No. AA 227, Final Award, (18 July 2014), para. 1694, the investor claimed for a compensation in the sum of 114,174 billion US dollars, though, the investor was granted a compensation of 50 billion US dollars. See, Shearman and Sterling LLP, "Shearman and Sterling LLP Secures Historic USD 50 Billion Award for Yukos Majority Shareholders" (2014), available at: < https://www.shearman.com/~/media/Files/Yukos/01-Yukos--Shearman--Sterling-Press-release-of-28-July-2014.pdf > accessed 23 May 2023, also, see, *Hulley Enterprises Limited v. Russia,* UNCITRAL, PCA Case No. AA 226, Final Award, 18 July 2014, para. 1888; *Veteran Petroleum Limited v. Russia,* UNCITRAL, PCA Case No. AA 228, Final Award, (18 July 2014), para. 1888.
[727] Government of France, "Vers un nouveau moyen de régler les différends entre États et investisseurs", (2015), available at: < https://www.data.gouv.fr/s/resources/corpus-de-documents-relatif-aux-negocationscommerciales-internationales-en-cours-ttip-et-ceta/20151022154940/20150530_ISDS_Papier_FR_VF.pdf > accessed 23 May 2023; United Kingdom, Government Response to the House of Commons Business, "Innovation and Skills Committee's Eleventh Report of Session" (2015), Transatlantic Trade and Investment Partnership, available at:<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448208/Cm_9103_TTIP_Government_response_to_Business_Innovation_and_Skills_Committee_report_PRINT.pdf > accessed 23 May 2023.
[728] UNCTAD, "World Investment Report 2015: Reforming International Investment Governance" (2015), available at: < https://unctad.org/publication/world-investment-report-2015, > accessed 23 May 2023.
[729] *Señor Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, (section VIII); S. D Franck, "Rationalizing Costs in Investment Treaty Arbitration" (2011), *Washington University Law Review*, Vol. 88, No.4, 777.
[730] C. Titi, "The Right to Regulate in International Investment Law" (2022), *International and Comparative Law Research Centre*.
[731] Gaukrodger and Gordon (n 731).

estimation of the legal costs of the Philippines in the two cases brought against it [732] amounted to the construction cost of two new airports. According to this principle, the losing party would bear the cost of the proceedings, and only in exceptional circumstances, the tribunal can apportion the costs between the disputing parties.[733] The loser pays principle originates in commercial arbitration as allocating costs equally between the disputing parties has been accepted under public international law.[734] The EU would theoretically discourage bringing frivolous claims by operating such principle in the MIC system.[735]

It can be concluded that the EU attempted to introduce an economical and cost-efficient mechanism. Yet, there are a few issues for further consideration. First is whether it has considered any solution when faced with a lack of funds. The second is whether it provided any flexibility in the budget structure. The third is whether it has introduced any mechanism to allocate the funds based on the caseloads.

The EU maintains that there is no room for annulment remedies as keeping them would lead to a three-tier system. The existence of such a system contradicts the objectives of legitimacy and efficiency (including the time and cost efficiency) of dispute settlement.[736] The EU admits that the treaty establishing a permanent body, at least for the contracting parties to the agreement, must address the waivers of other recourse for reviewing before other international or domestic fora. Nevertheless, implementing such a waiver depends on the

[732] *Fraport AG Frankfurt Airport Services Worldwide v. The Philippines,* ICSID Case No. ARB/03/25 and *Fraport AG Frankfurt Airport Services Worldwide v. The Philippines*, ICSID Case No. ARB/11/12.
[733] The EU TTIP Proposal, Article. 28(4), Section 3; CETA, Article. 8.39(5); the EU-Vietnam FTA, Article. 27(4).
[734] L. Shore and R. Rothkopf, "For Better or Worse, Is There a Common Law of Investment Arbitration?" (2013), Contemporary Issues in International Arbitration and Mediation, *The Fordham Papers*; S. Manciaux, C. Des, "Sentences Arbitrales" (2012), CIRDI, Journal *Du Droit International*, Vol. 139, No. 1.
[735] Government Response to the House of Commons Business, Innovation and Skills Committee's Eleventh Report of Session 2015, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/448205/Cm_9103_TTIP_Government_response_to_Business_Innovation_and_Skills_Committee_report_WEB.pdf, > accessed 23 May 2023.
[736] United Nations General Assembly, "Possible Reform" (n 631).

procedure which sets up the appellate. It is because only some, but not all national laws recognise such a waiver as a valid agreement to exclude the right to seek setting aside before their courts.[737] Therefore, the EU should consider tackling such an issue.

Concerning the grounds of appeal at the MIC, the EU includes the ICSID grounds for annulment.[738] It appears that the grounds for annulment or setting aside under the UNCITRAL are not applicable in the case of a permanent adjudicatory body since the standards of review in the context of international bodies are usually very high. For instance, in the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber, the parties are requested to submit their arguments for appeal. Also, they must provide references to the factual and legal basis for appeal. Furthermore, apart from showing that the Trial Chamber committed an error, they must prove that it caused a miscarriage of justice. It demonstrates the existence of a higher threshold rather than a simple reassessment of the evidence.[739] The Working Group stated that from the earliest days of the review of decisions to the present, the criminal appellate courts provided a limited interpretation of the grounds. Also, there were limited opportunities for the courts to interfere with the original sentence.[740]

In respect of the temporary suspension of the effect of the first-tier decision, the EU must suggest safeguards in the overall framework of the body to avoid enforcement of the first-tier decision and duplication of proceedings which could increase the risk of conflicting decisions. For instance, the contracting parties could agree to prevent their domestic court from examining a request for enforcement or setting aside a first-tier tribunal decision within the appealable period. The EU has acknowledged the importance of such an issue. The process

[737] G. K. Kohler and M. Potestà, *Investor State Dispute Settlement and National Courts. Current Framework and Reform Options* (Springer, 2020), Chapter 4.
[738] Howse, "Designing a Multilateral Investment Court" (n 674).
[739] International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber, for discussion in respect of fair trial, right to international protection, see the case of *Prosecutor v Kunarac,* ICTY 96 23&23/1 (12 June 2002).
[740] United Nation, General Assembly, "Possible Reform" (n 631) para.41.

could not be legitimate, and its overall efficiency could be negatively affected if the EU could not address this issue.

In addition, at the thirty-eighth session of the Working Group, some maintain that there should be a broad remand authority for the appeal tribunal. Others argue that remand should not be available because of costs and time considerations. Another group claims that in specific circumstances or under limited grounds, such remand authority should be provided.[741] Nonetheless, the EU expresses that the appellate should be authorised to remand where it is not in a position to complete the legal analysis based on the available facts before it. In this case, firstly, the EU must clarify how the first instance must be re-established has the appellate been given a remand authority. Secondly, it must explain whether the decision of the first-tier tribunal would be final or if it could still be subject to further appeal. Lastly, the EU must clarify how it would address a situation where the appellate found procedural irregularities (i.e., lack of independence), which could make it inappropriate to remand the case to the first-tier tribunal.

Another concerning issue associated with the proposed MIC appellate body is the availability of a *de novo* system for reviewing both law and facts by such a body. The EU states that, "while the question of law should be fully reviewable, the review of errors in the appreciation of facts should be limited to manifest errors."[742] It reasons that this would strike the right balance between ensuring the right to appeal and the efficiency and manageability of an appeal mechanism. To back up such an argument, it refers to the framework of the WTO AB, Article 17.6, in which appeals are limited to issues of law.[743] Yanovich and Voon claim that one of the considerable problems associated with the WTO AB is the limitation of

[741] *Ibid*.
[742] *Ibid*.
[743] World Trade Organization, Dispute Settlement Understanding, Article. 17.6.

practising appeal on the point of law.[744] They argue that enabling the WTO AB to consider both issues of law and fact could contribute to improving the system of the WTO.[745] This limitation and the absence of remand authority have been the roots of the problem which the WTO AB attempted to tackle. It has provided a basis for this Body to rule on an issue that was never addressed by a panel or to engage in a limited review of the facts to settle disputes.[746] It has been suggested that removing the distinction between fact and law in WTO appeals could create a basis for the establishment of an efficient time frame.[747] However, such a suggestion has not received any considerable support as this could add to the Appellate Body's workload in a manner that would threaten the already tight ninety-day deadline that applies to appeals.[748]

The EU and its member states also put forward a similar argument. They state that limiting the appeal to errors of law would contribute to the appellate hearing and deciding the cases in a less timely manner, which could guarantee to develop efficiency of the procedure. On the other hand, by analysing the structure of some of the developed domestic appeal mechanisms, it can be argued that the advantages of enabling the appellate to engage in the process of fact-finding would outweigh its disadvantages. For instance, it can be claimed that

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[744] A. Yanovich and T. Voon, "Completing the Analysis in WTO Appeals: The Practice and its Limitations" (2006), *Journal of International Economic Law*, Vol. 9, No. 4, 933-950.
[745] *Ibid*.
[746] Appellate Body has not simply reviewed the findings of the panel, instead, it has attempted to make its own finding on an issue that the panel did not address. To date, the Appellate Body has expressly indicated that it has completed the analysis in 11 of its 77 appeals. For instance, in *EC – Poultry and Australia – Salmon*, it was acknowledged by the Appellate Body that the decision to complete the analysis raised issues in relation to the limits of its mandate under Article 17 of the DSU, and particularly paragraphs 6 and 13. See, WTO Appellate Body Report, *United States Standards for Reformulated and Conventional Gasoline US – Gasoline* WT/DS2/AB/R, adopted (20 May 1996); WTO Appellate Body Report, Canada, Certain Measures Concerning Periodicals, *Canada – Periodicals* WT/DS31/AB/R, adopted (30 July 1997); WTO Appellate Body Report, EC – Hormones, para 222; WTO Appellate Body Report, *European Communities Measures Affecting the Importation of Certain Poultry Products, EC – Poultry* WT/DS69/AB/R, adopted (23 July 1998), para 156; WTO Appellate Body Report, Australia – Measures Affecting Importation of Salmon, *Australia – Salmon* WT/DS18/AB/R, adopted (6 November 1998), para 118; WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, US – Shrimp* WT/DS58/AB/R, adopted (6 November 1998), para 124; WTO Appellate Body Report, Japan, Measures Affecting Agricultural Products, *Japan – Agricultural Products II* WT/DS76/AB/R, adopted (19 March 1999), para 112.
[747] *Ibid*.
[748] World Trade Organization, Dispute Settlement Understanding, Article 17.5; 'As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report…in no case shall the proceedings exceed 90 days'.

the Appeal Courts of England or the High Court can serve as models for the MIC's appellate in this respect. The High Court in the case of *Boas and others v Aventure International Ltd*,[749] had to examine the principles surrounding an appeal against a judge's facts finding. The result was that the court allowed an appeal against the lower court's ruling on the position of a disputed boundary, where the trial judge had failed to appreciate the impact of a piece of photographic evidence and to draw the correct factual inferences and conclusions from it. In so doing, the court considered the principles applicable to appeals against findings of fact.[750] Similarly, the Court of Appeal, in the case of *Fratila & Tanase v Secretary of State for Work and Pensions*[751] set aside the decision of the High Court as it had held that the relevant exclusion was only indirectly discriminatory and could be objectively justified on the facts of this case.[752]

It can be concluded that without enabling the proposed MIC's appellate to hear the appeal based on both errors of law and fact, it would not be able to enhance the consistency, legitimacy, and predictability of the foreign investment dispute settlement system. Nevertheless, to maintain the procedure as effectively as possible and due to cost and time considerations, it is reasonable to provide some limitations for examining existing evidence or new issues. One of the negative consequences of preventing the appellate body from hearing appeals based on law and fact is it would create obstacles for this body to effectively resolve the given disputes. Also, as has been the case in the WTO AB, it could enable the appellate to find alternative ways to review the facts of the case, such as completing an analysis and considering issues that were never addressed in the first instance.

[749] *Boas and others v Aventure International Ltd* [2020] EWHC 237 (Ch).
[750] *Ibid*.
[751] *Fratila & Tanase v Secretary of State for Work and Pensions Neutral Citation Number* [2020] EWCA Civ 1741.
[752] *Ibid*.

Furthermore, it is questionable whether the proposed MIC's appellate could provide a consistent interpretation of investment protection standards. It must be noted that the WTO AB's primary work is treaty interpretation, and its mandate relates to a relatively defined group of treaties that go under the umbrella of the WTO agreements. It is the main reason behind its successful performance in developing an identifiable approach for interpreting the WTO agreements. However, this cannot be the case in the proposed MIC due to the existence of different sources in IIL. In that sense, it is apparent that the rights and obligations which are in dispute are not rights and obligations derived from a specific agreement. Also, the tribunal's task is not to interpret certain rights set out in the relevant contract or agreement, but to apply abstract general principles rooted in customary international law. This situation could be worse as some of the obligations included in the most investment agreements have a broad customary international law basis.[753] Likewise, the evidence admits that the WTO AB, on several occasions, had to interpret particular provisions of various agreements. Coherence and integrity exist in the context of the consistent application of specific provisions, as well as the harmonious interpretation of the provisions of agreements which could overlap. By contrast, under BITs, each agreement must be interpreted under its terms, and the existence of similarly worded terms in other BITs does not provide any authoritative basis for their interpretation in the same way.[754] The EU must take into consideration the fact that the WTO has been able to enhance consistency since it has been interpreting the same agreement or agreements linked in a comprehensive treaty regime under the umbrella of the WTO Agreement. As a result, the MIC's appellate can't develop consistency and enhance the overall legitimacy of this procedure

[753] One of the particular issues is the controversy surrounding the interpretation of NAFTA, Article. 1105(1) and whether the minimum standard of treatment as provided for by that article was related to a freestanding obligation of fair and equitable treatment or whether it was tied to the customary international law standard. In August 2001, the NAFTA Free Trade Commission adopted an interpretation of Article. 1105(1) stating that the standard provided for was the same as the minimum standard of treatment under customary international law. See, NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter 11 Provisions" (2001), available at: < https://opil.ouplaw.com/display/10.1093/law-oxio/e553.013.1/law-oxio-e553?rskey=90ZfRw&result=1&prd=OPIL > accessed 23 May 2023.

[754] Legum (n 34) 231, 234–6.

to any great depth in the absence of a single treaty agreement like the one that exists within the realm of WTO.[755]

5.3.3 Transparency

The focus of this section is to clarify whether the EU has successfully taken any steps to enhance the transparency of dispute settlement. Despite the existence of the comments and suggestions provided by the EU for reforming the adjudicators' appointment process, enforcement issues as well as the creation of an appellate, there is no clear information and comments about the EU's plan for the enhancement of transparency rules with regards to the publication of awards, access to evidence, conduction of public hearing and third-party participation. As a result of the absence of details regarding transparency in the EU's MIC proposal, the following sub-section focuses on the transparency rules incorporated in the new generation of EU's FTAs. Analysing the relevant provisions in these new FTAs would assist the author to assess to what extent the EU's MIC could successfully address the transparency concerns associated with the current system of ISDS. Effectively, the EU's thinking on transparency in FTAs is utilised as a proxy for its potential position on transparency with a future MIC. This is a logical conclusion, given that presumably the EU will wish to take an overall coherent approach when shaping its investment policy.

- ***Transparency Rules in the New FTAs***

The relevant provision in CETA is Article 8.36 (Transparency of Proceedings).[756] Article 8.36(2) states that the documents specified in Article 3(1) of the UNCITRAL

[755] Dolzer *et al*., (n 14); Newcombe and Paradell (n 138).
[756] CETA, Article. 8.36(1).

Transparency Rules must be made public.[757] Article 8.36(3) expands the UNCITRAL Transparency Rules Article 3(2). It declares that in addition to the publication of expert reports and witness statements,[758] exhibits shall also be included in the list of documents to be made available to public upon request of any person to the tribunal. In addition, Article 8.36(4) refers to Article 2 of the UNCITRAL Transparency Rules. It provides that the documents shall be made available promptly before the constitution of the tribunal.[759] Article 8.36(5) declares that the hearings shall be open to the public. Moreover, it states that it is the tribunals' duty, in consultation with the disputing parties, to create appropriate logistical arrangements to facilitate public access to such hearings. Article 8.37 follows Article 7 of the UNCITRAL Transparency Rules on exceptions to transparency.[760] It also maintains that a part of the proceeding can be conducted in private if the tribunal is required to protect information. Yet, the most considerable provision in CETA is Article 3.38, which categorises the available documents to the non-disputing parties into two groups. Article 3.38(1)(a) contains a list of documents that the respondent shall present even without the request of the non-disputing parties, and Article 3.38(1)(b) provides a list of documents that could be available upon request.

Furthermore, Article 20 of EVFTA, like Article 3.36 of CETA, states that the UNCITRAL Transparency Rules shall apply to disputes under this treaty.[761] Although Article 20(3) of EVFTA and Article 3 of the UNCITRAL Transparency Rules provide similar rules, Article 20(3) put forward an exception by adding the publication of exhibits to the list provided in Article 3 of the UNCITRAL Transparency Rules. Also, Article 20(4), in addition to

[757] The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014, (n 339), Article. 3(1).
[758] *Ibid*, The UNCITRAL Transparency Rules, Article. 3(2); 'Subject to Article. 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.'
[759] Ibid, The UNCITRAL Transparency Rules, Article. 2: 'Information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made among documents to be made public and excludes confidential or protected information from its scope.'
[760] *Ibid*, The UNCITRAL Transparency Rules, Article. 7.
[761] EVFTA, Article. 20.

documents specified under the UNCITRAL Transparency Rules, obliges parties to the treaty to promptly transfer the documents to the non-disputing party and make them publicly available, subject to the redaction of confidential or protected information.[762] Furthermore, like CETA, EVFTA in Article 25 distinguishes the documents which can be made available for non-disputing parties automatically and on request.[763]

In addition, the most relevant provisions of the EU–Singapore Investment Protection Agreement (ESIPA)[764] are Articles 3.16 (Transparency of Proceedings) and 3.17 (The Non-Disputing Party to the Agreement). One of the main differences between this agreement and other EU's FTAs is neither Articles 3.16 and 3.17 nor Annex 8 have made any references to the UNICTRAL Transparency Rules. Indeed, ESIPA introduced its own set of rules. Article 1(1) of Annex 8 resembles the other FTAs' relevant provisions. It provides the list of the documents which can be made available to non-disputing parties. Nevertheless, there are two distinctive features. Firstly, unlike CETA, ESIPA has not made any distinction between the documents which can be available automatically and those which can be made available upon request. This Article provides that all documents shall be made available. Secondly, Article 1(1) merges the provisions on public access to documents by non-disputing parties.[765] Moreover, like other FTAs, Article 2 of Annex 8 confirms that hearings shall be conducted publicly.[766] Regarding the third-party submissions, Article 3 of ESIPA Annex 8 borrows extensively from Article 4 of the UNICTRAL Transparency Rules.[767]

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[762] EVFTA, Article. 20(4).
[763] The first group includes requests for consultation, determination of the respondent party (regarding the EU and its MS), and submission of a claim. The second group refers to the documents which can be made available on request. See, Article. 20 of the UNCITRAL Transparency Rules (provided a list of documents which can be made public on request).
[764] EU–Singapore Investment Protection Agreement (hereinafter ESIPA), (2019), available at: < https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/singapore/eu-singapore-agreement_en > accessed 23 May 2023.
[765] ESIPA, Article 1: 'The documents and information that shall be made available to a non-disputing party shall also be made available to the public, regardless of whether they have any significant interest in the dispute or not.'
[766] ESIPA, Article. 2 of Annex 8.
[767] ESIPA, Article. 3.

Another distinctive aspect of ESIPA compared to the other FTAs is evident in Article 3(5) of Annex 8, which clarifies that, "the Tribunal shall ensure that such submissions do not disrupt or unduly burden the proceedings, or unfairly prejudice any disputing party."[768] Although this resembles Article 4(5) of the UNICTRAL Transparency Rules, it is the only new instrument that directly incorporates this provision into the treaty text. In addition, Article 4 of Annex 8 provides several additional procedures in relation to the submission of information and notification of confidential or protected information; (ii) objection to the reduction of information from submitted documents; and (iii) objection to the publication of allegedly protected information.[769]

The above discussions demonstrate that the new FTAs have explicitly or impliedly adopted the UNCITRAL Transparency Rules regarding third-party participation and non-disputing parties' participation in public hearings. The FTAs, compared to BITs, grant leeway for enhancing transparency through adopting, modifying, and extending the UNCITRAL Transparency Rules. It should be regarded as a significant improvement as many BITs have not even contained any rules on transparency. In other words, the new FTAs have successfully addressed the current silence of the ISDS in this regard.

Although the FTAs, like the UNCITRAL Transparency Rules, emphasize the necessity of protecting confidential information, they attempted to draw a balance between providing ample access to information and retaining private information, which could hamper dispute settlement proceedings. Notably, neither the UNCITRAL Transparency Rules nor the new FTAs determined the type of information that might have such an impeding effect. Yet, at least in principle, their attempts to draw such a balance should be regarded as valuable.

[768] ESIPA, Article. 3(5) of Annex 8.
[769] ESIPA, Article. 4(2)– (11).

The recent transparency improvement could lead the EU to achieve its objectives concerning the legitimacy of dispute settlement procedure with the MIC, particularly, with consistent application of treaty provisions since there is a close relationship between these two concepts. It is worth noting that accessing documents could affect the overall consistent interpretation and application of the given rules. Thus, it can be claimed that the new FTAs that have offered the modified version of the rules included in the UNCITRAL Transparency Rules have created a stepping stone for establishing a uniform set of standards governing transparency in the foreign investment regime.

Moreover, considering the direct impact of an investment dispute on citizens, including taxpayers, it is of great importance for the public to be aware of whether any of the EU member states are respondents to any investment dispute. Although the new FTAs contain a provision addressing the issue, the provided guidance is limited.[770] In the upcoming negotiations, the EU should clarify the type of documents and information as confidential. Also, the EU should tackle the issue of self-judging, which was created in Article 7(5) of the UNCITRAL Transparency Rules. This Article discusses that, "states are not obliged to make available information the disclosure of which considers being contrary to its essential security interests."[771] Although there is no doubt that confidential information must be preserved, this Article enabled host states to refuse disclosure of information, which is necessary for resolving a dispute under the guise of security interests. It could be beneficial to empower tribunals to use their adjudicatory discretion (without prejudice and with good faith scrutiny) to determine whether a particular piece of information should be disclosed to the public.

[770] CETA, Article. 8.21(3) notes that 'the European Union shall, after having made a determination, inform the investor as to whether the European Union or a Member State of the European Union shall be the respondent.' The subsequent paragraph (4) further notes that 'in the event that the investor has not been informed of the determination within 50 days of delivering its notice requesting such determination: (a) if the measures identified in the notice are exclusively measures of a Member State of the European Union, the Member State shall be the respondent. (b) if the measures identified in the notice include measures of the European Union, the European Union shall be the respondent while this (partial) clarification is helpful, further clarity might be needed with regard to disputes relating to multiple measures by both actors.'

[771] UNCITRAL Transparency Rules, Article. 7(5).

- ***Transparency Rules in Other International Institutions***

Chapter three,[772] clarified that one of the main defective aspects of ISDS is a lack of transparency, particularly, non-publication of awards and conduction of the hearings behind closed doors. It discussed that, unlike international commercial arbitration, in ISDS, the principle of confidentiality could not be fully justified due to the existence of public interest. Therefore, it seems that the conduction of public hearings and the publication of awards should be permissible in this system. Nevertheless, no unconditional permission could be provided as the direct result of the lack of maintaining confidentiality is the creation of several negative consequences for the dispute settlement procedure. However, the central question is to what extent the public should be able to obtain information about the process of investment dispute settlement.

There are three distinguishable categories or phases of openness;[773] input openness which relates to the written stage of the procedure; throughput openness which refers to the oral phase and the Courts' deliberations;[774] and output openness which relates to the delivery of judgment and subsequent diffusion.[775] It is beneficial to examine the framework of domestic and international institutions about each of these phases to respond to the above question.

The WTO DSU has not provided any possibility for access to the public to the documents.[776] Similarly, the CJEU precluded the public and third parties from accessing the

[772] Chapter III, 96-103.
[773] The Instructions to the CJ Registrar, Article. 2, the Instructions to the GC Registrar, Article. 5(1); the Instructions to the CST Registrar Article. 6(1); the Instructions to the Registrar of the General Court (Articles. 5 and 6) detail more than those of the CJEU the way in which Court files can be accessed.
[774] According to CJEU Statute, Article. 20(1), the procedure consists of a written part and an oral part. See also the CJ Rules of Procedure, Article. 53; Title 2 of the CST Rules of Procedure and of the GC Rules of Procedure, Chapters. 1 and 2; the CJ Rules of Procedure Article. 21 (4) and the GC Rules of Procedure, Article. 24 (6).
[775] C. Brandsma and A. Meijer, "How Transparent Are EU Comitology Committees?" (2008), *European Law Journal*, Vol. 14, No. 6.
[776] World trade Organization, Dispute Settlement Understanding, Article 17.

case file and procedural documents.[777] On the other hand, the ECtHR permitted public access to files in pending and closed cases.[778] Several domestic courts, such as the US Federal Court followed the latter approach.[779] In addition, the right of access to the document in pending cases has been recognised by Sweden and Finland.[780] It leads us to argue that providing access to submissions would not automatically create a basis for threatening the serenity of judicial proceedings.[781] However, the decision about the disclosure of the documents should be left to the courts. Advocate General Maduro rightfully maintains that, "the Court should be the master of its case since it is the only one in a position to determine whether releasing documents could negatively affect the proceedings."[782]

Furthermore, the CJEU has enabled the public to access judgments, orders, and opinions. The judgments would be published in their original version in the European Court Reports. However, there are some cases which exempted from publication.[783] The CJEU recently decided to abandon the paper version of the Court orders and replace them with the digital version, access to which is easy and free of charge. The proposed MIC could also follow CJEU's practice, not only regarding the publication of the final decisions but for replacing the

[777] In accordance with combined reading of TFEU, Article 15(3), the Statute and the Instructions to the Registrar, Article 20. In a case where third parties wish to access to a case file must justify a legitimate interest in inspecting the file. Another way is that they can request the parties to disclose their submission as in case of absence of legislative indication, in principle, they are free to do so, See, Instructions to the Registrar of GC, Article. 5(8) and the CST Rules of Procedure, Article. 20; Instructions to the Registrar of GC, Article. 5(8), the CST Rules of Procedure, Article. 20.
[778] ECHR, Article 40(2). Also, see *Thrsasga Szabadsigjogok and tv. Hungary, judgment of* (14 April 2009), Appeal. No. 37374/05, where the ECtHR held that failure to grant access to submissions in a case before the Hungarian Constitutional Court amounted to a violation of Article. 10.
[779] J. Anderson, "Transparent virtue: Secrecy in the Courts: At the Tipping Point?" (2008), *Villanova Law Review*, Vol. 53, 811.
[780] The opinion of A.G. Maduro in *API, Judgment in Joined Cases C-514/07, 528/07 & 532/07, API, [2010] ECR 1-8533*, para 156.
[781] *Ibid*, Anderson (n 779).
[782] *Ibid*.
[783] As per the disclaimers present on the Curia webpage: 'the texts of the judgments, orders, opinions and notices present on the site are subject to amendment; only the versions published in the ECR or the O.J. are authentic', available at: <https://curia.europa.eu/jcms/jcms/j_6/en/ > accessed 23 May 2023. The CJEU Rules of Procedure, new Article. 22(3) has extended the right of obtaining certified copies of judgments and orders for the third parties.

paper version of awards with the electronic version.[784] Easy, quick, and free-of-charge access to the awards could create a basis for the enhancement of transparency of the proceeding. It could also increase the efficiency of the MIC as it provides greater trust.

The author suggests that it is beneficial for the EU to consider the development plans created by other international courts regarding the permissibility of public hearings. For instance, the EU is not only being encouraged to follow the ECtHR in respect of permitting the conduction of hearings publicly, but it can also learn from the successful experience of the ECtHR regarding the conduction of broadcasting of the hearings through the creation of the online webcasts since 2007.[785] Since traditionally public was required to travel to Strasbourg to attend the ECtHR oral hearings[786] Undoubtedly, providing such easy access for the public could ultimately enhance the transparency of the procedure. Likewise, this could remove the pressure regarding the sudden increase in the number of visitors. Nevertheless, filming the courts is not generally acceptable practice at the national level as such a practice interferes with the act of justice, and it may be difficult for an average citizen to understand them.[787] However, considering the deep roots of social media and a 24-hour news cycle in the current era, the rejection of broadcasting the court trials is no longer justifiable.[788] It is evident in the case of the English judicial system. The changes made by social media created a motivation for England to make the relevant changes in this respect. For instance, the proceedings of the

[784] *Ibid*.
[785] Under Irish Aid financing as confirmed by the logo attached to each webcast on the site, available at: < https://www.irishaid.ie/what-we-do/who-we-work-with/civil-society/civil-society-programme-funding/ > accessed 23 May 2023; J. Hedigan, "The European Court of Human Rights: Yesterday, Today and Tomorrow" (2011), *German Law Journal*, Vol. 12.
[786] Under very limited and exceptional circumstances, the current rules provide the possibility to access the minutes of the hearing which constitute the official records or to listen to the soundtrack thereto, available at: Rules of Procedure of the CJ, Article. 33, Article. 84; Rules of Procedure of the GC, Article. 63; Rules of Procedure of the CST, Article. 53; Rules of Procedure of CJEU, Article. 85; L. Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge, 2011) 87-106; A. Alemanno and O. Stefan, "Openness at the Court of Justice of the European Union: Toppling a Taboo" (2014), *Common Market Law Review*, Vol. 51.
[787] According to Justice Sonia Sotomayor of the US Supreme Court, interview by Charlie Rose, (2013), available at: < www.charlierose.com/view/interview/12765 > accessed 23 May 2023.
[788] C-SPAN, "Cameras in the Supreme Court", (2011), available at: < www.c-span.org/Events/Bill-Would-Allow-Cameras-in-the-Supreme-Court > accessed 23 May 2023.

English Supreme Court are currently broadcast live on the internet page of Sky News.[789] Likewise, since 2013, filming the Appeal Courts of England and Wales has been permitted.[790] Also, since July 2020, crown court cases in England and Wales could be broadcast.[791] In addition, the Brazilian Supreme Federal Tribunal manages a YouTube page where the recordings of hearings are available at all times.[792] Nevertheless, due to the sensitivity of foreign investment disputes, it is necessary to create a few restrictions on filming the proceedings and making them available to the public. Thus, the EU could still discuss this with member states in their future negotiations and conclude whether online broadcasting would have any potential to enhance the transparency of the proposed MIC system.

In addition, creating an opportunity for the participation of third parties would not only increase the transparency of the dispute settlement procedure but would aid the court in reaching a more reliable, fair, and accurate decision. It has been confirmed in the *shrimp-turtle* case[793] in which the Appellate Body permitted NGOs to attach their briefs to the U.S. government's submission. This case demonstrated that the participation of non-governmental actors has made this process more transparent and accessible. Chapter four clarified that investment disputes involve complex and complicated issues, and their direct or indirect effects go beyond those considered in the dispute settlement process. They usually involve a range of different stakeholders, such as civil societies. Therefore, to provide the best possible investment protection, creating a balance between foreign investment with other social, environmental, and human rights goals is crucial. The tribunals should not prioritise investor protection over

[789] Sky News, "Supreme Court", available at: < https://news.sky.com/supreme-court-live > accessed 23 May 2023.
[790] O. Bowcott, "TV Cameras to be Allowed into Court of Appeal" (2013); The Guardian; "Cameras in Court for the First Time", available at: < https://www.gov.uk/government/news/cameras-to-broadcast-from-the-crown-court-for-first-time > accessed 23 May 2023.
[791] H. Siddique, "Crown court sentencing remarks to be televised for first time" (2022), available at: < https://www.theguardian.com/law/2022/jul/27/crown-court-sentencing-remarks-to-be-televised-for-first-time > accessed 23 May 2023.
[792] YouTube Channel, "The Brazilian Supreme Federal Tribunal", available at: < https://wordstodeeds.com/2013/07/12/brazilian-supreme-court-youtube-channel/, > accessed 23 May 2023.
[793] *Shrimp-Turtle WT/DS58/R* (15 May 1998), par. 91.

these goals. The EU should take a broad approach to investment-related dispute settlement that is not limited to cases of investment protection. The EU should ensure that the rights and interests of non-parties are not adversely affected. It can be concluded that without such an approach, the proposed mechanism is neither fully transparent nor efficient.

It can be suggested that the MIC, apart from permitting third parties to participate in the relevant dispute, should also have jurisdiction over other types of claims directly or indirectly related to foreign investment. For instance, it can hear the cases brought against investors by civil society organisations.[794] Also, the EU could create a referral mechanism within the proposed MIC, like the CJEU's preliminary reference procedure,[795] to ensure that it would acknowledge and understand other rights, such as human rights. The creation of such a mechanism could contribute to tackling one of the concerns associated with of ISDS, which is focusing too narrowly on investment law and failing to adequately incorporate norms from other spheres into the foreign investment regime.

5.3.4 Enforcement of Awards

One of the crucial features of any dispute settlement system is the existence of an enforcement mechanism. It is essential to ensure its effectiveness. Under the current system of ISDS, the awards are generally enforceable through either the New York Convention[796] or the ICSID Convention.[797]

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[794] For additional discussion in relation to the rights and interests of third parties in the context of ISDS and reform options, see, for example, CCSI, IIED and IISD. (2019, July 15). IISD, "Third Party Rights in Investor-State Dispute Settlement: Options for Reform" (2019), Available at: < https://www.iisd.org/sites/default/files/uploads/uncitral-submission-third-party-participation-en.pdf > accessed 23 May 2023.
[795] The Court of Justice of the European Union, "General Information", available at: < http://curia.europa.eu/jcms/jcms/Jo2_6999/ > accessed 23 May 2023.
[796] New York Convention 1959 (n 354).
[797] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966 (n 205).

The lack of introducing an effective enforcement mechanism is one of the shortcomings of the proposed MIC system. The EU states that, "any instrument that would be developed in the reform process should indeed include its enforcement regime."[798] The applicability of existing enforcement mechanisms to awards rendered by the proposed MIC depends on how such a body would be set up in the future. It is unclear whether the instrument establishing the MIC (founding convention) would include a specific enforcement regime, and if so, how decisions of this body could be enforced in states that are not a party to the founding convention (non-participating states). It is because such states would not be bound by any enforcement regime provided in this convention.

The most concerning issue is not related to the effectiveness of an internal enforcement mechanism, but the possibility of enforcing decisions rendered by the proposed MIC in non-participating states. This section assesses whether it is possible to enforce the awards rendered by the MIC under the New York Convention or the ICSID Convention in states that are not members of the founding convention. Moreover, it analyses whether there is any possibility for the creation of conflicts between the internal enforcement mechanism in the founding convention and other enforcement regimes.

ICSID section 1 states, "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[799] The EU might claim that the MIC final awards shall qualify as an award under the ICSID Convention. Thereby, it aims to extend the application of the above provision so that MIC awards could be enforced in third states as if they were ICSID awards. However, such a provision would not

[798] *Ibid*.
[799] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966 (n 205) Chapter IV, Section 6.

have any legal force in the third states.[800] It has been clarified by Article 34 of the Vienna Convention on the Law of Treaties (VCLT) 1969,[801] which declares that creating any obligations to enforce an international award must be accompanied by the respective state's consent. In addition to this Article, the principle of *res interaios acta* admits that, "a treaty does not create either obligations or rights for a third state without its consent."[802] It must be noted that the state parties to the ICSID Convention have just agreed to the defined enforcement procedure provided in Article 54, and any modification to this procedure pressurizes the state party to enforce the outcome of a process that it never agreed to.[803] Also, the modification of the ICSID Convention to enable the ICSID mechanism for enforcement of the MIC's awards would be legally feasible. Following Article 66, this is for a member state to propose an amendment, and such a proposal would be circulated to all members, to then it needs to be ratified, accepted, or approved by all contracting states. As a result, it does not seem to be possible to enforce the MIC's awards under Article 54 of the ICSID Convention.

Moreover, under the New York Convention, enforcement has been limited to awards rendered by arbitrators and arbitral bodies.[804] The Advisory Committee of Jurists confirms that arbitration distinguishes from the judicial procedure.[805] Piero Bernardini also points out that the investment court is not a permanent arbitral body, thus, it may fall outside the scope of New York Convention's application.[806] The question is whether the proposed MIC can be

[800] Kaufmann-Kohler and Potesta (n 669).
[801] United Nations, Vienna Convention on the Law of Treaties 1969, the text is available at: < https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf > accessed 23 May 2023.
[802] R. Happ and S. Wuschka, "From the Jay Treaty Commissions towards a Multilateral Investment Court: Addressing the Enforcement Dilemma" (2017), *Indian Journal of Arbitration Law*, Vol. 6, No. 1, 113.
[803] It should in particular be recalled that Article 53(1), 1st sentence of the ICSID Convention prescribes: 'The 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'.
[804] New York Convention, (n 354) Article. 1(2).
[805] Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice, League of Nations Advisory Committee of Jurists LN Doc. C.166.M.66.1929.V (1920).
[806] P. Bernardini, "Reforming Investor -State Dispute Settlement: The Need to Balance Both Parties Interests" (2017), *Foreign Investment Law Journal*, Vol. 38.

categorised as an arbitral tribunal. There are three essential criteria for defining arbitration: (i) the existence of an arbitration agreement between the parties, (ii) the nomination of arbitrators by the parties, and (iii) its voluntary nature.[807] To answer the above question, it must be considered whether the above three criteria apply to the proposed MIC.

Regarding the selection of judges, it is apparent that the power has been taken out from the disputing parties and transferred to the respective sovereign states.[808] In respect of the voluntary nature, it must be noted that even though the MIC is defined as a permanent dispute settlement institution with members appointed by the sovereign states, it can still be qualified as an arbitral tribunal as long as the investor is free to accept the states' standing offer to arbitrate investment disputes.[809] The above assertation can be challenged through distinguishing between the importance of consent to commercial arbitration and ISDS. Nevertheless, the application of the New York Convention is questionable if an appellate mechanism is created as a part of a regime that could not necessarily be qualified as arbitration.[810] The EU could include a provision which clarifies that the New York Convention applies to decisions rendered by the MIC.[811] Yet, the concern is the effect of such a provision on non-participating states could be very limited. Also, one of the possible consequences of enforcing the MIC decisions under the New York Convention is that there is a possibility for national courts to reach opposing conclusions at risk of jeopardising the enforceability of the decisions.[812]

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[807] *Ibid*.
[808] For the 'Judges' and 'Members of the Tribunal', TTIP-Proposal, Section 3, CETA, Article. 9(2), Article. 8.27; Draft EU-Vietnam FTA, Section 3, Article. 12(2). For the Members of the Appeal Tribunal or Appellate Tribunal; 'TTIP-Proposal, Section 3, Article. 10(3), CETA, Article. 8.28(3), and Draft EU-Vietnam FTA, Section 3, Article. 13(3); CETA, Article. 26.1.
[809] Happ and Wuschka (n 802).
[810] *Ibid*.
[811] United Nations Commission on International Trade Law Working Group II, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Resumed 38th Session (2020).
[812] A. Reinisch, "Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration" (2016), *Journal of International Economic Law*, Vol. 19, No. 4.

Furthermore, there are other related issues that the EU is required to address in the future. The first is whether there is a mechanism to ensure investor compliance as enforcement must also be effective against the investor. Likewise, the EU must assess the possibility of non-participating states opting into the internal enforcement mechanism included within the founding convention.

5.4 Conclusion

This chapter has analysed whether the EU-proposed MIC system could establish an effective mechanism for the settlement of international investment disputes. This analysis was undertaken within the broader context of the backlash against ISDS. The present chapter analysed this proposal by concentrating on four key angles; selection and appointment of the adjudicator; establishment of an appellate; transparency; and enforcement of awards. The main reason for focusing on these angles is they are the most concerning aspects of the ISDS system.

The EU's MIC proposal, in order to address the legitimacy crisis associated with the ISDS system and improve the adjudicator's appointment system, initially requests the candidates to prove that they have the knowledge and expertise in the field of trade and investment, as well as public international law. It is for guaranteeing that the court can deal with the public law matters, such as examining fundamental rights violations. However, this chapter suggests that the EU could achieve greater efficiency by distinguishing between the required qualifications for the first and second instances of the MIC, as this could prevent the parties from incurring substantial delays and costs for the settlement of their dispute. Nevertheless, the significant aspect of the MIC proposed adjudicator appointment procedure is selecting permanent, full-time, and non-renewable judicial. It is because utilising such terms could minimise the desire for re-election by the appointing entities. This chapter reasoned that

the ECtHR was praised for achieving a valuable reputation for selecting independent and impartial judges by setting similar terms. Another considerable aspect is that the EU attempts to enhance the transparency of the appointment procedure by introducing a screening phase for the selection of judges. It was discussed that evidence confirms that the screening phase, which exists under the ECtHR, has successfully contributed to the transparency of the appointment procedure of this institution.

Furthermore, regarding establishing an appellate within the proposed MIC, one of the significant steps taken by the EU is to remove the annulment or set aside remedies. Such a step would contribute to developing the overall efficiency and legitimacy of the system as this would prevent the creation of parallel proceedings and the conclusion of inconsistent decisions. It is particularly important as chapter three clearly illustrated that one of the fundamental deficiencies of ISDS is inconsistent decisions due to the exitance of parallel proceedings. Nevertheless, the EU proposed appeal mechanism, like the ICSID Article 52 annulment procedure, would be concerned with the legitimacy of the process (i.e., errors of law) rather than with the substantive correctness of the decision (i.e., errors of fact). The present chapter argued that the proposed appellate would not be able to improve the legitimacy and efficiency of the dispute settlement had it not been empowered to deal with both substantive and procedural matters. Such an argument is based on reviewing the Article 52 annulment procedure and the WTO AB and all the obstacles and limitations created due to the exclusivity of hearing appeals/reviews based on the error of law. The unavailability of hearing appeals based on the error of fact could lead the appellate to render ineffective decisions, which could negatively affect the overall legitimacy of the proposed MIC. Moreover, the EU has not clarified its plan to address the problem of inconsistent interpretations of BITs by the arbitral tribunal. The EU could not address such an issue, and it cannot bring coherence into the body of law by establishing an appellate due to the current fragmented system of IIL. The EU

proposed appellate could not be in the same position as the WTO AB since it is not required to interpret similar agreements but to interpret more than 3000 bilateral and regional agreements along with the principles of customary international law.

Moreover, this chapter discussed that the EU's MIC proposal has not introduced any specific plan to enhance the transparency of the dispute settlement system. Reviewing the new EU FTAs demonstrates that they have explicitly or impliedly adopted the modified version of UNCITRAL Transparency Rules with an aim of drawing a balance between transparency (i.e., providing access to the documents, hearings etc.) and confidentiality (i.e., retaining private information). Although the new FTAs attempted to gain such an aim, their provided guidance is limited. The EU must clarify the type of documents and information as confidential in its future negotiations. Moreover, it was reasoned that the successful performance of international institutions such as CJEU in conducting public hearings and publication of awards could motivate the EU to consider establishing a similar framework within its proposed MIC system. Similarly, the EU could benefit from following the newly implemented framework of the national judicial systems, such as the English Supreme Court about enabling the live broadcasting of proceedings, which has been regarded as a substantial move towards enhancing the transparency of a dispute settlement system in the current era.

In addition, this chapter discussed that the EU has not clarified whether the instrument establishing the MIC (founding convention) would include an internal enforcement regime. Yet, a more concerning issue is the possibility of enforcing decisions rendered by the proposed MIC in non-participating states. It is because enforcement of the MIC's awards under the ICSID Convention would be legally feasible as it requires modification of the Convention. Similarly, only awards rendered by arbitral bodies are enforceable under the New York Convention. Even by assuming that decisions of the MIC could be classified as arbitral awards, the applicability of this Convention in non-participating states is questionable.

Based on the discussions provided in this chapter, the author concludes that the proposed MIC system is not the most appropriate alternative for ISDS. The main justification for such a conclusion is establishing an effective MIC system is heavily dependent on the reform of the framework of the IIL. Therefore, the initial step for establishing an effective MIC system is to conclude an MIA, which can replace all the existing BITs. Indeed, a necessary basis for improvement of the legitimacy, efficiency and transparency within the dispute settlement system could only be provided by the conclusion of such a treaty. Nevertheless, establishing a MIC should not be labelled as an invalid suggestion. Such a mechanism, like other proposed dispute settlement methods discussed in the previous chapter, can still be utilised for settling investment disputes.

This chapter concludes that the unique character of IIL would not permit the establishment of a single method as an ultimate solution for the effective resolution of foreign investment disputes. This has led the author to suggest that the focus should not be on labelling or establishing a single method as the most appropriate dispute settlement mechanism, rather it should be on enabling the disputing parties to choose their preferred method among all the available dispute settlement mechanisms, including all the adjudicatory (i.e., MIC) and the consensus-based (i.e., mediation) methods. The discussions provided in this chapter and all the previous chapters have formed the basis of the next chapter to assess the credibility and possibility of establishing a foreign investment multi-track dispute settlement system in which all the mechanisms are available for the settlement of foreign investment disputes.

Chapter VI: Establishing a Foreign Investment Multi-Track Dispute Settlement System

6.1 Introduction

Chapter two demonstrated that the IIL has a decentralised and fragmented framework. This phenomenon results directly from the piecemeal emergence of the IIL regime and is the root cause of problems in the foreign investment regime. Chapter three went on to discuss the fundamental deficiencies associated with ISDS as a dispute resolution mechanism. Those deficiencies broadly centre around the rule of law-based concerns about legitimacy, consistency, and lack of transparency. Chapter four built on this by examining a number of the most prominent proposals for reform and replacement of the system of ISDS. After careful analysis of the evidence, that chapter concluded that the time for making minor changes and tweaks to the current system has now passed, and that solution of replacing the current system with an alternative is the best option in the current climate and given the historical context of IIL and ISDS. The chapter went on to elucidate that the prominent proposals for replacement of ISDS such as the establishment of state-to-state arbitration in lieu of ISDS are not the most appropriate alternative for ISDS. Recalling that, earlier in the thesis (chapter two), it was demonstrated that other consensus-based dispute settlement mechanisms (i.e., negotiation and mediation) could not be regarded as the most suitable replacement for ISDS. Following the outcomes of these studies, chapter five proceeded to examine the most prominent replacement proposal, namely the EU's proposed MIC. Chapter five concluded that the MIC proposal itself is not a silver bullet for the ills of the IIL regime. The chapter went on to conclude that it is impossible to effectively address the fundamental deficiencies associated with the current system of ISDS by establishing a world investment court without first reforming the substantive

foreign investment rules. Indeed, attempting to introduce a world investment court without the prior reforming of these rules would not lead to an effective and legitimate outcome.

Following the discussions of the previous chapters regarding the decentralised framework of IIL and the ineffectiveness of the most prominent proposals, the author concludes that the solution is not to introduce one single dispute settlement mechanism in lieu of ISDS. The most obvious and practicable solution would be to establish a system that would enable the disputing parties to freely choose their most preferred mechanism in accordance with their specific disputes' nature, content, and character. Accordingly, the main goal of this chapter is to introduce and evaluate the credibility of establishing a foreign investment multi-track dispute settlement system. Within such a system, the whole range of dispute resolution mechanisms would be available for selection by the disputing parties for the settlement of foreign investment disputes.

This chapter has been divided into two substantive sections. The first section reasons that the initial step for properly reforming the foreign investment regime is the fundamental reform of the framework of IIL. This would ideally begin with the conclusion of a MIA. However, the author recognises that this fundamental reform is highly unlikely to be achieved in the current geopolitical climate. Therefore, the second section somewhat pragmatically moves on to consider how the current foreign investment dispute settlement system can effectively be improved without the fundamental reform of the framework of IIL. In this section, the author examines the idea of establishing a foreign investment multi-track dispute settlement system (FIMTDS) as the most considerable and achievable solution. Accordingly, it will assess the proposed FIMTDS against the benchmarks of legitimacy, efficiency, transparency, and feasibility discussed in chapter one.

6.2 The Necessity of Reform of Substantive Foreign Investment Rules

As demonstrated by the previous chapters of this thesis, addressing the concerns (i.e., legitimacy crisis) associated with the ISDS system is not possible until reforming the substantive foreign investment rules. Several scholars and even states have admitted the same.[813]

The conclusion of a MIA could provide a connection link with investment-related matters, such as environmental protection and human rights.[814] It is valuable as other investment agreements, such as BITs, have not successfully regulated them. Likewise, Subedi elucidates that, "an ideal solution to address many of the problems in foreign investment law is, of course, to have a comprehensive global investment treaty."[815] Such a treaty could harmonise the investment rules and develop consistency and coherence. In addition, it could prevent the tribunal from interpreting the law in any manner they wish.[816] Also, it contributes elimination of treaty, forum and nationality shopping.[817] Moreover, it will increase the transparency, predictability and legal security of the foreign investment process, which assures the foreign investors that the host states' rules (which may have a detrimental effect on the foreign investment) would not be changed at will or on a whim.[818]

Chapter two demonstrated that even though the conclusion of a MIA is necessary, all the previous attempts to conclude such an agreement have been unsuccessful.[819] Perhaps the

[813] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of South Africa, 19-22- U.N. Doc. A/CN.9/WG.III/WP.176, (July 17, 2019), available at: <https://uncitral.un.org/sites/uncitral.un.org/files/1_7_6e_submissionsouthafrica.pdf > accessed 23 May 2023.
[814] K. Joachim, "On the Way to Multilateral Investment Rules- Some Recent Policy Issues" (2002), *Foreign Investment Law Journal*, Vol. 29, No. 1.
[815] Subedi (n 2) 196-199.
[816] *Ibid*.
[817] *Ibid*.
[818] K. Kennedy, "A WTO Agreement on Investment: A Solution in Search of a Problem?" (2003), *University of Pennsylvania Journal of International Economic Law*, Vol. 24, 77; A. Amarasinha and J. Kokott, "Multilateral Investment Rules Revisited" (2008), in P. Muchlinski (eds.), *Oxford Handbook of International Investment Law* (Oxford University Press, 2008).
[819] Chapter II, 55-60.

main reason for this is the controversies between developed and developing countries. The direct result of such a controversy is disregarding the needs of developing states in all the previous attempts.[820] For instance, no consensus was obtained under the auspice of WTO, as this organisation is widely known as a rich men's club that is exclusively operated and controlled by developed states who seek to serve their agendas.[821] Many developing countries, such as India, claimed that there have always been one-sided policies aim of which was to protect foreign investors. They assume that conclusion of a MIA could negatively affect their national sovereignty.[822] Also, it could lead them to lose their freedom over developing their domestic policies following their immediate needs. They believe that the developed states politically pressurise them to commit to such an agreement.[823]

It can be counterclaimed that a similar concern also existed at the time of the introduction of the BIT regime. India did not conclude its first BIT until 1994. Though, by 2006, it was a party to 56 BITs.[824] It indicates that although developing countries disagreed with the conclusion of BITs at the early stage, they gradually accepted them and started to deal with them. Therefore, hesitancy might only appear at the initial stage, and the states could give their consent once they realise that the direct result of concluding a MIA is the provision of a basis for establishing an effective foreign investment dispute settlement system.

Moreover, another significant reason is the reluctance of states to disregard BITs in favour of a MIA.[825] It is interesting to note that although the existent flexibility in bilateralism is costly (due to the difficulty of renegotiating large networks of bilateral agreements treaty-

[820] J. Kurtz, "A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment" (2003), *University of Pennsylvania Journal of International Law*, Vol. 23, No. 4.
[821] *Ibid*.
[822] *Ibid*.
[823] *Ibid*.
[824] *Ibid*.
[825] N. Marusja Saputo, "Paradoxical Pacts: Understanding the BIT Phenomenon and the Rejection of a Multilateral Agreement on Investment" (2014), *Ohio Northern University Law Review*, Vol. 41, No. 1, 121.

by-treaty), states still prefer BITs over a MIA.[826] A more substantial driver behind such a preference is the political tendency towards economic liberalisation. In the concrete, bilateralism enables states to customise agreements per their political-economic preferences. The undeniable issue is that states do not wish to give up the right to negotiate different treaties with each other. States follow different strategies and goals in every negotiation.[827] In addition, it is worth mentioning that a MIA would be regarded as general international law, and it would be binding on all member states. On the other hand, the concluded BIT between the two states would remain valid for typically 10 to 20 years, and it could be renewed or renegotiated following the needs of the parties to the agreement after the expiry of the initially agreed period. Therefore, withdrawal from BITs is not relatively easy for states.[828]

The best way to understand customization as a crucial element in investment treaties is through discussion provided by the game theory about the problem of coordination in which the investment regime is willing to find a solution.[829] In a coordination game, although players intend to cooperate, they cannot reach any agreement about the terms of cooperation since they could have many consequences.[830] The same scenario could also apply to the foreign investment regime. States enter into an investment agreement, as it is in their mutual interest to make an attractive market for foreign investors by offering compensation to investors regarding their losses. Though, they often cannot agree on the types of losses for which compensation should be provided. One of the instruments which could assist states in resolving

[826] C. J. Taylor, "Twilight of the Neanderthals, or are Bilateral Double Taxation Treaty Networks Sustainable" (2010), *Melbourne University Law Review*, Vol.34, 268; H. Mooij, "Tax Treaty Arbitration" (2018), *Arbitration International Journal*, Vol. 35; R. S. Avi-Yonah and H. Xu, "A Global Treaty Override? The New OECD Multilateral Tax Instrument and Its Limits" (2018), *Michigan Journal of International Law*, Vol. 39, 155-159.
[827] J. Huner, "Environmental Regulation and International Investment Agreements: Lessons from the MAI" (1998), *Seminar Trade, Investment, and the Environment, RIIA,* Chatham House.
[828] UNCTAD, "International Investment Agreements: Flexibility for Development" (2000), available at: < http://unctad.org/en/docs/psiteiitd18.en.pdf, > accessed 23 May 2023.
[829] R. H. McAdams, "Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law" (2009), *Southern California Law Review*, Vol. 82, No. 1, 209, 222, 236-38.
[830] *Ibid*.

such an issue is bilateralism. It is because the flexibility offered by bilateralism enables the states to tailor specific model agreements that differ from one state to another.[831] For instance, some states, such as the Gulf States, offer generous investment protections in their investment agreements.[832] While others, such as Turkey, Japan, and Canada, safeguard relatively greater regulatory flexibility by including general exceptions in their treaties.[833] It would enable states to provide different responses to the question of what investment losses should be taken up by host states and what losses should stay with the investors.

There is no political convergence in the investment regime as the interests of developed countries have never become aligned with the interest of developing states in combatting the issues associated with this regime. There are divergent positions within the G20[834] and between BRICS countries. They could not agree on the appropriate path for investment law's future.[835] It must be noted that divergent views do not exist only between developed and developing states but also in the developed world. The EU and Canada's preference for a standing court contradicts Japan's preference, which supports retaining ISDS.[836]

A key factor for concluding a MIA is to create a necessary ground for reaching a consensus before engaging in the negotiation process for the conclusion of a MIA. The divergent views among states highlight that negotiating some agreements, such as a MIA is not a zero-sum game. In other words, they cannot be either full liberalisation or protectionism as a possible outcome. Feasibly, the inevitable result should be an agreement with some

[831] Investment treaties are characteristically based on national treaty models. See, T. Rixen, *The Political Economy of Global Tax Governance* (Springer Link, 2008) 169-70; C. Brown and D. Krishan, *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013) 170-183.
[832] W. Alschner, D. Skougarevskiy and M. Wang, "Champions of Protection? A Text-as-Data Analysis of the Bilateral Investment Treaties of GCC Countries" (2016), *International Review of Law*, Vol. 5, No. 3.
[833] W. Alschner, "The Global Laboratory of Investment Law Reform Alternatives" (2018), *American Journal of International Law*, Vol. 112, 237.
[834] The Group of Twenty (G20), Available at: < https://www.g20.org/about-the-g20.html > accessed 23 May 2023.
[835] BRICS stands for the emerging economies Brazil, Russia, India, China and South Africa.
[836] A. Roberts, "Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration" (2018), *American Journal of International Law*, Vol. 112.

liberalisation and protectionism, like the current example of NAFTA. The draft should not contain a top-down list of exceptions if the goal is to achieve the necessary consensus. Also, it should provide the possibility of opts-in for states and enable them to specify the sectors they are willing to accept while leaving non-specified sectors outside the agreement.[837]

Another concern is that IIL has become a politically prominent issue, which makes it difficult for states to compromise, especially publicly.[838] Poulsen and Aisbett suggest that, "BITs were often concluded to coincide with diplomatic visits or the end terms of ambassadors."[839] In contrast to the technical language of DTTs concluded in the field of tax, BITs contain intuitive principles which could lead many signatories to believe that they are statements of goodwill rather than binding commitments.[840]

Another element that played a considerable role is that all the previous attempts failed to generate any benefits for the politics and business sectors to motivate them to push for the conclusion of the negotiations. For instance, in the US, in early 1998, there was no political appetite in the administration to fight for a MIA.[841] Similarly, the OECD countries' business sectors did not support the conclusion of a MIA since they believed that such an agreement could not eliminate any of the fundamental investment barriers that existed at that time in their countries.[842]

The most crucial question is, despite the numerous advantages, whether it is currently realistic to claim that there exists the necessary basis for negotiating a MIA. The short answer

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[837] Saputo (n 825).
[838] M. A. Clodfelter, "The Adaptation of States to the Changing World of Investment Protection through Model BITs" (2009), *ICSID Review, Foreign Investment Law Journal*, Vol. 24, No. 1, 165-168; K. J. Vandevelde, "Model Bilateral Investment Treaties: The Way Forward" (2011), *Southwestern Journal of International Law*, Vol. 18, 307-314.
[839] L. N. Skovgaard Poulsen and E. Aisbett, "Diplomats Want Treaties: Diplomatic Agendas and Perks in the Investment Regime" (2016), *Journal of International Dispute Settlement*, Vol. 7.
[840] *Ibid*.
[841] M. Robert, "Moving Towards a Common Set of Multilateral Investment Rules; Lessons from Latin America" (2002), available at: < http://ctrc.sice.oas.org/trc/Articles/MultilateralInvRules_MRobert_e.pdf > accessed 23 May 2023.
[842] *Ibid*.

is negative. Undoubtedly, the obstacles to concluding a MIC still exist in our time. In terms of negotiations, initially, there should be a round of discussion about the concerns associated with the WTO. The opponents would bring up the negative aspect of the WTO and claim that similar problematic issues could appear if an MIA concluded.

This section essentially concludes that in many ways, commentators are focusing on the wrong issue within the foreign investment regime; the main problem is not the procedure of ISDS, but rather the poor functioning of IIL itself caused by its decentralised and fragmented nature. The author asserts that it is necessary to take a different approach and make a substantial reform from the root to the rules. The stepping stone would be to formalise the regulation of investment matters and establish a single body of codified investment rules. Undoubtedly, without reforming the investment law system (reform of substantive rules), any attempts to develop the foreign dispute settlement mechanism (reform of procedure) would likely be futile. Indeed, no improvements can be made to a building where there exists neither a proper foundation nor a solid framework.[843] Unquestionably, this is not a task to be completed by a limited number of countries. It requires the corporation of the majority of states.

Although the most appropriate solution and ultimate goal is the reform of the framework of IIL system, the author accepts that the conclusion of such a treaty is not possible within the present geopolitical climate. Therefore, until the creation of the necessary ground for establishing such a treaty, other alternative reform options must be considered. This thesis attempts to come up with the best solution which is currently achievable. Considering the unique structure, character and framework of the current foreign investment regime, the thesis suggests establishing a foreign investment multi-track dispute settlement system. The thesis

[843] J. G. Janmaat, "Income Inequality and Economic Downturn in Europe: A Multilevel Analysis of their Consequences for Political Participation" (2018), *Springer Political Behavior,* Vol. 53, No. 3; A. Idowu, R. F. Bank-Ola, N. A. Lawal, "Social Investment and Sustainable Economic Development" (2018), *Business, Management and Economics Research*, Vol. 4, No. 6.

acknowledges that it cannot be the ultimate and perfect solution, but it is a workable solution that would address many of the problems associated with the current ISDS system.

6.3 Towards a Foreign Investment Multi-Track Dispute Settlement System

It is unlikely to convince all or most sovereign states to agree to identify a single mechanism for settling all investment disputes. Unsurprisingly, every state is keen on promoting its model through bilateral agreement.[844] For instance, Japan and the EU have yet to agree on a dispute settlement in their recent economic partnership agreement, as Japan favours a reformed version of ISDS over the MIC.[845] Similarly, India is willing to settle disputes through national courts.[846] On the other hand, some states, such as Brazil, supported establishing state-to-state arbitration.[847] Also, China proposed a reformed format of ISDS, which coupled with an appellate.[848] This has led the author to claim that the solution is establishing a foreign investment multi-track dispute settlement system (FIMTDS) which is compatible with the current foreign investment regime. Such a system would enable the disputing parties to choose from all the available dispute settlement methods in accordance with their preferences and desires.

Chapters two and four analysed a number of non-binding (i.e., mediation) and binding (i.e., ISDS) dispute settlement methods. They concluded that none of these methods could be

[844] Heideman (n 68); R. Happ and S. Wuschka, "From the Jay Treaty Commissions towards a Multilateral Investment Court: Addressing the Enforcement Dilemma" (2017), *Indian Journal of Arbitration Law*, Vol. 6; Zárate (n 55).
[845] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018), the CPTPP is the follow-up agreement concluded by the states that remained committed to the Trans-Pacific Partnership (TPP), which was signed on 4 February 2016. The CPTPP incorporates the text of TPP, which was heavily influenced by U.S. positions; The negotiations between EU and Japan on Economic Partnership Agreement have not been concluded yet. Therefore, the whole texts are also still under negotiations and not finalised.
[846] See the Model Text for the Indian Bilateral Investment Treaty (2016).
[847] G. Vidigal and B. Stevens, "Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?" (2018), *Journal of World Investment and Trade*, Vol. 19, 475.
[848] UNCITRAL Working Group III, "Possible Reform of Investor-State Dispute Settlement (ISDS) – Submission from the Government of China" (2019), UN Doc. No. A/CN.9/WG.III/WP.177.

labelled as the most effective and ultimate method for the settlement of foreign investment disputes.[849] However, it must be noted that nothing can prevent the disputing parties to utilise any of these methods if they believe that it could effectively resolve their dispute. Accordingly, the suggested multi-track system must have sufficient flexibility to enable the parties to choose the appropriate dispute settlement method, ranging from informal to formal procedures.

With this in mind, the proposed FIMTDS comprise two main sections. The first section includes the informal and non-binding dispute settlement methods, such as negotiation, consultation, mediation, and international commission of inquiry. The second section contains the formal binding dispute settlement mechanisms. This section would consist of four pillars. The first relates to the two-tier MIC that enables the EU and its member states to decide its structure and how it should work in practice. The second pillar operates as state-to-state arbitration under which Brazil and its followers could utilise such a mechanism for resolving disputes. The third pillar administers the exhaustion of local remedies as supported by the Indian Model BIT. The last governs ISDS, which provides an opportunity for investors and states that do not prefer utilising the traditional dispute settlement methods such as national remedies or even the newly proposed dispute settlement mechanisms such as the EU-proposed MIC. Under this system, the parties can initially choose a dispute settlement method from either of the discussed sections. Although there is no obligation for the parties to start with the first section, in order to save time and cost, the parties are encouraged to initially select either of the non-binding methods. Subsequently, they could submit a request to one of the available binding forums if their dispute remained unresolved.

It must be stated that the proposed FIMTDS is compatible with the flexibility which has always been claimed to be a hallmark in dispute settlement design in international courts and tribunals. Such flexibility also exists in other international fields. For instance, the ICJ

[849] Chapter II, 70-76; Chapter IV, 143-51.

formed a Chamber of five judges to deal with the case of *ELSI*,[850] in which the United States initiated proceedings against Italy in respect of a dispute arising for the assets of Raytheon-Elsi S.p., an Italian company 100 per cent owned by two American corporations. Similarly, under the WTO DSU, the consenting parties can refer a dispute to arbitration.[851] Likewise, the European Court of Human Rights has principally established and allocated for the settlement of disputes between states and individuals, yet there have been some instances where it has adjudicated between states.[852]

The inspiration for suggesting the establishment of a FIMTDS comes from reviewing similar systems: competition law's dispute settlement system and à la carte dispute settlement provided by the Convention on the Law of the Sea (UNCLOS). This section will, before assessing the structure and function of the suggested FIMTDS, analyse these systems to determine whether either of these systems could potentially serve as a model for the FIMTDS due to a number of similarities.

- ***Taking Inspiration from Competition Law***

One of the inspirational sources is the dispute settlement system in the field of competition law. Indeed, there are two distinct methods for settling a dispute in this field: litigation and arbitration. It has been discussed that arbitration, like litigation, could be utilised to resolve competition law-related matters, including antitrust law issues. However, a

[850] *Elettronica Sicula SpA (ELSI) (United States v Italy*), Judgment, ICJ Reports 1989, 15.
[851] See *WTO, United States–Section 110(5) of the US Copyright Act,* WT/DS160/ ARB25/1, Award of the Arbitrators (9 November 2011).
[852] See *European Court of Human Rights, Cyprus v Turkey, App No 25781/94*, (10 May 2001); *Republic of Ireland v The United Kingdom,* App No 5310/71, (18 January 1978).

distinction should be drawn between private enforcement and public enforcement of competition law since only the private aspect of competition law is arbitrable.[853]

The antitrust law is known as the guardian of free competition and economics. It has been designed to encourage free and fair competition in the open market by restricting various forms of anticompetitive and unfair conduct by market participants. Generally, antitrust disputes comprise exceedingly complex issues. Likewise, antitrust proceedings require fact-intensive endeavours and detailed evidentiary findings. It often involves complex market definition inquiries, which necessitate expert testimony concerning intricate economic theories.[854] Due to such inherent complexity, antitrust litigations are frequently costly and time-consuming.[855] There is a remarkable similarity in this respect between foreign investment disputes and antitrust disputes.

For the first time, the United States Supreme Court, in *Mitsubishi v. Soler Chrysler-Plymouth, [856]* declared that, "there are no public policy reasons prohibiting the arbitration of international antitrust disputes." Since that time, a clear trend has emerged in case law, which extended the reasoning of *Mitsubishi* to cases involving antitrust disputes as well. A similar trend was established by the ECJ's decision in the case of *Eco Swiss China Time Ltd v Benetton.*[857] This case would usually cite as an authority in this respect. Both these cases paved the way for the permissibility of arbitration for the resolution of antitrust issues. Likewise, in *Eurotunnel*,[858] the English High Court, in 2005, acknowledged that antitrust issues are arbitrable.

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[853] L. Ilie and A. Seow, "International Arbitration and EU Competition Law Complement Rather than Contradict One Another" (2017), *Journal of International Arbitration*, Vol. 34, No. 6, 1007.
[854] D. I. Baker and M. R. Stabile, "Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel" (1993), *The Business Lawyer*, Vol. 48, No. 2 395.
[855] *Ibid*.
[856] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985).
[857] *Eco Swiss China Time Ltd v Benetton I international N.V,* (1999), Case C-126/97.
[858] *ET Plus SA v Welters,* EWHC 2115 (Comm), (7 November 2005).

It is worth mentioning when *Mitsubishi* and *Eco Swiss* were decided, many judges in the USA and Europe were unsure about whether arbitration is of the capability to deal with antitrust claims. They were not sure about the effectiveness of adding arbitration to the litigation to resolve relevant disputes. Justice Stevens, a dissenting judge, referred to the public interest in enforcing the antitrust laws. He argued that these types of disputes could never be appropriately resolved by the rudimentary procedures of despotic decision making of arbitrators.[859] On the other hand, Justice Blackmun encouraged the national courts to "shake off the old judicial hostility to arbitration so that arbitral tribunals could take a central place in the international legal order."[860] Despite the dissenting opinions, the majority in both cases forcefully put the concerns away by concluding that the antitrust claims are arbitrable.

A few studies examined the effectiveness of the existing competition law's dispute settlement system in which arbitration is available along with litigation. They attempted to clarify whether the availability of both methods and permitting parties to choose amongst them could weaken or strengthen the antitrust regime regarding settling the relevant disputes.[861]

Generally, the evidence suggests more advantages of adding arbitration to litigation than disadvantages. It is because international arbitration, from the regulatory authorities' point of view, such as the European Commission, is a tool which could facilitate the resolution of commercial disputes.[862] It is not easy assessing the frequency of submitting antitrust claims to arbitration statistically. However, recent cases confirm the benefit of the availability of arbitration in addition to litigation for the settlement of given disputes. Delrahim confirms this

[859] *Mitsubishi Motors* (n 856).
[860] *Ibid*.
[861] International Competition Network, "Development of Private Enforcement of Competition law in ICN Jurisdiction" (2018), Subgroup Two of the Cartel Working Group; M. C. Stephenson, "Public Regulation of Private Enforcement: The Case for Explaining the Role of Administrative Agencies" (2005), *Virginia Law Review*, Vol. 68, 93, 118–19; J. B. Gelbach, "Material Facts in the Debate Over Twombly and Iqbal" (2016), *Stanford Law Review*, Vol. 68, 369,381–2; S. C. Salop and L. J. White, "Economic Analysis of Private Antitrust Litigation" (1986), *Georgia Law Review*, Vol. 74.
[862] J. Bridgeman, "Arbitrability of Competition Law Disputes" (2008), *European Business Law Review*, Vol. 19.

by stating that, "arbitration allows a neutral third party to decide important or dispositive issues without the expense of a trial. In particular, arbitration could be an antitrust specialist or former judge, either with economics training or with extensive experience handling complex antitrust cases."[863] Murray also maintains that the issue is not to determine whether the court system is way better than arbitration but to highlight the fact that competition law has several peculiarities. It means that some kinds of competition disputes would possibly work in arbitration while others would not. For instance, he referred to the issues of joint and several liabilities. He argues that attempting to resolve these kinds of multi-party issues through a multiplicity of different arbitrations is not a decent idea.[864] It appears that arbitration is also not an appropriate mechanism for the resolution of merger cases which involve multiple dispositive antitrust issues.[865] Thus, both these mechanisms are necessary to enable the parties to resolve their competition law-related disputes following the contents and characters. Similarly, in the case of *The Bremen*,[866] *U.S. v. Novelis Inc. and Aleris Corporation*[867] *Labinal v Mors*,[868] *Westland Aerospace*[869] and *Jacquetin v Intercaves,*[870] courts acknowledge the benefit of availability of arbitration along with litigation for settlement of competition law disputes. For instance, the Supreme Court in *The Bremen*[871] held that, "the expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. We cannot have trade and commerce in world markets and international waters exclusively on our

[863] *Ibid*.
[864] S. Lipton, "The Use of Arbitration and ADR in Antitrust Law Cases" (2016), *Commercial Dispute Resolution*.
[865] M. Lemley and C. Leslie, "Antitrust Arbitration and Merger Approval" (2015), *North-western University Law Review*, Vol. 110, No. 1.
[866] *The Bremen v Zapata Off-Shore Co* 407 US 1, 15 (1972).
[867] *U.S. v. Novelis Inc. and Aleris Corporation* (2020), available at: < https://www.justice.gov/atr/case/us-v-novelis-inc-and-aleris-corporation > accessed 23 May 2023.
[868] *Société Labinal v Société Mors & Westland Aerospace,* 1st Chambers, Section A, 19 May 1993.
[869] *Norris v. GKN Westland Aerospace, Inc.,* 921 F. Supp. 2d 1308 (2013).
[870] *Jacquetin v Intercaves CA Paris, (*20 March 2008), RG 06/06860.
[871] *The Bremen v Zapata Off-Shore Co,* 407 US 1, 15 (1972).

terms, governed by our laws, and resolved in our courts."[872] Likewise, in the case of *Microsoft Mobile OY v. Sony Europe Ltd*[873] the Advocate General argued that allowing arbitration undermines the EU law and it could cause the fragmentation of the litigation. Nonetheless, the High Court rejected this argumentation. It maintained that, "there is nothing in the decision of the [ECJ] to require to displace the effect of the arbitration clause as something inimical to EU law."[874]

The most substantial issue to consider is since 1985, arbitral tribunals along with the national courts have been frequently called upon to resolve competition law's related disputes. Reviewing the relevant case law[875] indicates that they would also be called upon in the future. It appears that there is a tendency in the field of competition law to create a unique multi-track dispute settlement system in which apart from litigation and arbitration, other ADR mechanisms (i.e., mediation) would also be available for resolution of the relevant disputes. This is because the availability of such mechanisms would not cause the parties to lose the advantages of litigation, but it provides extra support for the parties and could subsequently offer additional possible solutions.[876]

Apart from the competition law's dispute settlement system, another inspirational source is the UNCLOS dispute settlement system, which has also been referred to in the Multilateral Institution for Dispute Settlement on Investment (MIDSI) proposal recently put forward by Schill and Vidigal.[877] Yet, before considering the UNCLOS dispute settlement

[872] *Ibid*.
[873] *Microsoft Mobile OY v. Sony Europe Ltd*, EWHC 374 (Ch) (2017).
[874] *Microsoft Mobile OY (Ltd) v Sony Europe Limited & Ors* [2017] EWHC 374, para. 81.
[875] See *Landgericht Dortmund, Judgment of September 13, 2017 – 8 O 30/16 Kar*; *Apple Sales International et al. v. EBizcuss.com (C-595/17, October 24, 2018), para. 15*; *ET Plus v. Welter ET Plus v. Welter* [2005] EWHC 2115.
[876] *U.S. v. Novelis Inc. and Aleris Corporation 2020; Halsey v Milton Keynes General NHS* Trust [2004] EWCA Civ 576.
[877] S. W. Schill and G. Vidigal, "Designing Investment Dispute Settlement à la Carte: Insights from Comparative Institutional Design Analysis" (2020), *The Law and Practice of International Courts and Tribunals,* Vol. 18, No. 3.

system, it is crucial to analyse the proposed MIDSI due to the limited similarities between such a system and the thesis's suggested FIMTDS. Indeed, the main reason for conducting such an analysis is the author attempts to build on their work by addressing its defective aspects.

- ***Multilateral Institution for Dispute Settlement on Investment***

Recently, Schill and Vidigal put forward a proposal which supports establishing a MIDSI which comprises all the available dispute settlement mechanisms.[878] The proposed MIDSI attempts to enable states to choose their preferred method of dispute settlement. The highlight of their system is that all the available mechanisms would be managed by a multilateral institution.[879] Indeed, the MIDSI is designed to keep the effects of the fragmentation of the current system of ISDS to a minimum through institutionalisation. It has been claimed that institutionalisation contributes to developing consistency, coherence, and predictability in the foreign investment regime. Accordingly, Schill and Vidigal invite the EU to shift its core attention from creating a MIC system towards establishing a multilateral institution, which is acceptable for most states, including those that do not support the MIC proposal.[880] In addition, they suggest the EU to work on preparing a draft and creating a basis for sovereign states to participate in the negotiations process for the conclusion of an agreement through which MIDSI could be established.

These scholars argue that despite several bilateral and regional IIAs and parallel dispute settlement mechanisms, a single multilateral institution, which acts as an umbrella, could potentially lead to convergence, and exercise a greater degree of force. This thesis agrees with the general idea of creating a la carte system which comprises all the dispute settlement

[878] *Ibid*.
[879] *Ibid*.
[880] *Ibid*.

mechanisms. However, it rejects the proposal for establishing a MIDSI. The first reason for such a disagreement is the political feasibility of such a system, as it is highly dependent on the willingness of states to participate in the relevant negotiations for conclusion of the proposed MIDSI Agreement.

Schill and Vidigal reasoned that following the inclusion of most, if not all, of the dispute settlement methods within the envisaged MIDSI, it is highly likely that many states show a willingness to participate in the round of discussion since they have favoured different mechanisms following their political stance.[881] In particular, the availability of the models supported by the developing states could create a trust base and encourage them to support the proposed system.[882] Nevertheless, the significant factor directly related to the quality of the consent of participating states is democratic legitimacy.[883] The first element of democratic legitimacy is the recognition of all the states' equal rights. Next is to provide an account for delegation, accountability, and responsiveness. The third refers to transparency, fairness, and openness.[884] Hence, to create a democratic and legitimate MIDSI system, it is crucial to take into account the needs and interests of all the states regardless of the level of their development and provide a basis to strengthen the capacity of the participating states to deliver policy outputs.

In addition, an institution can be created through formal consensus, and such an institution could be legal but not legitimate had specific categories of states been prevented from expressing their needs and interest. Without following democratic rules and procedures,

[881] C. Titi, "Who's Afraid of Reform? Beware the Risk of Fragmentation" (2018), *American Society of International Law*, Vol. 112, 232; W. Shan, "From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law" (2007), *Northwestern Journal of International Law and Business*, Vol. 27, 631.
[882] Schill and Vidigal (n 877).
[883] J. Dunn, Democracy, *The Unfinished Journey, 508 BC to AD 1993* (Oxford University Press, 1992); D. Held, *Models of Democracy* (3rd edition, Stanford University Press, 2006).
[884] H.F. Pitkin, *The Concept of Representation* (University of California Publisher, 1967); B. Manin, *The Principles of Representative Government* (Cambridge University Press, 1997).

developing states may be overwhelmed by those with much more bargaining power to obtain their consensus.[885] There are some concerns associated with the envisaged MIDSI system. First, Schill and Vidigal must explain whether their proposed MIDSI could be established through democratic procedures. Next, they must clarify whether there is an opportunity for equal participation of all the states in the discussion process of the initial agenda to the final approval of it. Also, they should demonstrate whether the forum through which the negotiations are intended to be conducted could guarantee that all developing states are free from all the political pressures in respect of obtaining consensus.

As discussed earlier, one of the main factors behind the failure of all the previous attempts to conclude a MIA was a lack of trust in the negotiations' forum. The developing states claimed that they were never permitted to participate in the initial discussions. The stepping stone to accurately making an effective change in the foreign investment regime is to obtain consent from all the sovereign states democratically. These scholars selected the EU as a forum to conduct the negotiation process for the conclusion of a MIDSI's Agreement. It is worth mentioning that the EU's behaviour has been questionable in respect of informing the Asian, African, and Latin American countries of its plan to reform the ISDS system. It is due to its intention to sway votes in its favour through misusing its power that can be displayed over less-developed economies to change the ISDS framework and obtain a global consensus even from the beginning of drafting its proposal.[886] The EU has taken for granted that all states would comply with its proposal for reforming the ISDS system.[887]

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[885] M. N. Sellers, *Democracy; Justice, and Legitimacy of International Courts* (Cambridge University Press, 2018) 338-340 (discussing the difference between a court being effective at advancing justice and a court being legitimate); J. Habermas, *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy* (Blackwell Publishing, 1996) in William Rehg translation, 287–328 (discussing the procedural deliberative process).

[886] Heideman (n 68).

[887] The EU announced that Mexico and Chile's agreements will be changed according to its blueprint. European Comments, Inception Impact Assessment; Establishment of a Multilateral Investment Court for Investment Dispute Settlement, (2016), available at: <

Furthermore, it can be claimed that the legitimacy deficiencies have been associated with the EU's proposed MIC regardless of the prima facie consensus obtained by the EU to initiate the relevant discussions. The EU has failed to use a multilateral process of formal, transparent, and comprehensive discussions with other states to set up the agenda for establishing a MIC. The EU is required to conduct formal discussions with most states before initiating the negotiations process in UNCITRAL with a pre-established agenda due to the existence of more than 3,300 IIAs signed by approximately 180 states. Nevertheless, the EU did not follow the democratic principle of equal sovereign participation in its proposal for establishing a MIC. Conducting a few internal consultation sessions, holding a limited number of informal meetings with a few states, and organising some discussion meetings with the UNCITRAL Working Group and OECD do not provide the necessary legitimacy to confirm the MIC agenda has indeed achieved global consensus.[888]

In addition, it is worthwhile to note that similar legitimate deficiencies also occurred at the time of the establishment of the ICSID since the informal opinions of some developing states were never considered.[889] Likewise, a similar issue was raised in the realm of the WTO, which subsequently led this institution to be known as a rich men's club. As a result, it is crucial to select an international forum that can follow all the necessary democratic rules and procedures, acts with honesty about informing all the states regarding its plans and conducts global and comprehensive discussion sessions for all the stages of concluding the envisaged

http://ec.europa.eu/smartregulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf > accessed 23 May 2023.

[888] OECD, "Freedom of Investment Roundtables: Summary of Discussions", (summarizing OECD discussions), Note from the General Secretariat of the Council to Delegations (identifying the directives prioritized by the EU), available at: < https://www.oecd.org/daf/inv/investmentpolicy/oecdroundtablesonfreedomofinvestment.htm > accessed 23 May 2023.

[889] *Ibid*.

MIDSI's Agreement, from preparing the agenda to its final approval.[890] These scholars have not addressed either of the mentioned issues within their work.

Another concern regarding the proposed MIDSI is the possibility of integrating various models, such as the MIC and other arbitral tribunals. To create an effective MIDSI, all the models must have faith in the competence of such a system. The institution should be responsible for managing the relationship between different models. Also, it should deal with any possible challenges. Additionally, the integration process requires the creation of a framework to gather all the similar and different aspects of all the dispute settlement methods. The scholarly work suggested the institutionalisation for addressing the integration of all the available models by referring to the utilisation of a similar technique within the UNCLOS dispute settlement system.

The UNCLOS's dispute settlement system is known as the most complex and detailed system ever included in a law-making treaty.[891] It includes the International Tribunal for the Law of the Sea (ITLOS),[892] the ICJ, an arbitral tribunal constituted under Annex VII rules, and a special arbitral tribunal constituted following Annex VIII for specified categories of disputes.[893] Although UNCLOS Annex VII tribunals are ad hoc bodies, they have been institutionalised to a large extent by the UNCLOS Convention. The Convention has empowered the President or Vice-President of ITLOS to appoint the arbitrator(s) where either the respondent fails to appoint its arbitrator or when the parties cannot agree on the remaining arbitrators.[894] Moreover, the UNCLOS system has successfully created a close relationship

[890] Schill and Vidigal (n 877).
[891] The UN Convention on the Law of the Sea [hereinafter UNCLOS] 1982, available at: < https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf > accessed 23 May 2023.
[892] *Ibid*, UNCLOS, Annex VI, Article. 1.
[893] *Ibid*, UNCLOS, Article. 287, the compulsory dispute settlement under Part XV: (1) the International Tribunal for the Law of the Sea constituted under Annex VI; (2) the International Court of Justice; (3) an arbitral tribunal constituted under Annex VII; (4) a special arbitral tribunal constituted in accordance with Annex VIII for specified categories of disputes (particularly those involving fisheries, the protection and preservation of marine environment, marine scientific research and navigation, including pollution from vessels and by dumping).
[894] *Ibid*, UNCLOS, Article 3(c), (d) and (e) of Annex VII.

between the ITLOS and the Annex VII arbitral tribunals. One of the considerable examples of such a close relationship is the ITLOS judges served as arbitrators in most Annex VII arbitral tribunals. It confirms the existence of such a relationship, as well as the fact that these arbitral tribunals have been truly embedded in the framework of UNCLOS. Wood clarifies this by maintaining that, "under Part XV of UNCLOS, arbitration and a permanent court may be mutually reinforcing; a permanent court may act in support of an arbitral process pending establishment of the tribunal, thus removing one disadvantage of ad hoc arbitration."[895]

Schill and Vidigal claim that the MIDSI system could follow a similar structure to create a deep and reinforcing relationship between all the available methods. However, they failed to notice that, unlike UNCLOS, there is no single international investment agreement that contains all the applicable rules. The reason behind the existence of such a relationship between ITLOS and Annex VII arbitral tribunals is they have all referred to a single set of rules. It is not the case in the IIL regime. Without such a substantive agreement (i.e., a MIA), it is impossible to make a basis for all the dispute settlement mechanisms to cite each other's decisions and consider each other's decisions with similar values.

Furthermore, it is questionable whether, like the UNCLOS Convention, states becoming parties to the envisaged MIDSI Agreement would consent to the jurisdiction of the dispute settlement bodies set out under this Agreement. Also, it must be explained whether the MIDSI could provide an interpretation of provisions of IIAs for any dispute settlement methods. It must be clarified whether the states would be willing to empower such an institution to interpret the IIAs' provisions. There is no definite answer to the question of how ready the dispute methods are in respect of adhering to the provided interpretation by this institution.

[895] M. Wood, "Choosing between Arbitration and a Permanent Court: Lessons from Inter-State Cases" (2017), *Foreign Investment Law Journal*, Vol. 32, No. 1.

More importantly, the most concerning challenge the MIDSI might face is the problem of procedural fragmentation. It has also been an issue in the UNCLOS dispute settlement system. Many ICJ judges advised that creating a plethora of tribunals would lead to fragmentation due to the provision of differing interpretations. It is because, like IIL, there are hundreds of bilateral and multilateral treaties in the field of law of the sea. They could be implementing agreements to the UNCLOS Convention. Most of these treaties are dispute settlement clauses.[896] The cases of *Southern Bluefin Tuna*[897] and *Mox Plant*[898] in which multiple proceedings have been initiated confirm the existence of the problem of procedural fragmentation, which is a direct result of the involvement of various conflicting and overlapping dispute settlement mechanisms. This would cause an increase in the number of inconsistent decisions.[899]

Reviewing some cases brought under the UNCLOS regime demonstrates the potential for rendering inconsistent decisions. For instance, in the Swordfish dispute between the European Community (EC) and Chile, in July 2000, the parties agreed to the submission of the dispute to an Annex VII tribunal, though, in 2000, the parties subsequently agreed to submit it to a special chamber of ITLOS.[900] Although both cases were suspended as the parties reached

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[896] B. Kwiatkowska "The Australia and New Zealand v Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VI1 Arbitral Tribunal" (2001), *International Kournal of Marine and Coastal Law*, Vol. 16, 239, 286-289; S. Bateman and D. Rothwell, "Navigational Rights and Freedoms and the New Law of the Sea" (2000), *Publications on Ocean Development*, Vol. 35, 723-727.

[897] *Southern Bluefin Tuna (New Zealand v Japan, Australia v. Japan)* (Provisional Measures) (1999) 38 ILM 1624 (ITLOS).

[898] *MOXP/ant (Ireland v United Kingdom* (Provisional Measures) (2001) 41 ILM 405 (ITLOS).

[899] See, for example Judge Stephen Schwebel, President of the ICJ (Address to the United Nations General Assembly, 26 October 1999); Judge Gilbert Guillaumel, President of the ICJ (Address to the United Nations General Assembly, 26 October 2000). Both texts available at: < https://www.icj-cij.org/ > accessed 23 May 2023.

[900] See Natural Resources Defense Council (NRDC), "Swordfish in the North Atlantic" (1998), available at < http://www.nrdc.org/wildlife/fish/rnasword.asp > accessed 23 May 2023; World Wide Fund for Nature (WWF), Slipping the Net: Spain's Compliance with ICCAT, 1999, available at: < http://www.panda.org/resources/publications/water/slipping/ic-background.html > accessed 23 May 2023; United States National Marine Fisheries Service, available at: < http://www.st.nmfs.gov/st3/vol4swordfish.html, > accessed 23 May 2023; ATTC-68-10-2 Swordfish Stock Assessment WG – May 2001, available at: <www.iattc.org > accessed 23 May 2023.

an agreement, there was still potential for rendering inconsistent decisions due to procedural fragmentation.

One might argue that such inconsistency should be regarded as a small price for creating a flexible and multiplicity dispute settlement system. However, chapter three illustrated that one of the fundamental defective aspects of ISDS is the problem of procedural fragmentation and inconsistent decisions, which severely affected the overall credibility of this procedure. Schill and Vidigal put forward a few suggestions to reduce the risk of further fragmentations within the MIDSI. They stated that the MIC would be the leading MIDSI's adjudicatory pillar. They claim that the MIC could prevent further fragmentation by; serving as a reviewing body for decisions rendered by (inter-state and investor-state) arbitral tribunals; granting provisional measures, dealing with arbitrators' challenges; and issuing advisory opinions and preliminary rulings.[901]

The first suggestion is, like the WTO AB, the MIC could merely serve as an appellate. It means that the states could include a provision in their IIAs which permits investors to initially recourse to ISDS, state-to-state arbitration or domestic courts and subsequently request the MIC's appellate to hear their appeals. It could be particularly beneficial for the states that do not wish to fully accept the MIC's jurisdiction.[902] They claim that the MIC could create a high degree of consistency by reviewing the interpretations provided by the initial tribunal. In addition, tribunals would be requested to follow its interpretations unless they have a solid reason to take a different path.[903] Also, they alternatively suggest that to prevent the creation of a MIC with an excessively centralized role, like the ICSID Annulment Committees, the MIC could only be empowered to hear requests for annulment. The previous chapter illustrated that

[901] Schill and Vidigal (n 877).
[902] *Ibid*.
[903] *Appellate Body Report, US – Stainless Steel (Mexico),* (20 May 2008), WT/DS344/AB/R, paras. 304–313.

the crucial reason behind the WTO AB's success is it is requested to focus on the interpretation of a relatively defined group of treaties, which go under the umbrella of the WTO agreements.[904] As a result, it can be argued that by maintaining the bilateral nature of obligations and in the absence of a MIA, utilising the MIC as a reviewing body for the decisions rendered by either the MIC's first instance or any arbitral tribunals, could not enhance the consistency and prevent the issue of parallel procedures.[905]

These scholars acknowledge that enabling the MIC to hear appeals or requests for annulment may not be sufficient to promote consistency. They further explain that the above suggestion would be effective if combined with other institutional features.[906] For instance, the MIC could perform a similar role as the CJEU[907] which the arbitral tribunals and domestic courts can submit requests for a preliminary ruling on the question of international law in exceptional circumstances to achieve consistent interpretation of applicable law.[908] In other words, instead of national courts of European member states, in the field of foreign investment, arbitral tribunals should be authorised to make a reference and request the MIC to clarify a point concerning the interpretation of an applicable treaty.

Even though there are some considerable benefits in the above suggestion for the development of interpretative coherence, it is not transferrable to the proposed MIDSI system for several reasons. First, there exists no mechanism to bind the requested tribunal with the MIC's interpretation. Next, no consequences have been discussed in a case where the tribunal fails to give effect to the interpretation. Also, no study has examined whether the contracting parties agree with empowering the MIC to offer a binding interpretation of treaty provisions.

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[904] Legum (n 34) 234.
[905] Dolzer *et al.,* (n 14).
[906] Schill and Vidigal (n 877).
[907] Court of Justice of the European Union, available at: < https://www.europarl.europa.eu/factsheets/en/sheet/26/the-court-of-justice-of-the-european-union > accessed 23 May 2023.
[908] C. H. Schreuer, "Preliminary Rulings in Investment Arbitration" (2008), *Transnational Dispute Management*, No. 3; K. Diel-Gligor "International Investment Jurisprudence, A Preliminary Ruling System for ICSID Arbitration" (2017), *International Investment Law Series*, Vol. 7, No. 1.

The main difference between the CJEU and the proposed MIC is the supremacy of EU law over national law.[909] Moreover, it is questionable whether it is possible to convince arbitral institutions, such as the ICSID to amend their framework to fit such a suggestion. Additionally, establishing a preliminary ruling procedure within the proposed MIDSI system, apart from increasing the risk of creating abusive power for the MIC, contradicts the hallmarks of the system, which are flexibility, and respecting the freedom of parties to choose their preferred method of dispute settlement. Forcing tribunals to follow and give effect to the provided interpretation of the MIC, in practice, the solution for the submitted dispute has been provided by the MIC rather than the arbitral tribunal that the disputing parties initially selected.

Furthermore, they claimed that, like the ICJ,[910] the MIC could have jurisdiction to issue advisory opinions in respect of some specific points for interpretation of IIAs, such as in a case when the first instance dispute resolvers are of opposing views.[911] A similar scenario could also happen under the CPTPP/TPP/USMCA, where the tribunal provides divergent decisions regarding interpreting a single text. Empowering the MIC to provide advisory opinions could contribute to developing interpretative coherence. It is because it potentially enables the dispute resolvers who disagree with the adopted interpretation of a shared norm by a particular tribunal which substantially contradicts another tribunal's interpretation, to refer the question to the MIC for an advisory opinion. Although the MIC could provide advice, by considering its non-binding character and that the tribunal which requested advice is free to give effect to it, the actual contribution of such a procedure towards the development of consistency of interpretation of the investment norms is dubious. Also, there is no evidence to prove whether the arbitral tribunals and domestic courts are willing to submit a question to the MIC.

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[909] Treaty on the Functioning of the European Union, Treaty on European Union - Maastricht Treaty, Treaties of Rome, Treaty of Amsterdam, Treaty of Lisbon. See, *Macarthys v Smith* [1979] 3 All ER 325, per Lord Denning MR.

[910] International Court of Justice, "Judgement, Advisory Opinions and Orders", (2022), available at: < https://www.icj-cij.org/en/decisions > accessed 23 May 2023.

[911] Schill and Vidigal (n 877).

One more suggestion put forward by these scholars for decreasing the risk of fragmentation procedure is to enable the tribunals, in consultation with the parties, to select two or more technical experts to provide extra support and opinion for them to reach accurate decisions.[912] The issue with such a suggestion is there is no obligation for the dispute resolvers to either appoint any expert or to follow their opinions.

It is evident that the proposed MIDSI mainly focused on the defragmenting role of the MIC. It raises some issues. Firstly, the scholars should clarify whether any alternative solutions are available had a MIC never been established by the EU. Secondly, they must discuss whether parties can still submit a subsequent claim to another dispute settlement method if the decision made by the initial tribunal is claimed to be either unacceptable or defective. Permitting both or one of the disputing parties to submit their dispute to a subsequent tribunal would increase the likelihood of rendering inconsistent decisions in the proposed MTIDS system. It would only restart the clock and create a basis for the occurrence of a similar problem in the newly proposed system. There would be no basis for enhancing the consistency if the parties were not obliged to exclude further procedures at the time of agreeing on the initial dispute settlement forum.[913]

It must be noted that the thesis's suggested FIMTDS and the MIDSI proposed by Schill and Vidigal are two different systems despite sharing a few similar features. In this section, the author explained all the reasons behind the thesis's disagreement with the idea of institutionalism put forward by these scholars. This thesis supports establishing the FIMTDS as it is compatible with the current state of the IIL regime. It reasoned that due to the current geopolitical climate, it is impossible to obtain the consent of the majority of states regarding

[912] UNCLOS (n 891), Article. 289.
[913] See, *Southern Bluefin Tuna (New Zealand v Japan, Australia v. Japan) Award on Jurisdiction and Admissibility* (4 August 2000) 39 ILM 1359. In this case it has been argued that the jurisdiction of UNCLOS tribunals could not be triggered because the parties had already agreed to use the dispute settlement procedures under Article. 16 of the CCSBT which excluded recourse to UNCLOS dispute settlement procedures.

the conclusion of an international investment treaty such as the envisaged MIDSI Agreement. Therefore, this thesis claims that its suggested FIMTDS could operate in the meantime until the creation of the necessary basis for reform of substantive rules (i.e., concluding a MIA) that could subsequently pave the way for fundamental reform of the foreign investment dispute settlement system.

6.3.1 Evaluating the Foreign Investment Multi-Track Dispute Settlement System

The focus of this sub-section is on evaluating the proposed FIMTDS against the criteria of legitimacy, efficiency, and transparency, which correspond directly with the rule of law benchmarks. In addition to analysing the above criteria, it considers the feasibility of the proposed FIMTDS.

A) Feasibility

Unlike the MIDSI, integrating various models (i.e., the MIC and other arbitral tribunals) is not an issue in this thesis's suggested FIMTDS since all the dispute settlement mechanisms are available, and there is no requirement for their integration due to the lack of an institution. In other words, each method operates individually and there is not any direct or indirect relationship between them. Accordingly, there is no need to conclude an agreement for the establishment of any institution.

Nonetheless, this thesis suggests that it is crucial to conclude a particular convention for establishing the proposed FIMTDS. This is because, without such a convention, the states would have to amend all their existing BITs, which this would subsequently create further hardships for them. The envisaged convention would release states from the burden of pursuing

the potentially complex and lengthy amendment procedures outlined in their existing investment agreements. Indeed, such a convention, akin to the Mauritius Convention,[914] would directly apply to existing treaties of the states that wish to sign and ratify it. In fact, it will modify numerous treaties at once in order to create a legal and legitimate ground for the functioning of the proposed FIMTDS.

It must be clarified that like the Mauritius Convention, the proposed FIMTDS convention would not only apply to investment treaties conducted after its conclusion date, but an efficient mechanism should be introduced through which states can express their consent to its application, which arose out of earlier treaties (prior to the ratification date of the envisaged FIMTDS Convention). Similarly, it could be drafted in a way to extend its retrospective effect to the investment contracts if the parties agree to amend their existing contracts (i.e., adding a new clause) to give their consent to the application of this convention.

It can be claimed that including most, if not all, of the dispute settlement methods within the suggested FIMSTD (particularly those supported by the developing states), would create a trust base for many states and subsequently encourage them to support establishing such a system. Thus, it is highly likely that several states show willingness to sign and ratify the envisaged FIMTDS convention since they have favoured different mechanisms following their political stance.

B) Legitimacy

The legitimacy concerns associated with Schill and Vidigal's proposed MIDSI discussed above are irrelevant to the FIMTDS. This is because the aim of the FIMTDS

[914] The Mauritius Convention (n 344).

agreement is not to set up a new institution or codify a set of multilateral investment rules (i.e., a MIA). It merely focuses on enabling the disputing parties to choose their preferred method of dispute settlement in accordance with the nature, content, and character of their disputes. The introduction of an opt-in mechanism creates an opportunity for the states that are unable or unwilling to make their decisions in respect of signing such an agreement at its early stage, the direct result of which is free states (i.e., developing states) from all the political pressures in respect of obtaining formal consensus.

Another considerable aspect of the FIMTDS is there is no prerequisite for a MIC to serve as a model to address the issues of procedural fragmentation and inconsistent decisions. Instead, this thesis attempts to tackle these issues by utilising different mechanisms similar to those employed by the new EU's FTAs.

The new EU's FTAs have included a clause to prevent parallel and subsequent proceedings, which would reduce the risk of inconsistent decisions. For instance, the CPTPP prohibits recourse to domestic courts by requiring a waiver of such proceedings once the ISDS proceeding is initiated.[915] Likewise, it provides the requirement of the exclusion of recourse to ISDS once domestic proceedings are initiated, yet, only towards Chile, Mexico, Peru, and Vietnam.[916] CETA also provides the possibility of consolidating claims. It contains a fork-in-the-road clause which prohibits parallel domestic and international proceedings. It means that any future recourse to domestic or other international proceedings is required to be waived by investors. It has prohibited the inter-state proceedings in parallel to ISDS.[917]

In addition, the USMCA, apart from providing the possibility of consolidating claims, includes a unilateral fork-in-the-road clause which prohibits the submission of claims against Mexico in respect of a breach of a USMCA investment obligation before a Mexican court or

[915] See CPTPP/TPP, Article. 9.21(2)(b).
[916] See CPTPP/TPP, Annex 9-J.
[917] See CETA, Article. 8.42(1).

administrative tribunal. Finally, under India's 2016 Model BIT, tribunals are required to stay their proceedings had a parallel claim been brought under another international agreement which could result in an overlap of compensation or the creation of a significant impact on the investment arbitration.[918] It attempted to prevent parallel proceedings at the international and domestic levels by prioritising the exhaustion of local remedies rule at the expense of setting aside ISDS. Indeed, it requires investors to recourse to domestic courts or administrative instances initially, and if no successful outcome was achieved, they take the matter to ISDS.[919]

This thesis claims that the suggested FIMTDS could follow a similar approach to prevent the occurrence of any parallel/multiple proceedings and minimise the risk of rendering inconsistent decisions by different dispute settlement forums. The envisaged FIMTDS convention could contain a provision which imposes an obligation on the disputing parties to waive the right of recourse to all the available domestic and international dispute settlement mechanisms upon submission of a dispute to their preferred means. Such a provision could address the concern of those who believe that the availability of various forums could lead to further fragmentations caused by the complications arising from parallel proceedings in national and international tribunals.

Furthermore, the proposed FIMTDS attempts to address the criticisms associated with ISDS regarding the independence of the party-selected arbitrators and the legitimacy of their rendered awards by offering various national and international dispute settlement methods. In fact, this system enables the parties to select a method under which they believe dispute resolvers who are accountable, independent, and impartial, such as the state-to-state adjudication settlement (i.e., ICJ), could efficiently resolve their dispute. At the same time, this system would still respect the view of those who assert that their dispute could be appropriately

[918] See India Model BIT, Article. 14.
[919] *Ibid*, Article. 14.3.

resolved by arbitrators since, in comparison with national or international judges, they have expertise, experience and knowledge to deal with technical issues associated with foreign investment disputes, evaluate the evidence and arguments presented by the parties and, their findings would not be negatively affected by any national element.[920] Yet, to enhance the democratic accountability of dispute resolvers and ensure the provision of decisions that contain features associated with the rule of law, it can be suggested that the proposed FIMTDS Agreement should incorporate a provision which imposes an obligation on all the dispute resolvers, including arbitrators to provide their detailed reasons/justifications behind their decisions, in particular, if their decision would negatively affect the host states' regulatory ability.

C) Efficiency

It should also be emphasized that the multi-track system would yield the efficiency alluded to earlier in the thesis. This thesis suggests that the drafter of the proposed FIMTDS convention should set up a committee which consists of highly skilled experts whose task is to conduct a comprehensive study (i.e., assessing the relevant statistics and records) to consider the content, nature and character of disputes which could potentially and frequently arise in the course of foreign investment. Subsequently, based on the outcome of such a study, they must prepare a non-exhaustive list that categorises various foreign investment disputes and accordingly suggest the most appropriate method for each category identified in such a list. For instance, the state-to-state judicial settlement method could better resolve essential security interest (ESI)[921] disputes since the scope of such disputes goes beyond the commercial capacity of

[920] Dimitropoulos (n 305).

[921] The investment protection offered under BITs is generally subject to an exception clause by which States may preserve important national interests (i.e., national security, restoration of peace, maintenance of public order). Such an exception clause is known as an 'essential security interests" (ESI) clause'. In practice, the ESI clause has been relied on by states in investment arbitration as a defence against the investor's claims regarding

investment arbitral tribunals and involves several public law considerations.[922] The review of the cases of *CMS*, *Enron*, *Sempra*, *LG&E* and *Continental Casualty* ,[923] which concern the interpretation of the ESI clause brought by investors under the US-Argentina BIT, clearly demonstrates that the tribunals in these cases reached inconsistent decisions. Notably, even the CSID Annulment Committees could not adequately address the inconsistency created by the tribunal in these cases.[924]

In addition, it has been apparent from assessing these cases[925] that the investment arbitral tribunals had failed to consider the distinction between an ESI clause and the general defence of necessity (necessity doctrine) available under customary international law.[926] Moreover, they have not been able to consistently and accurately take into account the host states' right to preserve their regulatory space while interoperating such a clause in a given dispute. The tribunals in the Argentinian cases[927] held states to a much higher standard, the result of which was the creation of a hurdle for them to prove that any economic emergency measures taken

breach of BIT obligations. See, J. W. Salacuse, *The Law of Investment Treaties* (2nd edition, Oxford University Press, 2015) 377-378; W. Burke-White and A. von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures provisions in Bilateral Investment Treaties" (2008), *Virginia Journal of International Law,* Vol. 48.

[922] The ESI clause defence is closely related to the more general defence of necessity in international law (aka the necessity doctrine). See, T. Gazzini et al., "Necessity Across International Law: An Introduction" (2010), *Netherlands Yearbook of International Law*, Vol. 41, No. 3.

[923] *CMS Gas Transmission Co. v Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005); *Enron Corporation Ponderosa Assets, L.P v Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007); *LG&E Energy Corporation and Others v Argentine Republic*, ICSID Case No. ARB/04/4, Award (25 July 2007); *Sempra Energy International v Argentina*, ICSID Case No. ARB/02/16, Award (28 September 2007), para 378; *Continental Casualty Co. v Argentine Republic*, ICSID Case No. ARB/03/9, Award, (5 September 2008).

[924] See, *Enron Creditors Recovery Corp Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 July 2010), para 405; *Sempra Energy International v Argentina*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award (29 June 2010), paras 160- 165.

[925] *Supra* note 923.

[926] For instance, the tribunal in the case of *LG&E Energy Corporation and Others v Argentine Republic* chose not to equate Article XI of the BIT with Article 25 of Responsibility of States for Internationally Wrongful Acts 2001, see, United Nations, "Draft Articles on Responsibility of States for Internationally Wrongful Acts" (2001), available at: < https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf > accessed 23 October 2023.

[927] *Supra* note 922.

were the only way out of an economic crisis labelled as a state of necessity.[928] For instance, the tribunal in the *CMS*[929] illustrated that states would face numerous problems in justifying the criteria for necessity set out under Article 25 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts, in particular when it comes to economic crises.[930]

On the other hand, the ICJ, in the case of *Gabčikovo Nagymaros Project,*[931] experienced no difficulty in recognising that the necessity defence is based in customary international law "for precluding the wrongfulness of an act not in conformity with an international obligation... on an exceptional basis."[932] Thus, it seems that the ESI disputes could be efficiently resolved through state-to-state judicial settlement method (i.e., submitting a dispute to the ICJ) since it can properly consider and interoperate an ESI clause in line with the general defence of necessity available under customary international law and subsequently reach a reasonable and fair decision.[933] Interpreting an ESI in line with the necessity doctrine is vital to settle the related disputes since the ESI clause contained in several BITs (like the US-Argentina BIT) did not clarify the meaning of key terms and phrases such as "necessary" or "essential security interests", which this has consequently led to inconsistent interpretations by investment tribunals. Alberto Alvarez-Jiménez has affirmed this by arguing that, "the more acceptable route is to make the requirements set in Article 25 workable within the investment regime".[934]

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[928] A. Reinisch, "Necessity in Investment Arbitration" (2010), *Netherlands Yearbook of International Law,* Vol. 41, 137, 149.
[929] *CMS Gas Transmission Co. v Argentine Republic* (n 923).
[930] United Nations, "Draft articles on Responsibility of States for Internationally Wrongful Acts (with commentaries) 2001, available at: < https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf > accessed 27 October 2023; Responsibility of States for Internationally Wrongful Acts 2001 (n 926).
[931] *Gabčikovo Nagymaros Project*, (Hungary/Slovakia) (Judgment) [1997] ICJ Rep 7, Para 50.
[932] *Ibid*, para 50-51.
[933] See the case of *Elettronica Sicula SpA (ELSI), United States v Italy* (n 588).
[934] A. Alvarez-Jiménez, "Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law: A New Approach Based on the Complexity of Argentina's 2001 Crisis" (2010), *Journal of International Arbitration*, Vol. 27, 141- 149.

Furthermore, another advantageous aspect of this method is the home state could seek remedy under international law on behalf of its injured national through commencing a state-to-state exercise to achieve compliance. This is because in inter-state disputes, compliance has been considered political and has not been a matter for legal consideration.[935] Legal means are insufficient and political involvement may become inevitable, even though it might go against the core objective of the ISDS system to depoliticize the process.[936]

Apart from the state-to-state judicial dispute settlement, state-to-state arbitration could also efficiently settle a particular category of disputes. For instance, it could deal with investment-related disputes that might arise in the course of foreign investment, including situations involving armed conflict or civil disturbances if the host state has initially agreed to provide protection to covered investment in such circumstances.[937] It appears that, in such situations, the home state is in a better position to make constructive dialogues with the host states to resolve the relevant dispute since they might have experienced similar issues within its territories in the past. Likewise, considering the reasonings and final decisions of the tribunal in *Italy v. Cuba*,[938] it can be claimed that state-to-state arbitration could properly deal with the cases where the host states' conduct has not only violated the rights of foreign investors but also impacted the home states' rights.

Another category of disputes could be efficiently settled by mediation. It is a complementary method which could be utilised to reach an early settlement during the 'cooling

[935] A. Rajput, "Non-Compliance with Investment Arbitration Awards and State Responsibility" (2022), *ICSID Review*, Vol. 37, No. 1.
[936] *Ibid*.
[937] UNCTAD, "Dispute Settlement: State-State" (2003), available at: < https://unctad.org/system/files/official-document/iteiit20031_en.pdf > accessed 23 October 2023.
[938] *Italy v. Cuba* Interim Award (Sentence Preliminaire entre Republic D'italie et Republique de Cuba) (March 15, 2005). In this case, Italy espoused the claims of its nationals and demanded from Cuba compensation for the losses they suffered. In addition to the espoused claims, it also brought forward within the same proceedings a claim for the violation of its own rights under the treaty through Cuba's conduct and asked the tribunal to find that Cuba had violated 'the terms, the spirit, and the purpose of the BIT'. The tribunal followed Italy's position and admitted both claims.

off period'.[939] Such a method has the benefit of resolving disputes at their early stage and saving considerable time and cost for the disputing parties. In many ISDS cases, even the winning parties do not perceive the award issued in their favour as sufficiently satisfactory since the awards amount to millions of dollars, many of which have been challenged, reduced, sometimes partially annulled or remain unpaid.[940] These are some of the possible risks that both disputing parties may incur after years of disputes, including loss of profits and legal fees. In addition, it allows the parties to focus on the business needs that are possibly still underneath the investment when the dispute arises. The evidence demonstrates that mediation has been utilised under various IIAs.[941]

In addition, on 19 July 2016, the Energy Charter Conference approved the decision containing the Guide on Investment Mediation "an explanatory document designed to encourage Contracting Parties to consider using mediation on voluntary basis as one of the options at any stage of the dispute to facilitate its amicable solution".[942] The guide contains a non-exhaustive list of situations when the parties may consider choosing mediation for settling their disputes. For instance, the parties, to assess whether mediation is the most appropriate method for the resolution of their particular dispute, could consider whether mediation is a more suitable method if "maintaining a relationship is more important than the substantive outcome for parties, parties do not require interim relief, a party would seek some non-

[939] "Cooling-off period" in BITs or FTAs can be defined as the timeframe between the notification of the claim to the opposing party and the initiation of the dispute resolution proceedings, either before an arbitral tribunal or a domestic court. Negotiations usually take place during this period to try and reach an amicable settlement, see Max Planck Institute, "Colling Period (Investment Arbitration)" (2017), *Max Planck Luxemburg Working Paper,* No. 7.

[940] Bohmer (n 449); Yannaca-Small (n 451); Webster (n 452); Audley (n 452).

[941] 10 cases under the Energy Charter Treaty (ECT) 1991, 3 cases under the NAFTA, and 3 cases under the Russian Federation-Ukraine BIT, see, UNCTAD, "Investor-State Dispute Settlement: Review of Developments in 2016", available at: < https://investmentpolicy.unctad.org/publications/172/investor-state-dispute-settlement-review-of-developments-in-2016#:~:text=Developments%20in%20investor%2DState%20arbitrations,by%20investors%20from%20developed%20countries > accessed 27 October 2023.

[942] International Energy Charter, "Guide on Investment Mediation" (2016), available at: < https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf > accessed 27 October 2023.

monetary relief such as an apology, a public statement or acknowledgement to third parties, matters of fundamental principle are not at stake".[943] It must be noted mediation may not be an appropriate method for settling a wide range of disputes. This is mainly due to various barriers that states and investors might face in the process of resolution of their disputes through the utilisation of this method, such as the public nature of both the respondent and the measures at issue, the inability of the parties to assess the merit of their cases due to uncertainties in the governing principles applicable to investor-state claims, and the political convenience of accepting an imposed decision and the reluctance of governments to take ownership over the settlement.[944] Nevertheless, the utilisation of such a method is particularly advantageous when there is a need to preserve an ongoing relationship (i.e., long-term investments) due to the major interests underneath of both the host country and the foreign investor.

Moreover, the exhaustion of local remedies could also be a considerable method for settling particular disputes, such as those involving taxation, natural resources or obligations in treaties with indigenous peoples. This method could be appropriate and preferred by foreign investors for resolving such disputes in the first place if they have sufficient confidence in the quality of the host states' judicial system. For instance, if the host state provides access to highly respected and developed courts in which highly qualified judicial who are well versed in the relevant jurisprudence and are able to consistently and accurately apply the related domestic investment law and international law (i.e., both the IIAs and the international law).[945] Resolution of foreign

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[943] *Ibid*.

[944] See M. A. Clodfelter, "Why Aren't More Investor-State Treaty Disputes Settled Amicably?", in S. Franck and A. Joubin-Bret, UNCTAD (eds.), "Investor-State Disputes: Prevention and Alternatives to Arbitration II" (2011), available at: < https://unctad.org/system/files/official-document/webdiaeia20108_en.pdf > accessed 27 October 2023; M. Dahlan and W. Von Kumberg, "Investor-State Dispute Settlement Reconceptualized: Regulation of Disputes, Standards and Mediation" (2018), *Pepperdine Dispute Resolution Law Journal*, Vol. 18, No.3.

[945] M. Dietrich Brauch, "Exhaustion of Local Remedies in International Investment Law" (2017), *IISD Best Practices Series*, available at: <https://www.iisd.org/library/iisd-best-practices-series-exhaustion-local-remedies-international-investment-law > accessed 27 October 2023; Agreement between the United States of America, the United Mexican States, and Canada (2018), Annex 14-C (Legacy Investment Claims and Pending Claims), para. 3, available at: < https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between > accessed 27 October 2023; CETA, Article 8.18(3).

investment disputes by the competent and developed host states' national courts is of a considerable number of benefits. Firstly, similar concerns (i.e., lack of consistency, legitimacy and transparency) to the ISDS system are not associated with this method.[946] The domestic courts could increase predictability by providing a precedent-based interpretation of investor protection rules while providing opportunities for appeal. Secondly, affected third parties (i.e., NGOs and civil societies) could participate in domestic judicial proceedings.[947]

It must be stated that although the suggested FIMTDS list is not mandatory and the disputing parties could still reject its suggested method, it could provide valuable guidance for the parties and assist them in observing their dispute from other perspectives and consequently making a more reasonable choice following the assessment of the given disputes' content and character. It would inevitably lead to a decrease in the cost and the time of the dispute settlement. In addition, this could reduce the temptation of the parties to subsequently submit a claim to a different proceeding to deal with the same issues since, following the conduction of a detailed assessment, they gained an assurance that their primary selected method is the most efficient one among all the available means for settling their disputes.

D) Transparency

As stated in chapter one, one of the key areas of the umbrella protections of the rule of law is the necessity of transparency of dispute settlement proceedings (i.e., easy access to procedures and information for parties and the public).[948] It is particularly significant in the

[946] UNCTAD, "World Investment Report 2015: Reforming International Investment Governance" (2015), available at: <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245 > accessed 27 October 2023; Government of the Republic of India, Model text for the Indian Bilateral Investment Treaty (2015), available at: < https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download > accessed 27 October 2023; Reciprocal Investment Protection and Promotion Investment Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (2016), available at: < https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3711/morocco—nigeria-bit-2016- > accessed 27 October 2023.
[947] *Ibid*, *supra* note 944.
[948] Chapter I, 30-32

foreign investment regime due to the involvement of public interest in the foreign investment claims. Nevertheless, the lack of confidentiality could potentially provide several negative consequences, such as the risk of disclosure of secret and sensitive information.[949] Thus, it is vital to create a balance between maintaining confidentiality and transparency.

The proposed FIMTDS attempts to create the necessary balance by offering various dispute settlement methods and each provides a different degree of transparency. This means that considering the content and character of a given dispute (i.e., the involvement of trade secrecy), a specific category of methods could be suggested. For instance, state-to-state arbitration is not a suitable method for resolving disputes where third-party participation and witness statement submission are necessary. This is because state-to-state arbitral tribunals would not readily permit third-party participation, including foreign investors, because of customary practice and notions of state sovereignty and governmental secrecy.[950] An investor or any other third parties who might have a stake in the state-to-state arbitration proceedings will face significant challenges to attend such a proceeding.

It must be noted that in some investment disputes, the participation of international organisations, corporations and individuals is of significant importance. The participation of these actors would have been impossible had state-to-state arbitration been the only available mechanism to deal with all foreign investment disputes. It has been evident in the field of the law of the sea. The ICJ is only open to the states, yet, in some law of the sea's matters, it is crucial to allow individuals to bring an action, and this was not possible if the only available forum was the ICJ.[951]

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[949] *Supra* note 327.
[950] G. Born, *International Arbitration: Law and Practice* (Kluwer Law International 2021) 439-42, (Territorial boundary disputes and post-conflict settlements were particularly common subjects of state-to-state arbitration.)
[951] Statute of the International Tribunal for the Law of the Sea, Article. 20(2), Annex. VI. Australia, Cyprus, USA, Yogoslavia, Peru, Zaire, Tunisia, Ecuador, and Fiji made their statements in the Plenary during the fourth session (1976) to support the ITLOS as forum.

On the other hand, ISDS could be an appropriate mechanism for settling disputes, the proper resolution of which require third-party participation.[952] It is notable that after the adaptation of the new transparency rules,[953] the investment arbitral tribunals have taken a new approach towards creating a balance between confidentiality and transparency. Indeed, reviewing some of the recent cases demonstrates that some tribunals have conferred substantial weight on the views of *amici* when deciding a given case.[954] The tribunals in *Philip Morris* stated that when *amici* proved their particular expertise about the issues on which they seek to participate, tribunals would generally agree with permitting their submissions.[955] Similarly, the tribunal in the case of *Biwater Gauff* allowed several sustainable development advocacy groups to submit *amicus curiae* briefs following the reasoning provided in the *Philip Morris* case.[956] The tribunal in *Methanex* went further and held that, "even if no public interest would be affected, amicus submissions should be accepted because of the additional desirable consequence of increasing the transparency of investor state arbitration".[957]

Although the tribunals have acknowledged the importance of permitting *amicus curiae* briefs in a number of cases, they have consistently recognised the significance of ensuring fairness and efficiency of the procedure when considering amicus submissions. This is known as the tribunal's 'gate-keeping role'.[958] For instance, the tribunal in *LSF-KEB v Korea* rejected

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[952] Chapter III, 96-103.
[953] ICSID Convention, Regulations and Rules 2022, (n 328), Articles 63,64,65, and 68; UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014 (n 329), Articles 2, 3,4, 5, and 7; Mauritius Convention on Transparency 2014 (n 344), Articles 2,3, and 6.
[954] E.g., the submissions of the World Health Organization in the case of *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7 (8 Jul 2016).
[955] *Ibid*, paras 389–410.
[956] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 5 (2 February 2007), para 54.
[957] *Methanex Corp v United States of America,* UNCITRAL, [2005], Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae' (15 January 2001), available at: < https://www.italaw.com/cases/683 > accessed 27 October 2023.
[958] *Ibid*, para 50; UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-Third Session (2010), UN Doc A/CN.9/712 (2010) para 47; *UPS v Canada*, UNCITRAL, Petition of the Canadian Union of Postal Workers and the Council of Canadians (10 May 2001) para 69 ('The power of the Tribunal to permit amicus submissions is not to be used in a way which is unduly burdensome for the parties or which unnecessarily complicates the Tribunal process.'); *Aguas Argentinas SA, Suez, Sociedad General de*

an *amicus* application on the ground that the application would unduly increase the costs of the proceedings or prejudice one of the parties.[959] It held that, "it was very late in the proceedings, in circumstances where it could have been made a long time ago. This delay would cause significant difficulties including significant extra costs, for the Disputing Parties".[960] A similar reasoning was provided in the *Resolute Forest* case in which the tribunal rejected an *amicus* application by stating that, "among other things, it would unnecessarily burden the [disputing parties] by imposing further work, time and expense on them".[961]

It can be claimed that the tribunals in all the above cases have reached reasonable decisions. They demonstrated that they are able to assess and make a distinction between admission of the *amicus curiae* briefs, which would be beneficial for the efficiency of the procedure and subsequently assist them in reaching an accurate decision and preventing *amicus* participation, which could highly likely lead to unfair prejudice, mistreating either party and disruption to the arbitration process.[962] It has been highlighted in the case of *Infinito Gold Ltd*, in which the tribunal acknowledged that, "it is the duty of the arbitral tribunal to ensure that the *amicus* acts as a 'friend' of the tribunal and that there is no unfair prejudice or disruption to the arbitration process".[963]

Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic, ICSID Case No ARB/03/19, para 29 ('the Tribunal will endeavour to establish a procedure which will safeguard due process and equal treatment as well as the efficiency of the proceedings'); *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales v The Argentine Republic*, ICSID Case No ARB/03/17, (17 March 2006), para 28 (Order in Response to a Petition for Participation as Amicus Curiae).

[959] *LSF-KEB Holdings SCA and others v Republic of Korea*, ICSID Case No ARB/12/37, Procedural Order No 15 (21 December 2015).

[960] *Ibid, Philip Morris* (n 954) paras 52, 55.

[961] *Resolute Forest Products Inc. v Government of Canada*, UNCITRAL, PCA Case No 2016-12, Procedural Order No 6 (29 June 2017) paras 1.1–1.4.

[962] Most institutional rules and national arbitration legislation mandatorily require equality of treatment of the parties or impose mandatory due process requirements. Even in jurisdictions where there are no express statutory provisions requiring equality of treatment and due process, national courts have imposed similar mandatory procedural requirements. See, G. Born and S. Forrest, "Amicus Curiae Participation in Investment Arbitration" (2019), *ICSID Review*, Vol. 34, No. 3; UNCITRAL Rules (2010), Article 17; ICDR Rules (2014), Article 16(1).

[963] *Infinito Gold Ltd v Republic of Costa Rica*, ICSID Case No ARB/14/5, Procedural Order No 2 (1 June 2016) para 38.

In addition, another suitable option is the exhaustion of local remedies since the affected third parties have been permitted to participate in domestic judicial proceedings. Also, the public has access to the national courts' final decisions.[964]

The EU proposed MIC could also be an appropriate method for settling disputes in which third-party participation is necessary. In chapter five, it was discussed that there is no clear information about the EU's plan for enhancing transparency rules (i.e., regarding public hearings and third-party participation). As a result, it assessed the relevant provisions incorporated in the EU's new FTA[965] to examine to what extent the EU's MIC could successfully enhance transparency. It was illustrated that although the new FTAs grant leeway for enhancing transparency through adopting, modifying, and extending the UNCITRAL Transparency Rules,[966] they emphasize the necessity of drawing a balance between providing ample access to information and retaining private information, which could hamper dispute settlement proceedings. It must be noted that since the proposed MIC has not yet come into existence, it is impossible to examine the performance of the MIC in terms of applying such rules to the related dispute.

All in all, it can be argued that although both the UNCITRAL Transparency Rules and the new FTAs' relevant provisions have some flaws (i.e., failed to determine the type of information that might have impeding effects), at least in principle, their attempts to draw such a balance should be regarded as valuable until the time has come to establish an MIA which contains a set of codified rules in respect of transparency of proceedings.

6.4 Conclusion

[964] *Supra* note 944.
[965] ESIPA (n 764); CETA (n 542); EVFTA (n 639).
[966] Chapter V, 186-190.

The chapter clarified the most significant obstacle which prevents the introduction or labelling of a single dispute settlement mechanism as the most appropriate alternative for ISDS. It demonstrated that without overhaul reform of the framework of IIL, it is not possible to promptly develop the foreign investment dispute settlement system. The conclusion of a MIA could indeed lead to the achievement of the necessary legitimacy, consistency, and transparency. Such a treaty would remove the decentralised and fragmented character of the IIL by replacing all the existing bilateral and regional treaties. It comprises a globally accepted set of rules that apply to all investment disputes. Also, it improves consistency as the tribunals could similarly interpret the law. In addition, it would gradually contribute to eliminating the well-known issues of the treaty, forum, and nationality shopping, which are associated with ISDS. Taking this into consideration, this chapter examined a number of significant reasons behind the failure of all the previous attempts to negotiate such a treaty. Unfortunately, the two main reasons; the controversies between developed and developing states in respect of agreeing on universal norms and the political tendency to retain the bilateral nature of investment agreements, are still in existence.

Having explained that currently, it is not possible to reform the IIL led the thesis to conclude that no single mechanism is of the required capacity to be the most appropriate mechanism for settling foreign investment disputes. However, the author conducted a further study to clarify what steps can be taken to make a development, even minor, to the foreign investment dispute settlement process until such a time as a MIA can be concluded. The outcome of such a study is the establishment of a multi-track dispute settlement system that enables the investment parties to choose their preferred model amongst all the available dispute settlement mechanisms in accordance with the content, nature, and character of their dispute. The creation of such a system is the most achievable suggestion which can currently be put forward to improve the foreign investment dispute settlement system. The core justification is

that states still prefer the bilateral nature of agreements, and each of them includes their desirable method of dispute settlement within their agreement. It would be challenging to convince all or most states to agree to label a single mechanism for resolving all investment disputes. In addition, creating competition between different models could lead to increasing inconsistency.

This chapter attempted to build on the recently proposed MIDSI system by addressing its limitations and deficiencies. Additionally, this chapter refined the proposal further by proposing the idea of establishing FIMTDS. It is because this thesis disagrees with the idea of institutionalism. It explained the reasons for such a disagreement. The new proposal failed to clarify whether it is possible to democratically obtain the consent of the majority of the states in respect of establishing such a system. The suggested mechanism for integrating various dispute settlement methods has also proved to be futile. Likewise, the suggestions for reducing the fragmentations associated with ISDS were also ineffective since the proposal failed to consider that by maintaining the bilateral nature of obligations, the MIC, even as a reviewing body for other models, could not bring coherence and integrity into that body of law.

Unlike the recent scholarly work of Schill and Vidigal, this thesis does not claim that establishing a FIMTS system is the ultimate solution for developing the current foreign investment dispute settlement system. It is because such a system is not able to address all deficiencies associated with ISDS. However, the author reasoned that establishing this system is the most achievable solution in the interim until the creation of a basis for reforming the framework of the IIL regime (i.e., concluding an MIA).

The main driver behind putting forward such an argument is the proposed FIMTDS corresponds with the benchmarks of legitimacy, efficiency, transparency and feasibility discussed in chapter one. The FIMTDS attempts to tackle the issues of procedural

fragmentations and inconsistent decisions by incorporating a provision into the envisaged FIMTDS convention which imposes an obligation on the disputing parties to waive the right of recourse to all the available dispute settlement methods upon submission of a dispute to their preferred means. In addition, it endeavours to address the criticisms associated with ISDS regarding the independence of the party-selected arbitrators and the legitimacy of their rendered awards by enabling the parties to select their most preferred method among various national and international dispute settlement methods, and subsequently respect their choice.

This thesis demonstrated that the FIMTDS could enhance its efficiency by setting up a committee encompassing highly skilled investment experts to prepare a non-exhaustive list that categorises various foreign investment disputes and accordingly suggests the most appropriate method for each category identified in such a list. Likewise, the proposed FIMTDS could create a balance between maintaining confidentiality and enhancing transparency by allocating a method which preserves a high level of confidentiality for the specific category of disputes involving protected information (trade secrecy).

The author demonstrated that establishing the proposed FIMTDS is also feasible through the conclusion of a convention, akin to the Mauritius Convention, which would directly apply to existing treaties of the states that wish to sign and ratify it. Likewise, the FIMTDS, by including most, if not all, of the dispute settlement methods, creates a trust base for many states and subsequently encourages them to sign and ratify the envisaged FIMTDS convention.

Another significant driver behind proposing the FIMTDS is the successful performances of similar multi-track dispute settlement systems, which exist in other international regimes, such as the international law of the sea and the competition law. The substantial aspects of these systems, such as the existence of formal and informal mechanisms and the flexibility in selecting the most desirable method, led this thesis to claim that they can

serve as suitable models for the suggested FIMTS. In addition, apart from the general advantageous aspects, there is no need for concluding a specific agreement for creating such a system, integration is not a concern in this system, and its establishment does not depend on the availability of a specific method such as a MIC. Undoubtedly, there are still various issues which must be further considered before establishing such a system in the foreign investment regime.

Chapter VII: Conclusion

7.1 Answering the Research Questions

The introductory chapter of this thesis defined the central question which the research sought to address; examining whether the EU's proposed MIC system is the most appropriate alternative for the system of ISDS. Nevertheless, this was just the primary question. It raised several ancillary questions, such as: whether ISDS is still an effective mechanism for resolving foreign investment disputes, and whether any other alternative methods could address all or the majority of the deficiencies associated with the current ISDS system.

The findings of this thesis which have been discussed in the previous chapters, support a number of specific conclusions:

I) ISDS is not an effective mechanism for resolving foreign investment disputes.

Although in the early days, ISDS had a successful performance in respect of settling foreign investment disputes, in recent decades, its efficiency has been questioned. The critics claim that it is currently suffering from several fundamental deficiencies. Regardless of the discussed issues, such as the high cost and delay, the central problems associated with this mechanism are the crisis of legitimacy, inconsistency, and lack of transparency. Some international investment experts, such as Legum [967] and Paulsson[968] assert that no significant inconsistencies have ever been featured. However, reviewing the outcome of numerous arbitral cases such as

[967] Legum (n 34).
[968] Paulsson (n 31).

Lauder,[969] *SGS*[970] and sets of NAFTA cases[971] where different tribunals reached different conclusions, even with the involvement of similar facts, acknowledged the existence of inconsistency in ISDS. Furthermore, considering the growth in the number of foreign investment disputes,[972] there is notable potential for further inconsistency in the future. In addition, along with the sovereign states, civil societies and human rights protectors have also demonstrated their disagreement regarding the inefficiency of ISDS. The situation even became depreciated when capital-exporting states realised the tensions between ISDS and their constitutional principles of the rule of law. All of these led this thesis to assess the best solution in any way possible to address ISDS's most fundamental defective aspects.

II) Neither of proposals (retaining/reforming ISDS and complete replacement of ISDS) effectively address all (or even most) of the defective aspects of ISDS.

The focus of chapter four was on examining prominent proposals from two distinct groups. The outcome of assessing the effectiveness of the first group is that the discussed reforms[973] have not moved significantly towards the enhancement of the transparency of ISDS. None of the new Rules[974] has introduced substantial changes to the publication of awards, third-party participation, and public hearings. There is still the need for greater efforts to implement

[969] *Czech Republic v. CME Czech Rep. B.V.,* (2003), including the Judgment of the Court of Appeal, Case No. T 8735-0*; Lauder v. Czech Republic, IT,* 187-91, UNCITRAL, (2001).
[970] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,* ICSID Case No. ARB/02/6, (2002); *SGS Société Générale de Surveillance S.A.v. Islamic Republic of Pakistan, Decision on Jurisdiction,* ICSID, Case No. ARB/01/13, (2003).
[971] *S S.D. Myers v. Canada, ILM* 1408, (2000); *Metalclad Corporation v. United Mexican States,* ICSID Case No ARB(AF)/97/1, (2000)*; Pope & Talbot Inc. v. Government of Canada,* ILR 293, (2002).
[972] According to the statistics, the number of international investment disputes has risen massively over the last decade, see, ICSID, "The ICSID Caseload, Statistics" (2019), available at: < https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/ICSID%20Web%20Stats%202019-1%20%28English%29_rev.pdf > accessed 23 May 2022.
[973] The ICSID Arbitration Rules in 2006, the ICSID Rules and Regulations 2022, the adoption of the UNCITRAL Rules on Transparency 2013, the Mauritius Convention on Transparency 2014, CETA, CPTPP, and USMCA.
[974] *Ibid*.

external transparency in ISDS, as apart from the parties involved, other actors might have a stake in the outcome. In addition, in respect of reforming the selection of dispute resolver's procedure, the recent suggestions[975] cannot successfully address the problems of the lack of democratic accountability, the lack of impartiality, and the lack of independence associated with ISDS. Despite the differences between these reform proposals, it is evident that they all apply the procedural rules of ISDS in this regard.

The discussions about the possibility of establishing an appeal mechanism within the ISDS system confirm that there is no capacity in the current system for establishing such a mechanism. There are substantial obstacles in the way of creating such a mechanism. Amongst these obstacles, diversity, and fragmentation of the sources of IIL have played a vital role. The only possible way is to add an extra layer to the numerous already existing arbitral procedures. However, this is not the most suitable solution as introducing several different appeal mechanisms would increase rather than decrease the inconsistency, unpredictability, and incoherence. These appeal tribunals, like the arbitral tribunals, could reach inconsistent decisions as they are obliged to consider and apply the diverse and, to some extent, contradictory rules provided by different BITs. For all these reasons, the time for minor changes and tweaks to the current system of ISDS has passed. Indeed, the proposed minor changes would be incapable of tackling all or most fundamental defects, and the solution appears to be replacing the current system of ISDS with an alternative method of dispute settlement.

One of the hotly debated proposed replacement mechanisms is state-to-state arbitration. The discussions in chapter four indicate that regardless of the significant aspects of this mechanism, it cannot be the most appropriate method for resolving foreign investment

[975] CETA, Articles. 8.27 and 8.28; Brazil-Chile CIFA, Annex I, Article. 4.5; CPTPP, Article. 9.25(3); USMCA, Article. 9.2; India Model BIT, Article. 24.3.

disputes. The obligatory requirements associated with this method would have no result but create further hardships and confusion for both disputing parties and tribunals. Likewise, it would add costs and cause further delays in the settlement process. Additionally, an unresolvable issue associated with this mechanism is it cannot be the sole mechanism for resolving investment disputes, since the exercise of diplomatic protection is a discretionary right. The foreign investor has no remedy had the home state rejected exercising such a right. At the most, such a mechanism could co-exist with other available methods, such as ISDS. Moreover, the concerns of independence and impartiality of arbitrators, inconsistency in jurisprudence, lack of transparency, and lack of corrective mechanism associated with ISDS, are also applicable in state-to-state arbitration.

It is evident that in this mechanism, like investment arbitration, there is no distinct way of enhancing transparency. In respect of addressing the crisis of legitimacy, such a mechanism might only be able to develop the legitimacy of the process if states select judicial settlement roots, such as referring the case to be heard by the ICJ. As a result, it is to claim that state-to-state arbitration, even if several changes are applied, is still incapable of being labelled as the most appropriate alternative for resolving foreign investment disputes.

III) The EU's proposed MIC System is not the most credible alternative for ISDS.

Amongst the several proposals recently put forward to tackle ISDS's deficiencies, the EU-proposed MIC system received greater attention. The idea of establishing a global investment court system is not novel. It has been previously considered by several prominent international investment law experts, though, until today, it has not been possible to create such a court. Many scholars have already concluded that the world investment court would only work if established as a part of a broader reform. The initial step for creating such a court is to negotiate

a MIA which would provide a clear, coherent, and detailed framework for international investment law and can replace all the existing bilateral and regional investment agreements. However, until today, all the previous attempts to negotiate such a treaty have failed due to a number of reasons such as the controversies between developed and developing states in respect of agreeing on universal norms and the political tendency to retain the bilateral nature of investment agreements.

The thesis evaluated the possibility of creating a MIC system without the conclusion of MIA. Even though the EU is still in the negotiation process with its member states, and we still need to wait to see the ultimate outcome of the upcoming negotiations about the proposed system, there is no real prospect of success despite its considerable presumed aspects. Unlike other relevant literature, instead of assessing its overall possible efficiencies, the thesis placed its core focus on analysing this proposal from four specific angles; selection and appointment of the adjudicators; establishment of an appellate body; publication of the award, third-party participation, and public hearings; enforcement of judicial awards. The main reason for such a specific analysis is the above-mentioned have been the most defective aspects of the current system of ISDS, thus, this thesis attempted to determine whether the new proposal would be able to address them.

The author agrees with the argument that the EU's selection of permanent, full-time, and non-renewable judiciary could develop the efficiency and legitimacy of investment dispute settlement. It is because the proposed terms could contribute to the selection of independent and impartial adjudicators by minimising the desire for re-election. Reviewing the reputation of the ECtHR that set out similar terms could justify the validity of such a statement. Likewise, following the general code of conduct and setting out qualifications similarly requested by other international courts could also improve the legitimacy of the procedure. It is because the judicial candidates should prove that apart from having knowledge and expertise in the field of

trade and investment, they are also experts in public international law. It is crucial as the judges might need to decide on public law matters while dealing with a foreign investment dispute. Nevertheless, by distinguishing the required qualifications for the first and second instances, the MIC could be a more effective mechanism. It could subsequently increase the chance of obtaining a more reliable decision by the appellate and prevent the parties from incurring substantial delays and costs for settling their dispute.

Regarding the effectiveness of the MIC's appellate, the EU would undoubtedly face a few significant issues. One of these issues is the unavailability of hearing appeals based on errors of fact, which could cause this body to make inaccurate and unfair decisions and could negatively affect the overall legitimacy of the proposed MIC. The EU must review the related experience of the WTO AB to the obstacles that emerged due to the exclusivity of hearing appeals based on the errors of law. A more substantial obstacle to developing legitimacy through the creation of an appeal mechanism is the existing fragmented and decentralised system of IIL. Considering the mentioned obstacles, the EU could not ultimately achieve its goal; consistent interpretations of the overall investment protection standards through creating an appeal mechanism. The fragmented system of IIL would prevent the proposed MIC from bringing coherence and integrity into the body of law. One of the main reasons behind the success of WTO AB in improving coherence, predictability and consistency is it has only been required to interpret the same agreement or linked agreements in a comprehensive treaty regime under the umbrella of the WTO Agreement. It is not the case for the proposed MIC appellate as it would be required to apply various regional and bilateral agreements with the customary principles of international law. Indeed, the current framework of IIL is not well suited for creating a MIC system. It inherently means that more fundamental reform to the foreign investment regime is necessary before considering the establishment of a MIC. In other words, only through conclusion of a MIA, it is possible to create an effective MIC system through

which the purpose of enhancement of legitimacy, efficiency and transparency of the dispute settlement process is achievable.

Moreover, the EU's MIC proposal has not provided any clear information about its plan for the enhancement of transparency rules with regard to the publication of awards, access to evidence, conduction of public hearings and third-party participation. Reviewing the new EU FTAs demonstrates that they have explicitly or impliedly adopted the modified version of UNCITRAL Transparency Rules with the aim of drawing a balance between transparency (i.e., providing access to the documents, hearings etc.) and confidentiality (i.e., retaining private information). Although the new FTAs attempted to gain such an aim, their provided guidance is limited. The thesis suggested that the EU must clarify the type of documents and information as confidential in its future negotiations. Moreover, the EU could benefit from taking into account the features of international institutions such as CJEU that have been praised for their successful performance in respect of conducting public hearings and publication of awards. Similarly, the EU could benefit from following the newly implemented framework of the national judicial systems, such as the English Supreme Court about enabling the live broadcasting of proceedings, which has been regarded as a substantial move towards enhancing the transparency of a dispute settlement system in the current era.

In addition, the EU has failed to clarify whether the instrument establishing the MIC (founding convention) would include an internal enforcement regime. Perhaps, a more concerning issue is the possibility of enforcing decisions rendered by the proposed MIC in non-participating states as enforcement of the MIC's awards under the ICSID Convention would be legally feasible since it requires modification of the Convention. Similarly, only awards rendered by arbitral bodies are enforceable under the New York Convention. Even by assuming that decisions of the MIC could be classified as arbitral awards, the applicability of this Convention in non-participating states is questionable.

Although the EU's proposed MIC cannot be labelled as the most appropriate alternative for ISDS due to the discussed deficiencies, it can still be one of the possible mechanisms for settling investment disputes, like other proposed mechanisms discussed in chapter five.

IV) The most appropriate solution is reforming the framework of IIL regime (i.e., reforming the substantive rules).

Within the current foreign investment regime, the main problem is not the efficiency of the ISDS system but the poor functioning of IIL itself caused by its decentralised and fragmented nature. Indeed, without reforming the IIL (reform of substantive rules), any attempts to properly develop the foreign dispute settlement system (reform of procedure) would likely be futile. Indeed, no such improvement can be made to a building where there exists neither a proper foundation nor a solid framework.[976] As a result, the stepping stone would be to formalise the regulation of investment matters and establish a single body of codified investment rules (i.e., a MIA). The conclusion of a MIA could harmonise the investment rules and develop consistency and coherence. Also, it creates a link with investment-related matters, such as environmental protection and human rights.[977] It is valuable as other investment agreements, such as BITs, have not successfully regulated them. Likewise, it contributes elimination of treaty, forum, and nationality shopping.[978] Moreover, it will increase the transparency, predictability and legal security of the foreign investment process, which subsequently assures the foreign investors that the host states' rules (which may have a detrimental effect on the foreign investment) would not be changed at will or on a whim.

[976] J. G. Janmaat, "Income Inequality and Economic Downturn in Europe: A Multilevel Analysis of their Consequences for Political Participation" (2018), *Springer Political Behavior,* Vol. 53, No. 3; Idowu (n 843).
[977] K. Joachim, "On the Way to Multilateral Investment Rules- Some Recent Policy Issues" (2002), *Foreign Investment Law Journal*, Vol. 29, No. 1.
[978] *Ibid*.

The fundamental reform of the framework of IIL is a global issue, thus, it requires the corporation of the majority of states. However, all the previous unsuccessful attempts to reform the framework of IIL through the conclusion of a MIA demonstrate a number of significant facts. Firstly, IIL has become a politically prominent issue, which makes it difficult for states to compromise, especially publicly. There are controversies between developing and developed countries. The core of such controversy relates to disregarding the needs of developing states in all the previous attempts. Indeed, there exist no political convergence in the investment regime as the interests of developed countries have never become aligned with the interest of developing states in combatting the issues associated with this regime. Secondly, the states are reluctant to disregard BITs in favour of a MIA. The main drivers behind such a preference are the inherent flexibility that exists in BITs and the political tendency towards economic liberalisation.

Despite the numerous advantages and the necessity of concluding an MIA, the basis for restarting the process of negotiating a MIA does not exist since the discussed obstacles for the conclusion of a MIC still exist in our time. In order to create a basis for restarting the process of negotiations, perhaps one of the steps to take is to invite the sovereign states to participate in a round of discussions about the concerns associated with the system of WTO. It is because it is highly likely that the opponents of concluding a MIA would bring up the negative aspect of the WTO (known as the rich men's club) and claim that similar problematic issues could appear if an MIA concluded.

V) The most achievable short-term solution is the establishment of a multi-track dispute settlement system for foreign investment.

Until the creation of the necessary basis for a broader reform (i.e., concluding a MIA) in the foreign investment regime, the most achievable solution which is compatible with the unique structure, character, and framework of the current IIL regime is establishing a FIMTDS. The thesis acknowledges that establishing such a system cannot be the ultimate and perfect solution, yet, it is a workable solution that could address many of the problems associated with the current ISDS regime.

Perhaps, the initial stage for creating a foundation for developing multilateralism within the foreign investment regime is establishing a FIMTDS. Such a system would enable the disputing parties to choose from all the available dispute settlement methods in accordance with their preferences and desires. The suggested system comprises every means of investment dispute settlement: state-to-state adjudication, MIC, local remedies, ISDS, and all the consensus-based mechanisms (i.e., negotiation and mediation). Although chapter two concluded that none of the consensus-based methods could be labelled as the most effective mechanism for resolving foreign investment disputes, they can still play a role within the suggested FIMTS. The investment parties should be able to utilise any of these methods if they believe it could effectively resolve their disputes. These methods can be utilised initially before taking the matter to be dealt with by the adjudicatory dispute settlement mechanisms such as ISDS. They provide an opportunity for the disputing parties to fully control the outcome and achieve the most suitable justice based on terms, values, interests, and the nature of their dispute. In other words, the new system encourages the parties to choose non-binding methods, then if it provides no resolution, submit a request to one of the available binding forums. It could address the high cost and lengthy delay associated with the current ISDS procedure

This thesis built on Schill and Vidigal's proposed MIDSI system by first addressing its limitations and deficiencies and subsequently refined the proposal further by proposing the idea of establishing a FIMTS. It reasoned that the idea of institutionalism proposed by MIDSI is

unjustifiable. The scholars failed to clarify whether it is possible to democratically (recognition of all states' equal rights) obtain the consent of most of the states in respect of establishing this system. Another concern is the political feasibility, as it is highly dependent on the willingness of states to participate in the relevant discussions for the creation of such an institution. In addition, they have not recommended any mechanism to guarantee that the forum through which the negotiation is conducted is free from all the political pressures in respect of obtaining consensus. The selection of the EU to prepare a draft and create a basis for sovereign states to participate in the negotiations' process for the conclusion of the Agreement through which the proposed MIDSI could be established is not defensible. The best justification for such an argument is that the EU has failed to utilise a multilateral process of formal, transparent, and comprehensive discussions with other states to set up the agenda for establishing a MIC system. Chapter five illustrated that the MIC proposal has not followed the democratic principle of equal sovereign participation.

Moreover, the suggested way (creating an institution) for integrating various dispute settlement methods has also proved futile. It is because the proposed MIDSI system cannot create a similar deep and reinforcing relationship between all the available methods similar to UNCLOS. In UNCLOS a la carte system, ITLOS and Annex VII arbitral tribunals are all the methods that refer to a single set of rules, whereas, in the foreign investment regime, there is no single agreement which contains all the applicable foreign investment rules. In the absence of such a substantive foreign investment agreement, no basis can be established for all the dispute settlement mechanisms to cite each other's decisions and to consider each other's decisions with similar values.

In addition, this proposal has not prevented the disputing parties from subsequently submitting their dispute to another dispute settlement mechanism if the initial decision is unacceptable by one or both. It could increase the likelihood of inconsistency in the proposed

MTIDS system. There is no chance for the development of consistency if the parties are not obliged to exclude procedures when agreeing on the initial dispute settlement forum.[979]

Moreover, the suggestions for reducing the fragmentations associated with ISDS were also ineffective since the proposal failed to consider that by maintaining the bilateral nature of obligations, the MIC, even as a reviewing body for other models, could not bring coherence and integrity into that body of law. Likewise, suggestions, such as empowering the MIC to provide preliminary rulings asserted to be non-transferable to the proposed system. The proposal has not offered any mechanism under which the interpretation provided by the MIC becomes binding on the requested tribunal. It has not indicated the possible consequences that the tribunal might face had it failed to give effect to the delivered interpretation. It is not clear whether the contracting parties are willing to agree with the idea of empowering the MIC to provide a binding interpretation of treaty provisions. It is not justifiable to refer to the success of the CJEU as the most considerable difference is the supremacy of the EU law over the national law has already been accepted by the European member states.[980] However, there is no evidence to prove that states have recognised the supremacy of the IIL over their national laws. Furthermore, the establishment of a preliminary ruling procedure contradicts the hallmarks of the system, which is respecting the freedom of disputing parties to choose their preferred method of dispute settlement. Forcing tribunals to follow and give effect to the provided interpretation of the MIC means that, in practice, the solution for the submitted dispute has been provided by the MIC rather than the arbitral tribunal that the disputing parties initially selected.

[979] *Southern Bluefin Tuna (New Zealand v Japan, Australia v. Japan),* (4 August 2000) 39 ILM 1359.
[980] Treaty on European Union and Treaty on the Functioning of the European Union, Maastricht Treaty, Treaties of Rome, Treaty of Amsterdam, Treaty of Lisbon.

On the other hand, the thesis justified that the establishment of the proposed FIMTDS is feasible through concluding a convention, akin to the Mauritius Convention, which would directly apply to existing treaties of the states that wish to sign and ratify it. The lack of such a convention would create many challenges for the states since they must amend all their existing BITs. The conclusion of this convention releases them from the burden of pursuing the potentially complex and lengthy amendment procedures outlined in their investment agreements. This convention by modifying numerous treaties at once creates a legal and legitimate ground for the functioning of the proposed FIMTDS. The FIMTDS convention would not only apply to investment treaties conducted after its conclusion date, but its retrospective effect enables the states to express their consent to extend its application to their earlier treaties. The convention's retrospective effect could also be extended to the existing investment contracts if the parties agree to give their consent to its application. Likewise, including most, if not all, of the dispute settlement methods creates a trust base for many states and subsequently encourages them to sign and ratify the envisaged FIMTDS convention.

Furthermore, this thesis illustrated that this system corresponds with the benchmarks of legitimacy, efficiency, transparency, and feasibility discussed in chapter one. Under the FIMTDS, there is no prerequisite for establishing a MIC for minimising the discussed procedural fragmentations and inconsistent decisions. Instead, it suggests that these problems could be tackled by incorporating a provision into the envisaged FIMTDS convention which obliges the parties to waive the right of recourse to all the available dispute settlement mechanisms as soon as submitting a dispute to their preferred dispute settlement method. Such a provision prevents further fragmentations caused by the complications arising from parallel proceedings in national and international tribunals. In addition, the proposed FIMTDS endeavours to address the criticisms associated with ISDS regarding the independence of the party-selected arbitrators and the legitimacy of their rendered awards by enabling the parties to

select their most preferred method among various national and international dispute settlement methods, and subsequently respect their choice.

In addition, the proposed FIMTDS can yield the efficiency alluded to earlier in the thesis. This system aims at enhancing efficiency by establishing a committee comprised of highly skilled investment experts who have the responsibility of preparing a non-exhaustive list that categorises various foreign investment disputes and accordingly suggests the most appropriate method for each category identified in such a list. In some cases (i.e., involving taxation), the committee might suggest foreign investors exhaust local remedies for resolving their disputes in the first place if they have sufficient confidence in the quality of the host states' judicial system. Whereas, in other cases where there is a need to preserve an ongoing relationship (i.e., long-term investments), the committees might encourage foreign investors to utilise consensus-based methods such as mediation for settling a given dispute. Although such a list is not mandatory and the disputing parties could still reject its suggestion, it could assist the parties in carefully assessing the content and character of their dispute and subsequently select the best possible method for the resolution of such dispute, which the inevitable result is reducing the cost and the time of the dispute settlement.

Moreover, the FIMTDS could create the desirable balance between maintaining confidentiality and enhancing transparency by allocating particular types of methods (i.e., state-to-state arbitration) which preserve a high level of confidentiality for settling specific categories of disputes involving protected information (trade secrecy) and assigning different methods (i.e., ISDS and exhaustion of local remedies) which provide third party-participation in the proceedings if the proper resolution of a given dispute necessitates such participation.

7.2 Further Research

The core focus of this thesis is to determine the ultimate solution for improving the foreign investment dispute settlement system and the most appropriate alternative for the current ISDS system. The research findings suggest that the need for establishing a multi-track system is present and creating such a system would be a significant development in the foreign investment regime. Chapter Six concluded that due to the many considerable similarities between the IIL and the fields of international law of the sea and competition law, their dispute settlement systems could serve as appropriate models for establishing the suggested foreign investment multi-track dispute settlement system. It could follow the advantageous features and dismiss the defective aspects of these dispute settlement systems.

The preliminary analysis suggested that creating a multi-track system might be the most suitable suggestion for improving foreign investment dispute settlement system. There is a considerable amount of work that must be completed before this system can come to fruition. Scholars and legal experts must undertake further research to make an informed decision about the exact structure and framework of such a system. They need to address many issues before establishing such a system. Therefore, conducting intensive research is required regarding assessing the functioning of the multi-track system, its main features, and the solutions for resolving the possible conflicts and challenges. In addition, they should consider the precise scope for flexibility of this system.

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